Fund Management

Contributing editors
Bryan Chegwidden and Michelle Moran

2017

GETTING THE DEAL THROUGH

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2015
Third edition
ISSN 2058-6744

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Preface

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Third edition

Getting the Deal Through is delighted to publish the third edition of *Fund Management*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Ireland and Norway.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Bryan Chegwidden and Michelle Moran of Ropes & Gray LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
April 2017

Global overview

Michelle Moran, John Young and David M Geffen

Ropes & Gray LLP

We continue to see steady growth in the worldwide investment fund industry. Mutual fund assets were about US$41 trillion by 3Q 2016, excluding regulated funds-of-funds assets, reflecting growth of approximately US$3.8 trillion, or more than 10 per cent, from 3Q 2015. Europe and the US account for approximately 87 per cent of the world's mutual fund assets. Worldwide growth has been achieved despite sluggish economic performance, deflationary threats and geopolitical tensions and uncertainties. There are four key factors for this overall positive outcome: the quest for investment returns within a very low interest rate environment; the enhanced investor protection now offered by investment funds; the variety of investment strategies and risk–return profiles available; and central banks' actions to prevent deflation and foster economic growth.

Higher personal pension savings and low interest rates have set a record growth in assets under management. Regulators are ever more conscious of the need to prioritise investor protection and managers face ever-higher regulatory burdens and supervision. Worldwide, key regulatory themes for fund managers that have dominated the period since the financial crisis and continue to set the agenda are: monitoring and management of systemic risk; investor education and protection; and shadow banking. Regulatory disclosure continues to be seen as critical, with asset managers disclosing ever more extensive data sets on risk and trades, while investor disclosure becomes more prescriptive. Separately, the EU is taking steps to encourage capital market-based financing as an alternative to bank financing in its Capital Markets Union initiative.

Set against international cooperation and convergence is the resurgence of 'nationalist' agendas, notably the outcome of the UK's referendum result in 2016 and the election of Donald Trump as president of the United States in 2017. The United States has announced that it will scale back many of the rules enacted since the 2008 financial crisis and has laid down principles to that end. Any such effort will take time, and it remains to be seen how this will affect the development of the post-financial crisis regulatory agenda.

Americas

United States

The year 2016 was a steady one for the US investment fund industry, despite substantial market volatility and domestic political uncertainty. Total assets of Securities and Exchange Commission (SEC)-registered investment funds (RICs) – US$18.7 trillion at the end of 3Q 2016 – were up by about 5.5 per cent relative to year end 2015 (US$17.8 trillion). Assets of private funds (both hedge funds and private equity funds) managed by SEC-registered investment advisers (RIAs) increased by approximately 1 per cent from US$6.9 trillion (2Q 2015) to US$7 trillion (2Q 2016).

In response to the financial crisis, the US Congress adopted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) to: improve the functioning of the financial markets; enable enhanced monitoring of systemic risk; and provide better investor protection. However, much of the Dodd-Frank Act was not self-executing and required various regulatory agencies to adopt rules implementing its provisions. As a result, the majority of recent and anticipated regulatory changes affecting asset managers relate to the implementation of the Dodd-Frank Act by regulators. In addition to the changes mandated by the Dodd-Frank Act, regulators also have independently adopted or proposed other regulatory reforms.

Key US regulatory themes

Derivatives

The Dodd-Frank Act includes substantial new requirements with respect to over-the-counter (OTC) derivative transactions. The changes are largely designed to mitigate systemic risk by decreasing credit risk between parties to derivatives transactions and by increasing transparency in derivatives markets. Some of the key requirements are as follows:

- certain interest rate swaps and credit default index swaps are required to be cleared through a central clearing house;
- US regulators have finalised rules that require the exchange of variation margin and will require minimum amounts of initial margin for uncleared derivatives transactions; and
- certain benchmark interest rate swaps and frequently traded credit default index swaps are required to be executed on a swap execution facility or exchange, rather than on a bilateral basis. All of these changes are increasing the costs of derivatives transactions and may well impact the liquidity of the derivatives market.

In October 2016, the SEC adopted a new rule requiring RICs (including exchange traded funds but not money market RICs) to establish written liquidity risk management programmes. 'Liquidity risk' is defined as 'the risk that a fund could not meet requests to redeem shares issued by the fund without significant dilution of remaining investors' interests in the fund.' A RIC's liquidity risk management programme is required to include the classification of the liquidity of each of the RIC's assets; the assessment and periodic review of the RIC's liquidity risk; and management of the RIC's liquidity risk, including maintaining a minimum percentage of the RIC's net assets in holdings that could be converted to cash within three business days.

For most families of RICs (with combined assets of at least US$1 billion), the compliance date for the new rule is 1 December 2018. RICs and their managers will be required to devote significant resources to develop liquidity risk management programmes that satisfy the applicable requirements.

In October 2016, the SEC also finalised new and amended rules and forms that significantly broaden the type and scope of information reported by RICs. The changes require RICs to report detailed information about their monthly portfolio holdings and risk metrics to the SEC using a prescribed XML data format. Detailed information, not currently reported, is required with respect to each RIC investment (eg, type of investment, value, payoff profile, asset and issuer type, country of investment and issuer, fair value level and whether the investment is a restricted security or an illiquid asset). The changes also expand significantly the reportable information about a RIC's investment in derivatives, including the characteristics and terms and conditions of each derivative contract that are important for understanding the payoff profile of a RIC's investment in such contracts, as well as the exposures created or hedged in the RIC. For most families of RICs (with combined assets of at least US$1 billion), the compliance date for these changes is 1 June 2018.

In December 2015, the SEC issued a long-anticipated release regarding the use of derivatives and certain related instruments by

RICs. The proposal would supplant a significant volume of SEC guidance on the use of derivatives by RICs, and would introduce a range of specific, technical restrictions. Depending on the extent and complexity of its derivatives usage, a RIC would be required to adopt and implement a written derivatives risk management programme reasonably designed to assess and manage the risks associated with the RIC's derivatives transactions. The comment period on the proposed rule closed in March 2016. The SEC had not adopted a final version when the SEC Chair stepped down from her post in January 2017. Whether the SEC finalises the proposal in one form or another remains an open question.

Cybersecurity preparedness

Cybersecurity remains a SEC priority. RIAs are required to adopt and follow written policies and procedures that are reasonably designed to safeguard the personally identifiable information of their clients. In February 2015, in a 'risk alert', the SEC reported on the results of its 2014 cybersecurity examinations of RIAs and described current practices employed by RIAs, including data regarding the frequency with which the observed practices have been adopted. In the risk report, the SEC also stated that its staff continues to review the information it has gathered and will continue to focus on cybersecurity using risk-based examinations. In September 2015, in another 'risk alert', the SEC announced a second round of cybersecurity exams. In addition to gathering information about industry practices, the SEC announced that it intends to test RIAs' implementation of cybersecurity procedures and controls. Finally, in both January 2016 and January 2017, the SEC announced its examination priorities for the year ahead. Among these, it stated that it would continue to examine RIAs to test and assess how well firms have implemented cybersecurity procedures and controls.

Systemic risk oversight

In 2014, the SEC promulgated amendments to the rules governing money market RICs to address redemption or 'run' risks, which some deemed to present as 'systemic' risks. Money market funds were required to begin compliance with these amendments in October 2016. In early 2017, the SEC announced that examining money market RICs for compliance with the amended rules is among its priorities.

In December 2014, the then-Chair of the SEC announced initiatives to address prudentially risks arising within the asset management industry. These initiatives resulted in the liquidity management requirements and the expanded RIC reporting requirements described above. The initiatives also resulted in the proposed (but not final) requirements regarding the use of derivatives and certain related instruments by RICs.

Canada

In 2014, total net assets of Canadian mutual funds surpassed C$1 trillion for the first time and, at year end 2016, were approximately C$1.3 trillion.

In December 2015, the Canadian Securities Administrators published draft rules that, if adopted, would require publicly offered mutual funds and exchange-traded funds to employ standard deviation to measure risk and to continue to disclose their risk according to a specified five-tier risk classification scale.

In 2014, the Canadian federal government and several provinces, including Ontario (which includes Toronto) signed a memorandum of understanding establishing a 'Cooperative Capital Markets Regulatory System' (CCMRS). In August 2015, the provinces participating in the CCMRS published for comment a revised consultation draft Capital Markets Act (CMA) and draft initial regulations. The CMA and initial regulations are intended to modernise and harmonise the legislative frameworks of the participating provinces. In May 2016, the Department of Finance Canada released for public comment a revised consultation draft of the Capital Markets Stability Act (CSMA). The CSMA addresses national data collection, systemic risk related to capital markets and criminal enforcement. Once operational, the Capital Markets Regulatory Authority will administer the CMA, the initial regulations and the federal CSMA.

Latin America

Brazilian mutual funds represent more than 80 per cent of Latin American fund assets. Brazil saw its mutual fund assets contract from over US$1 trillion in 2014 to approximately US$730 billion as of 3Q 2015, during a period beset by an economic crisis and political controversy in Brazil. As of 3Q 2016, Brazilian mutual funds had rebounded to exceed US$1 trillion, in net assets, coinciding with the recovery of Brazilian equities.

Europe

Key European regulatory themes

Brexit

Given that the UK's asset management industry is the second largest in the world, the outcome of the UK's referendum result in 2016 was the key event of the year. Much has yet to be determined, but the consensus is that the key impact of the referendum result is the loss of the financial services passport. From a purely asset management perspective, the solution to the loss of the passport is to establish an EU subsidiary and to outsource or delegate critical functions (such as portfolio management) back to the UK. This is designed to enable the UK firm to leave some resources and expertise in the UK, while still taking advantage of the EU subsidiary's regulated status and associated passporting rights. The key hurdles are ensuring that there is sufficient substance (particularly in terms of seniority and expertise of staff) at the EU subsidiary, and ensuring that existing sales and marketing staff can continue to conduct their activities in the EU. Substance will largely depend upon member state approaches, although the European Commission (with an eye to regulatory arbitrage) has already discouraged member states from introducing comparatively light requirements. UK businesses that are already established in other member states may be able to restructure relatively easily in order to meet the requirements. However, for businesses located mainly in the UK, a restructuring of staff and operations to move the mind and management of a business to within the EU may present a significant challenge. It is clear that there is no single impact but a patchwork of consequences, issues and considerations with various options to be worked through.

Systemic risk and alternative manager regulation

Measures determined at the 2009 G20 summit to address worldwide systemic risk continued to be implemented in the EU in 2016. Under the European Market Infrastructure Regulation (EMIR), the first clearing obligation for certain interest rate derivatives applied from 21 June 2016, nearly four years after EMIR came into force. Separately, on 1 March 2017, rules came into force requiring parties to exchange variation margin in relation to uncleared OTC derivatives, resulting in a significant change to parties' operations and a large papering or re-papering exercise in relation to collateral arrangements. It is not clear whether the industry was prepared for the scale of the impact of the variation margin requirements. In contrast to the approach in the US, physically settled FX forwards and swaps are in scope of the variation margin requirements, although physically settled FX forwards are exempt until the Markets in Financial Instruments Directive II (MiFID II) application date (3 January 2018). Initial margin requirements will be phased in between February 2017 and September 2020.

The 'trading obligation' (the obligation to conclude certain classes of OTC derivatives on exchanges or certain other trading venues) will be introduced in Europe through the MiFID II package of legislative measures (see 'Investor protection').

European fund managers have largely finished changes to their operations and documentation resulting from the overhaul of fund management regulation in the form of the Alternative Investment Fund Managers Directive (AIFMD) and revised UCITS Directive (for European retail managers) which took place between 2013 and 2016. European fund managers are now focussed on MiFID II, the next iteration of the MiFID, which will apply in January 2018.

Although MiFID primarily regulates European financial markets and their broker-dealer intermediaries, it also regulates some types of asset managers and fund distributors and advisers. While fund managers that are within the AIFMD are not within MiFID, any manager that runs a segregated account business line is within MiFID, encompassing the majority of hedge fund managers. Although MiFID will strictly apply only to the segregated account business line (and any sub-advisory business), in practice most hedge fund managers will apply the new requirements in MiFID across their business – any other approach would be against market standards and inefficient. Additionally, some member states (notably the Financial Conduct Authority (FCA)) are gold-plating their implementation to apply some of the new requirements to fund managers. MiFID II introduces a considerably more detailed best execution regime (which will require public disclosure of large amounts of data on managers' execution, whether executed directly on the market or through brokers), new rules on the receipt of investment research from brokers, extensive record-keeping and telephone taping requirements, and requires detailed transaction reporting (the daily reporting of transactions to regulators) from managers, which largely previously relied on their brokers. One over-arching aspect of MiFID II is the requirement to collect, process and (in some cases) disclose large amounts of data – inevitably requiring managers to invest in new IT systems.

The AIFMD promised a 'third-country' marketing passport to non-EU managers, granting them the same rights to market funds in the EU as for EU managers. Whether or not this will be introduced, the practicalities of national state regulators supervising managers located outside the EU and whether any non-EU manager will find it viable to meet the conditions required (notably, full compliance with the AIFMD) are now all open to doubt. The European Securities Markets Authority (ESMA) issued its final advice to the European Commission in July 2016 on the extension of the third-country passport, confirming that there were no significant obstacles to the grant of the passport to managers and funds established in Canada, Guernsey, Jersey, Japan and Switzerland, and giving qualified advice in relation to the United States, Australia, Hong Kong, Singapore, Cayman Islands, Bermuda and the Isle of Man. ESMA's advice was qualified in relation to some jurisdictions on the basis that rule changes would be required (in relation to, for instance, reciprocal marketing access) as a condition for the passport to be granted to managers or funds in those jurisdictions.

Since receiving this advice, the Commission has not taken any further steps on the grant of the passport to third-country managers. The grant of the passport to any third country would create a precedent for dealing with the UK's position under AIFMD following Brexit – suggesting a very good reason for the delay in this workstream.

EU rules on staff remuneration continued to be developed in 2016, particularly exposing political differences between the UK and the rest of the EU. The headline event was the Prudential Regulation Authority and FCA's joint statement in March 2016, which confirmed that firms (including some types of managers) that are subject to the bonus cap in Capital Requirements Directive (CRD) IV need not apply the cap on the basis of the proportionality principle, which is that the cap is disproportionate to the size of the organisation and the nature, scope and complexity of its activities. As a consequence, UK asset managers that are governed by CRD IV and are not 'large and systematically important CRD-regulated' firms may disapply the bonus cap. Remuneration rules were introduced in March 2016 for UCITS managers, aligning their position with the AIFMD. Given that UCITS funds are very often in practice managed by sub-advisers – within and outside the EU – one key question relating to UCITS remuneration was the degree to which sub-advisers should comply, particularly in the case of non-EU sub-advisers who may have little appetite to comply with regulation outside their jurisdiction for the benefit of a regulator that does not have the power to supervise them.

The revised EU market abuse regime, the Market Abuse Regulation, took effect in July 2016. Although the Market Abuse Regulation (and the associated Criminal Sanctions for Market Abuse Directive) did not significantly change the insider dealing prohibitions in its predecessor Market Abuse Directive, it heralded an intended step-up in regulatory monitoring and enforcement throughout the EU and introduced a significant new level of prescription in areas such as issuer obligations on disclosure of inside information, the keeping of insider lists by recipients of inside information and market soundings and systems required to prevent and detect market abuse. The Market Abuse Regulation has triggered a review by EU and non-EU managers of their internal rules and processes for preventing insider dealing and market abuse. One (arguably unintended) consequence was the application of insider dealing rules (and attending record-keeping and disclosure obligations) to bond issues listed on EU multilateral trading facilities, such as the Irish Global Exchange Market and the Luxembourg EuroMTF. Applying rules designed for widely traded equity issues to institutional trading in bond issues was distinctly unpopular and will inevitably encourage new issues to be made on non-EU exchanges.

The FCA is expected to apply its 'Senior Manager' regime to asset managers in 2018. The FCA introduced this regime in 2016 to banks, to ensure better accountability of senior individuals in authorised firms for their decisions and conduct. Under the regime, firms must allocate applicable responsibilities to relevant senior managers to ensure that there is an individual accountable for every aspect of regulated activity in the firm and, therefore, liable, if the regulator can show that the individual did not take 'reasonable steps' to prevent misconduct. The regime has attracted praise in the banking sector – questions remain as to its precise application to large and small firms in the asset management sector.

The EU Benchmarks Regulation was finalised in 2016 and will apply in January 2018. Its stated aim is to restore confidence in the accuracy and integrity of benchmarks by ensuring that benchmarks are not subject to conflicts of interest, are used appropriately and reflect the actual market or economic reality they are intended to measure. The Regulation introduces a framework for prior authorisation (or registration, if non-EU) of benchmark administrators. The key condition for an EU asset manager is that it may use a benchmark only if provided by an EU authorised or non-EU registered benchmark administrator. Use of a benchmark in the asset management context means using the benchmark for measuring the performance of a fund against a benchmark for the purpose of the fund performance as against the index, for index tracking funds or for computing a performance fee. Registration of third-country benchmark administrators is subject to an equivalence regime for supervision and regulation. Fund managers also need to consider the impact on proprietary benchmarks, for which they will be benchmark administrator.

The EU Securities Financing Transactions Regulations took effect in 2016. This required managers to report all securities financing transactions to trade repositories, placed additional investor reporting requirements on investment managers and introduced prior risk disclosures and written consent before assets are rehypothecated.

Investor protection

The delay in the application of MiFID II to January 2018 was confirmed in the course of 2016. The principal focus for asset managers is the new requirement for full 'unbundling' of the research charge and execution charge from dealing commissions paid to brokers. The FCA was widely regarded as 'holding the pen' on this aspect of MiFID II, and continued to consult and inform the industry on the practical application of the new requirement. It has now become clear that managers can either decide to pay for research out of their own resources or can continue with the use of commission sharing agreements (CSAs), which split the commission charge into research and execution elements. Managers that elect to continue to use CSAs will need to do so under much stricter requirements of accountability to their clients and ensure that the research element of the charge reflects a negotiated price for research received for the benefit of that particular client. A number of large managers have already declared their intention to pay for all research out of their own resources, without on-charging the cost to their clients – smaller managers may be more inclined to continue to use CSAs. Some managers may take different approaches for equities (where the CSA model is widely used) than for fixed income (where payment for research is an entirely new concept). Managers have mixed views on whether they will pay more for research and execution under the new model, with the consensus that overall costs should fall for equities, but likely increase for fixed income. At the same time, there has been a price discovery process between research providers and managers, with managers considering both ex post pricing (based on an assessment of the value of the research received) and ex ante pricing. Other challenges associated with the new rules are blocking receipt of unwanted and unpaid for research and distinguishing research that amounts to a 'minor non-monetary benefit' from valuable, paid for, research. Lastly, there is the significant challenge of EU managers requiring US broker-dealers to charge for research, something they are largely unwilling to do, in light of the attendant requirement to register as an investment adviser. For international managers with an EU presence (such as portfolio management capability or a trading desk), the new EU dealing commission rules have worldwide impact.

Capital markets union

Following the launch by the European Commission of the Capital Markets Union initiative in 2015, the Commission has implemented various initiatives to encourage capital market-based financing as an alternative to bank financing. From an asset management perspective, initiatives of interest include a possible new regulatory framework for loan origination funds (in practice, not likely to be popular with the industry), reforms to the EU Venture Capital Funds Regulation and Social Entrepreneurship Funds Regulation (designed to widen the types of investments permitted by these vehicles) and changes to the Prospectus Regulation to take effect in 2018 (allowing easier capital raising for smaller issues and secondary issues).

Competition
The FCA published its interim report on its Asset Management Market Study in November 2016. The FCA made some significant charges against retail and institutional investment managers in the report, with a particular criticism of active fund management. In particular, the FCA criticised the following:
- weak price competition among active funds;
- lack of out-performance of benchmarks;
- consistently high profit margins;
- weak cost control;
- over-reliance by retail investors on 'best-buy' lists and past performance;
- lack of transparency on transaction costs;
- inadequate communication to investors on investment objectives and outcomes; and
- poor fund governance.

The FCA is empowered to take this approach under its objective to promote effective competition. The FCA has made interim suggestions to address these issues and will translate its findings into new rules with its final report due in 2017. The form of the rules is unknown – it is hoped that the FCA will introduce new requirements while ensuring the competitiveness of the UK industry with the rest of the EU.

Retail funds
The EU UCITS fund continues to attract attention from managers and investors around the world. There was a noticeable increase in the popularity of UCITS mandates for US and other non-EU alternative managers, which can replicate certain alternative strategies in the UCITS framework. One reason for the increase in popularity might be the opportunity to obtain exposure of the manager's strategy to EU institutional investors under the UCITS marketing passport, in light of the restrictions imposed by the AIFMD on marketing by non-EU managers. Another recent development in the UCITS world was the publication by ESMA in January 2017 of its opinion on UCITS share classes, which will prohibit UCITS funds from using share classes as a means to offer volatility or interest rate hedging to (largely) institutional investors, in light of regulatory concerns on contagion risk between share classes arising from use of derivatives – new sub-funds will be required, to the extent viable.

MiFID II will introduce new rules to treat 'complex' UCITS differently (in the context of the appropriateness check that distributors must perform on an 'execution-only' sale), signalling the end of a single distribution regime for UCITS funds. Structured UCITS (including UCITS that use swaps to obtain investment exposure) will automatically be complex UCITS – investment firms will need to determine whether other UCITS are complex. Complex UCITS are a product of the 2003 liberalisation of the UCITS regime that in particular allowed UCITS to use derivative instruments for investment exposure. The designation of a category of UCITS as 'complex UCITS' by EU regulators is thought to do no favours to the UCITS brand worldwide.

Lastly, the application date of the EU Regulation on Packaged Retail Investment and Insurance Products was delayed until 31 December 2017. This envisages standard pre-contract disclosure for any fund (or other financial product) distributed to retail investors. It is designed to allow like-for-like comparison of risk, costs and projected returns for investors across different products. In practice, drafting the disclosure is time consuming and will need to be done with care, in light of the willingness of regulators to enforce in this area and the possibility of investor recourse for a misleading or insufficient disclosure.

Asia-Pacific
In terms of regional asset allocation themes, it is worth highlighting the following trends:
- in Japan, investors are increasingly responding favourably to the government's push to migrate savers toward riskier assets, alongside a switch from income paying to total return funds;
- in China, investors are seeking global solutions as the local markets remain volatile. In addition, Chinese regulators are generally (though not uniformly) working to attract and support inbound capital flows from global investors;
- in Australia and New Zealand, given pension reforms, investors are focusing more intensely on strategic retirement solutions that can provide both income and capital appreciation after they leave the workforce; and
- alternative investments continue to gain importance in Asia-Pacific investor portfolios, with particular emphasis on credit-oriented strategies.

Key regulatory themes continue to be implementation of G20 post financial crisis commitments, the elimination of international trade barriers and reduction of regulatory arbitrage.

There has been ongoing work on OTC derivative reforms, including commencement of clearing requirements for OTC derivatives and margining requirements for non-cleared transactions in Australia, Singapore and Hong Kong. Regulators in the region are increasingly focusing on the industry's culture and conduct, in terms of behaviour of senior management, risk takers and the sales force. In Australia, in response to an independent review of the financial system commissioned by the government, 2016 saw the introduction of product governance responsibility, product intervention powers for the conduct regulator, stronger sanctions and a professional standards framework for financial advisers. The Australian government also consulted on strengthening Australian Securities and Investments Commission's enforcement tools in relation to the financial services and credit licensing regimes. The Hong Kong government launched a consultation in November 2016 on a code of conduct for fund managers, covering matters such as securities lending and repurchase agreements, safe custody of funds, liquidity risk management and disclosure of leverage. The Hong Kong government is also proposing steps to remove conflicts of interest in the sale of investment products. Regulators are also increasingly worried about the risk posed by high reliance on managers on technology systems, with a number of regulators releasing standards on strengthening cybersecurity.

Hong Kong schemes for mutual recognition of funds
Since 2015, there has been mutual recognition of eligible mainland China and Hong Kong funds, which allows the funds to be distributed in each other's market through a streamlined vetting process. Along similar lines, the Hong Kong Securities and Futures Commission (SFC) announced the mutual recognition of a funds programme between Switzerland and Hong Kong (Swiss-HK MRF) in December 2016. In order to be eligible, funds seeking approval must be domiciled, managed and approved for retail distribution in the home jurisdiction. The types of Swiss funds that are eligible for SFC approval and distribution in Hong Kong under the mutual recognition initiative are much broader than the equivalent scheme for mainland China. Apart from equity funds, bond funds, mixed funds, index tracking funds and exchange-traded funds, the Swiss-HK MRF scheme also permits the offering of the following Swiss funds in Hong Kong: feeder funds, fund of funds, money market funds, structured funds and funds that extensively use financial derivatives for investments.

Asian funds passporting
In relation to the Asian funds passport, the Memorandum of Co-operation (MoC) on the establishment and implementation of the Asia Region Funds Passport came into effect in June 2016, signed by representatives from Australia, Japan, Korea, New Zealand and Thailand. These five countries have 18 months to implement domestic arrangements under the MoC, and the passport will be activated when any two participating economies complete the implementation. The MoC also ensures any other eligible countries are able to participate in the passport. The passport will facilitate the cross-border offering of eligible collective investment schemes to retail investors within the participating countries while ensuring investor protection. Over time, the Asian funds passport should allow cross-border marketing of locally domiciled funds, representing an alternative to UCITS funds.

The separate Asean Collective Investment Scheme (CIS) framework exists alongside the Asia Region Funds Passport. This allows mutual recognition of funds authorised in participating jurisdictions based on a home state authorisation, subject to compliance with qualifying conditions for the fund's operator and fund investment restrictions. To date, Singapore, Malaysia and Thailand participate. As at August 2016, 14 funds were granted ASEAN CIS status, and there are ongoing discussions to expand the number of signatories, harmonise disclosure standards and relax certain investment restrictions.

Hong Kong open-ended fund company regime

The Hong Kong government introduced legislation in 2016 for the establishment and regulation of open-ended fund companies (OFCs) in Hong Kong. This form of fund vehicle will sit alongside unit trusts. The launching of OFCs is expected to increase the saleability of Hong Kong-based funds to offshore investors who are more familiar with corporate fund structures as opposed to unit trusts. The fact that such funds may be structured as umbrella funds enhances their flexibility.

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

Fund management is a regulated activity under British Virgin Islands (BVI) law pursuant to the BVI Securities and Investment Business Act 2010 (as amended) (SIBA). SIBA provides that any person carrying on 'investment business' (which includes acting as the manager of a mutual fund and managing investments belonging to another person involving the exercise of discretion (other than as manager of a mutual fund)) in or from within the BVI must be licensed or approved to do so by the BVI Financial Services Commission (FSC).

Subject to limited exceptions, this means that any BVI entity acting as the manager of a fund (whether open-ended or closed-ended) must be licensed or approved to do so by the FSC. Generally a non-BVI company does not need to be authorised by the FSC to act as the manager of a BVI fund, unless it has a physical presence in the BVI or solicits a person in the BVI to provide the fund management services.

BVI investment managers may either be licensed by the FSC under SIBA (a SIBA licensee) or approved by the FSC pursuant to the Approved Manager Regulations 2012 (as amended) (an approved manager).

The FSC is the local financial services regulator in the BVI, overseeing the recognition or registration of open-ended funds, fund managers and those marketing investment funds in the BVI that fall within the scope of SIBA or the Mutual Funds Regulations 2010 (as amended) (the Regulations).

Closed-ended funds (being funds in which investors do not have the right to redeem their fund interests on demand in accordance with the fund documents) fall outside the definition of a 'fund' under SIBA and are therefore not generally regulated under SIBA.

2 Is fund administration regulated in your jurisdiction?

Fund administration is a regulated activity under BVI law pursuant to SIBA. SIBA provides that any person carrying on investment business (which includes fund administration) in or from within the BVI must be licensed to do so by the FSC.

Subject to limited exceptions, this means that any BVI entity providing administration services with respect to investments (which includes acting as the administrator of a fund) must be licensed to do so by the FSC under SIBA. Generally a non-BVI company does not need to be authorised by the FSC to act as the administrator of a BVI fund, unless it has a physical presence in the BVI or solicits a person in the BVI in order to provide the fund administration services.

Fund administration services are defined under the Regulations to include (i) acting as registrar or transfer agent with respect to mutual funds; and (ii) providing accounting services for, or with respect to, mutual funds excluding the provision of audit and related services. The definition of administration services is wider under SIBA and also catches the administration of certain assets other than acting as administrator of a mutual fund.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

The process for recognition or registration of a BVI fund depends on the type of fund. As noted in question 1, closed-ended funds generally fall outside of the regulatory regime in the BVI and, as such, are not required to be recognised or registered with the FSC. Open-ended funds, whether retail or non-retail, will generally fall within the scope of regulation by the FSC under SIBA.

See question 25 for further details on the authorisation and licensing process for certain funds.

See questions 16 and 28 for further details on certain requirements applicable to managers and operators of investment funds in the BVI.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

Fund regulation in the BVI does not have extraterritorial effect in that there is generally no requirement for an overseas manager that is performing management activities or providing services to BVI companies to be authorised by the FSC to do so in the BVI, provided that the manager is not physically based in the BVI or is not soliciting business from or from within the BVI.

However, subject to limited exceptions, any BVI company acting as a fund manager from anywhere in the world must be licensed or approved to act as such by the FSC. See question 1.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

The direct or indirect acquisition of a significant interest in a SIBA licensee requires the prior written consent of the FSC. For these purposes, a 'significant interest' is defined under SIBA as a holding or interest in the licensee or in any parent of the licensee held or owned by a person, either alone or with any other person and whether legally or equitably, that entitles or enables the person, directly or indirectly to:

- control 10 per cent or more of the voting rights of the undertaking;
- a share of 10 per cent or more in any distribution of the surplus assets of the undertaking; or
- appoint or remove one or more directors of the undertaking.

The acquisition of shares in an approved manager does not generally require the prior written consent of the FSC; however, it is good practice to do so.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

There are no applicable regulatory restrictions on the structuring of a BVI fund manager's compensation and profit-sharing arrangements.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

SIBA contains a number of restrictions on the promotion of fund interests in the BVI. Only a fund that is recognised as either a public fund, a professional fund or a private fund pursuant to SIBA (a BVI fund) or a recognised foreign fund (as defined in SIBA) is permitted to promote itself in or from within the BVI and the promotion must be made in accordance with SIBA. The person promoting the fund may also need to be licensed to do so under SIBA.

8 What marketing activities require authorisation?

See question 7. Unless the marketing activity is undertaken as a result of an approach by an individual to the fund, only a fund that is a BVI fund or a recognised foreign fund may market or promote itself in or from within the BVI. This includes, but is not limited to, communicating, or causing to be communicated, an invitation or inducement to any other person, or advising or procuring any other person, to become an investor, or to offer to become an investor, in that fund.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

See questions 7 and 8.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

An overseas fund that is not a BVI fund (a non-BVI fund) and wants to promote itself in or from within the BVI, or solicit an individual within the BVI to subscribe for or purchase any of its fund interests, must apply to the FSC for, and be granted, recognition as a recognised foreign fund before undertaking such regulated activity. Once recognition is granted, the recognised foreign fund may then only undertake such regulated activities in accordance with the provisions of SIBA.

A non-BVI fund is not deemed to be soliciting individuals within the BVI if the subscription or purchase of fund interests is made as a result of an approach made by the individual to the non-BVI fund without any solicitation being made by or on behalf of the non-BVI fund.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

See questions 7 and 8. The following restrictions apply in relation to commission payments for an investment business licensee:

- where an investment business licensee provides services constituting investment business to a retail customer, it must do so under a written agreement signed by both the licensee and the customer. The written agreement must detail, among other things, the basis or amount of the licensee's charges for such services (including any such commission payments); and
- the fees and charges levied by a licensee for the provision of investment business services shall not be unreasonable in the circumstances.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

The statutory and regulatory framework in the BVI has typically attracted funds that seek investment from high net worth individuals and other sophisticated and institutional investors rather than funds aiming to raise money through retail channels, though there are regulatory categories that would facilitate the registration with the FSC of funds wishing to raise money in this way.

The majority of information in relation to non-retail funds generally also applies to retail funds unless otherwise mentioned below.

Open-ended funds

A public fund can be established as either a BVI business company or a unit trust governed by the trust laws of the BVI and with a trustee in the BVI, of which the BVI business company is by far the most popular option for a public fund and a unit trust is not commonly used as a vehicle for a public fund. Therefore, questions 12 to 22 focus on public funds incorporated as BVI business companies.

See question 23 for the process to incorporate a business company or form a unit trust.

Once incorporated, the company or unit trust (as applicable) will then have to apply for registration as a public fund with the FSC.

Closed-ended funds

Closed-ended funds fall outside of the scope of SIBA and are therefore not generally regulated in the BVI. The BVI is a popular jurisdiction for closed-ended funds that invest in illiquid assets (such as private equity and real estate), but these are not what would generally be considered to be retail funds. Therefore, questions 13 to 22 relate to open-ended public funds only.

13 What are the key laws and other sets of rules that govern retail funds?

The key statutory and regulatory provisions that apply in respect of retail funds are the same as those that apply in respect of non-retail funds, with the exception of the Public Funds Code 2010 (as amended) (PFC) that is specifically relevant to public funds.

See question 24 for further details.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Yes, a retail fund must be registered with the FSC as a public fund under SIBA before commencing business.

A non-BVI fund can apply to be registered as a public fund or recognised as a recognised foreign fund. It would generally only do so if it intends to operate from a place of business in the BVI or solicit an individual in the BVI to subscribe for or purchase any of its fund interests.

For the avoidance of doubt, a foreign fund does not carry on business in the BVI solely by reason of the fact that it has a BVI-licensed fund administrator, manager, adviser or custodian.

See question 7 in relation to marketing.

15 Who can market retail funds? To whom can they be marketed?

SIBA contains restrictions on the promotion of a public fund and a person, including the fund itself, may only promote a public fund in accordance with SIBA.

A public fund may only make an invitation to the public (whether in or outside the BVI) to subscribe for or purchase its fund interests if the invitation is contained in a registered prospectus and complies with the requirements of SIBA, the Regulations and the PFC. Subject to limited exceptions (such as an offer to an experienced investor, a person having a close connection with the issuer or the BVI government), an invitation to any person anywhere in the world to subscribe for or purchase fund interests in a public fund is deemed to be an invitation to the public to subscribe for or purchase such fund interests.

SIBA and the PFC contain detailed guidance on the form and content of a prospectus. For example, the prospectus must:

- be in writing, be dated and signed by the directors of the fund (where the fund is a company);
- provide full and accurate disclosure of all such information that investors would reasonably require and expect to find for the purpose of making informed investment decisions;
- contain a summary of investors' rights; and
- comply with the requirements of SIBA, the Regulations and the PFC.

See also questions 7, 8 and 10.

16 Are there any special requirements that apply to managers or operators of retail funds?

A public fund that is a BVI business company must at all times have the following:

- at least two directors;
- a fund manager;
- a fund administrator; and
- a custodian (unless an exemption has been granted by the FSC).

Each director must be an individual. No person shall be appointed as a director or functionary of a public fund without the prior written approval of the FSC, which shall not be granted unless the FSC is satisfied that the person satisfies its fit and proper criteria.

17 What are the investment and borrowing restrictions on retail funds?

There are no applicable investment or borrowing restrictions in respect of public funds.

18 What is the tax treatment of retail funds? Are exemptions available?

The tax treatments and exemptions available to non-retail funds apply equally to retail funds; for further details see question 29.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

There are no requirements for assets of a BVI fund to be held by a separate custodian located in the BVI. However, unless a public fund has been exempted by the FSC from the requirement to appoint a custodian, the public fund must ensure that it has, at all times, a custodial agreement with its custodian that includes provisions for the appropriate segregation of the fund property and the taking of adequate measures by the custodian to ensure the safekeeping of the fund property.

A public fund shall ensure that all fund property is transferred into the custody or control of its custodian as soon as is reasonably practicable after it is acquired.

If a public fund has been exempted by the FSC from the requirement to appoint a custodian, the public fund must put in place, and ensure that at all times it maintains, adequate arrangements for the segregation of the fund property from the property of other functionaries of the fund and the safekeeping of the fund property.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

Public funds have a number of continuing obligations under SIBA, the Regulations and the PFC.

An example of such continuing obligations is that a public fund shall take reasonable care to maintain a clear and appropriate apportionment of significant responsibilities between its governing body and functionaries so that it is clear who has which of those responsibilities and the business and affairs of the fund can be adequately monitored and controlled by the governing body; and establish and maintain such procedures as are appropriate for the nature, size, complexity, structure and diversity of the fund and the fund property.

See also question 31 for further details on requirements relating to record-keeping and filings, and question 16 on directors of a public fund.

21 What are the periodic reporting requirements for retail funds?

A public fund is required to appoint an auditor, and its financial statements, signed by a director, must be submitted to the FSC within six months of the end of the financial year to which they relate, accompanied by the following:

- a directors' certificate;
- an auditor's report;
- a report on the affairs of the public fund made in respect of the relevant financial year to the investors of the public fund; and
- such other documents as may be prescribed.

A public fund must also file a 'mutual funds annual return' with the FSC on an annual basis.

See also question 31 for further details on requirements relating to record-keeping, filings and annual fees.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

Yes, but such restrictions must be disclosed in the registered prospectus.

A public fund is also required to establish and maintain the following:

- a fully and clearly documented policy for the issue and redemption of fund interests; and
- procedures that are sufficient to ensure that the policy is effectively implemented.

Such policy and procedures must be as follows:

- appropriate for the nature, size, complexity, structure and diversity of the fund and the fund property;
- consistent with the provisions concerning valuation in the constituting documents and the prospectus; and
- approved and reviewed by the governing body on at least an annual basis.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

An open-ended private or professional fund can be established as a BVI business company, a limited partnership or a unit trust. An incubator or approved fund can be established as a BVI business company or a limited partnership.

Closed-ended funds are not generally regulated under SIBA. BVI business companies and limited partnerships are most commonly used as the vehicle for a closed-ended fund.

Companies

Companies are by far the most common vehicle used for open-ended funds in the BVI.

A BVI business company is subject to the BVI Business Companies Act 2004 (as amended) (BCA), which is widely regarded as one of the most modern and progressive company law regimes in the world.

Every BVI business company is required to have a BVI-registered agent and registered office and a company is incorporated by its proposed BVI-registered agent filing memorandum and articles of association, signed by the BVI-registered agent as incorporator, with the BVI Registrar of Corporate Affairs together with a 'consent to act' as registered agent and paying the annual government fee (currently US$350 for a company authorised to issue up to a maximum of 50,000 shares). Subject to the receipt by the BVI-registered agent of all necessary client take-on information, the incorporation of a BVI company can generally be done on a same-day basis.

A segregated portfolio company (SPC) is a single legal entity within which may be established various segregated portfolios. The assets and liabilities of each segregated portfolio are legally separate from those of other segregated portfolios. An SPC is formed in a similar manner to a business company except that only private, professional or public funds (or certain insurance companies) may be incorporated as SPCs and the prior written consent of the FSC is required to incorporate an SPC.

Limited partnerships

A BVI international limited partnership (ILP) is required to have a BVI-registered agent and registered office. An ILP does not have a separate legal personality and is formed by at least one general partner and one limited partner signing articles for the ILP and giving them to the proposed BVI-registered agent. The registered agent must then sign a memorandum for the ILP and file it with the FSC and pay the registration fee (currently US$500). An ILP is formed pursuant to the BVI Partnership Act 1996 (as amended). ILPs are more commonly used for closed-ended funds and private equity funds than open-ended funds.

Unit trusts

Unit trusts are not commonly used for the establishment of closed-ended or open-ended funds in the BVI. A unit trust is formed though a declaration of trust by the trustee alone or by a trust deed executed by both the trustee and the investment manager.

24 What are the key laws and other sets of rules that govern non-retail funds?

SIBA is the principal legislation relevant to the regulation of investment funds in the BVI, together with its subsidiary legislation, the Regulations, the Securities and Investment Business (Incubator and

Approved Funds) Regulations 2015 (the AF Regulations) and the PFC (which is specifically relevant to public funds).

SIBA refers to investment funds as 'mutual funds' and, as such, defines a mutual fund as a company or any other body, a partnership or a unit trust incorporated, formed or organised, whether under the laws of the BVI or the laws of any other country which:

> *(a) collects and pools investor funds for the purpose of collective investment, and (b) issues fund interests that entitle the holder to receive on demand or within a specified period after demand an amount computed by reference to the value of a proportionate interest in the whole or in a part of the net assets of the company, the partnership, the unit trust or other similar body, as the case may be.*

This includes an umbrella fund whose shares are split into a number of different class funds or sub-funds, and a fund that has a single investor that is a fund not registered or recognised under SIBA.

The definition of fund interest under SIBA excludes debt and, therefore, funds issuing debt rather than equity interests will generally fall outside of the scope of SIBA.

There are no restrictions imposed by the laws and rules of the BVI on investment strategies of hedge funds or their use of leverage, shorting or other techniques.

All investment funds must comply with relevant anti-money laundering legislation and regulations. The BVI government and the FSC actively work with the OECD, the Financial Action Task Force and regulators in numerous jurisdictions to ensure international standards of good practice are maintained and observed. Further, all funds, whether regulated by the FSC or not, are subject to the Anti-Money Laundering and Terrorist Financing Code of Practice 2008 (as amended) and the Anti-Money laundering Regulations 2008 (as amended).

See question 12 regarding closed-ended funds.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Yes. See questions 7 and 8 in relation to marketing.

SIBA provides for four categories of mutual fund, being private funds, professional funds, public funds and recognised foreign funds. The most popular fund is the professional fund.

In addition, the AF Regulations introduced two new types of open-ended funds in the BVI, being the incubator fund and the approved fund.

An application for recognition of a private and professional fund shall be in the approved form and shall specify the following:

- the address of the fund's place of business in the BVI;
- the name and address of each of the fund's directors;
- the name and address of the fund's authorised representative;
- if the fund is a unit trust, the name and address of the trustee;
- the address of any place of business that the fund may have outside the BVI;
- the name and address of the fund's auditor;
- the name and address of each of the fund's functionaries;
- whether the fund has issued, or intends to issue, an offering document;
- in the case of a foreign fund, written details of the nature and scope of the fund's business; and
- such other information as may be required by the approved form.

The application shall be accompanied by the following:

- a copy of the fund's constitutional documents;
- a copy of the fund's certificate of incorporation, formation or registration or equivalent document;
- details in relation to exemption applications (if any);
- a copy of the offering document (if relevant); and
- if the fund is not issuing an offering document, an explanation as to why and how relevant information will be provided to investors.

A professional fund may carry on business for up to 21 days before obtaining FSC recognition, as long as the application for recognition is lodged with the FSC within 14 days of launch. This means it is possible for professional funds to come to market very quickly in the BVI. Unlike a professional fund, a private fund must obtain its FSC recognition before launch. However, in our experience, this is usually a fairly quick process that takes a couple of weeks.

An application for approval of an incubator fund or approved fund shall be in the approved form and shall include the following information:

- details of the applicant and the intended date to commence business;
- the name and address of each of the fund's directors and a CV for each director;
- the name and address of the fund's authorised representative;
- proof of classification; and
- details of the fund's administrator (for an approved fund only).

The application shall be accompanied by the following:

- the constitutional documents specifying whether the applicant intends to be an incubator fund or approved fund;
- a written description of the investment strategy of the proposed incubator fund or approved fund;
- a written warning that the incubator fund or approved fund will issue to investors or potential investors as provided in the AF Regulations; and
- such other information as may be required in the prescribed form.

Incubator and approved funds can commence business within two days of the date the FSC receives a complete application in accordance with the AF Regulations.

Regarding closed-ended funds, see question 12.

26 Who can market non-retail funds? To whom can they be marketed?

See questions 7 and 8.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

Open-ended funds

Professional funds

SIBA provides that the fund interests in a professional fund shall only be issued to professional investors.

A professional investor is defined under SIBA as a person:

- whose ordinary business involves, whether for that person's own account or the account of others, the acquisition or disposal of property of the same kind as the property, or a substantial part of the property, of the fund; or
- who has signed a declaration that he or she, whether individually or jointly with his or her spouse, has net worth in excess of US$1 million (or its currency equivalent) and that he or she consents to being treated as a professional investor.

The minimum investment in a professional fund is US$100,000 or its currency equivalent, unless the investor is an exempted investor (being the manager, administrator, promoter or underwriter, or an employee of such).

Private funds

SIBA provides that a private fund either has a maximum of 50 investors or that invitations to subscribe for, or purchase, interests in the fund are made on a private basis only.

An invitation to subscribe for, or purchase, fund interests on a private basis includes an invitation that is made: (i) to a specified person (however described) and is not calculated to result in fund interests becoming available to other persons or to a large number of persons; or (ii) by reason of a private or business connection between the person making the invitation and the investor.

Incubator funds

An incubator fund is an open-ended fund that is designed for start-up managers who are looking to come to market quickly and create a track record over an initial set period of time.

The key features of an incubator fund are as follows:

- it can have a maximum of 20 investors. An investor must be a 'sophisticated private investor', which is defined under the AF Regulations as being 'a person who has been invited to invest in an incubator fund and the amount of his or her initial investment is not less than US$20,000';
- the minimum investment for each investor is US$20,000; and

- the net assets must not exceed US$20 million or its equivalent in any other currency.

An incubator fund is authorised to initially operate for a period of two years, which may be extended to three years on application to the FSC. At the end of the initial two-year period, or if the incubator fund has more than the authorised number of investors or net assets for an incubator fund, it must either convert to an approved, professional or private fund, or liquidate.

Approved fund

An approved fund is an open-ended fund that is designed for small, private funds or friends and family funds. Unlike the incubator fund, there are no eligibility requirements, no minimum level of investment is required and there is no limit to the time that it may exist as an approved fund (as long as it does not breach any of the relevant limits as described below).

The key features of an approved fund are as follows:

- it can have a maximum of 20 investors; and
- the net assets must not exceed US$100 million or its equivalent in any other currency.

Closed-ended funds

See question 12.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

Professional and private open-ended funds are required to have a manager at all times unless an exemption from such requirement is granted by the FSC. The manager should normally be from a 'recognised jurisdiction' but there is no requirement for the manager of a BVI fund to be resident or domiciled in the BVI and no BVI laws or regulations will apply to an overseas manager unless it has a physical presence in the BVI or is soliciting individuals in the BVI for the purpose of providing fund management services. There is no requirement under the AF Regulations for an incubator or an approved fund to have a manager.

A list of recognised jurisdictions can be found on the FSC's website (www.bvifsc.vg).

See question 1 regarding BVI investment managers. Investment managers that wish to establish themselves in the BVI will generally need to be licensed by the FSC and comply with the provisions of SIBA or the Approved Manager Regulations as appropriate. SIBA regulates 'investment business', which includes managing investments, dealing in investments and providing investment advice, among other things. 'Investments' are widely defined and include shares, partnership interests, fund interests, debentures, options, futures and contracts for differences, among other things.

The requirements that apply to operators of a fund will depend on the type of vehicle used for the fund, for example, private and professional funds established as companies must have at least two directors, at least one of whom must be an individual.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

Funds are not subject to any income or capital gains taxes in the BVI and no capital or stamp duties are levied in the BVI on the issue, transfer or redemption of fund interests (assuming that the fund does not own an interest in land in the BVI). Shareholders who are not tax-resident in the BVI will not be subject to any income or capital gains taxes in the BVI, with respect to the fund interests owned by them and dividends received on such fund interests, nor will they be subject to any estate or inheritance taxes in the BVI.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

There are no requirements for assets of open-ended non-retail funds to be held by a separate custodian located in the BVI. However, private and professional funds are required, at all times, to have a custodian, unless an exemption from this requirement is obtained. The custodian of a private or professional fund should meet the FSC's fit and proper criteria and also either:

- be functionally independent from the fund manager and the fund administrator; or
- where the custodian is the same person as the fund manager or fund administrator, be a company having systems and controls that ensure the persons fulfilling the custodial function are functionally independent from the persons fulfilling the fund management and administration functions.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

Private and professional open-ended funds have a number of statutory requirements and continuing obligations, which include the following:

Recognition

Private and professional funds are required to be recognised by the FSC and pay an annual recognition fee. The fee is currently US$1,000 per annum.

Record-keeping

A private or professional fund is required to maintain records that are sufficient:

- to show and explain its transactions;
- to enable its financial position to be determined with reasonable accuracy, at any time;
- to enable it to prepare such financial statements and make such returns as it is required to make under BVI law; and
- if applicable, to enable its financial statements to be audited.

Such records must be retained for a period of at least five years after completion of the relevant transaction.

Filings

A private or professional fund is required to make various filings with the FSC including but not limited to filing:

- changes to its place of business;
- amendments to its offering or constitutional documents;
- a notification of the appointment of a new functionary; and
- a notification of the change of directors.

Officers

A private or professional fund is required to have the following:

- at least two directors (at least one of whom must be an individual);
- a BVI-registered office, registered agent and authorised representative;
- a manager, custodian and auditor (unless an exemption is obtained); and
- an administrator.

Incubator and approved funds

Incubator and approved funds must be approved by the FSC and pay an annual approval fee of US$1,000. Incubator and approved funds have limited ongoing obligations, which include the requirement to have at least two directors (one of whom must be an individual) and an authorised representative, and notifying the FSC within 14 days of key changes to the funds in accordance with the AF Regulations.

An incubator fund is not required to have a manager, administrator, custodian or auditor. An incubator fund may also have a term sheet rather than a fuller offering document, which must include certain risk warnings.

An approved fund must have a third-party administrator but it is not required to have a manager, custodian or auditor. Like the incubator fund, an approved fund may also have a term sheet rather than a fuller offering document, which must include certain risk warnings.

32 What are the periodic reporting requirements for non-retail funds?

A BVI private or professional fund is required to have an auditor and file audited financial statements on an annual basis within six months of the end of the fund's financial year, or have obtained an exemption from the requirement to do so. It is also required to file a 'mutual funds annual return' with the FSC on an annual basis.

Incubator and approved funds are required to make semi-annual returns to the FSC regarding the fund's assets and number of investors and file annual financial statements to the FSC (which need not be audited).

See question 31 for further details.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Since the financial crisis in late 2007 there has been an increase in demand by investors for greater control of, and transparency in respect of, their investments and as a result the BVI has seen an increase in separately managed accounts. A typical structure would be the use of a business company limited by shares or a segregated portfolio company, depending on whether the arrangement is a one-off or part of a platform operated commercially to warehouse many managed accounts.

34 What are the key legal issues to be determined when structuring a separately managed account?

A key issue is to ensure that appropriate transparency and control or input in management decisions is given to the underlying investor so as to ensure that their reasons for investing by way of a managed account – which is often more expensive to establish and manage than investing via a commingled fund – are adequately addressed.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

The manager or entity marketing the separately managed account is generally subject to the same regulation as a fund manager. Managed accounts (which are not structured as SPCs) by their very nature will generally fall outside of the definition of mutual fund under SIBA because there is no pooling of investor funds.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

The statutory and regulatory framework in the BVI has been built on the back of partnerships between the government, the FSC and industry, and there is every reason to expect the framework to evolve as demands on, and of, the industry evolve.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

The process of listing equity securities on a stock exchange would be driven by the rules of the relevant exchange.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

Yes, this is most common in the context of companies, which redomicile into and out of the BVI with relative ease. The process for company redomiciliation is set out in the BCA and can be achieved for funds that are, or that will be required to be, recognised by or registered with the FSC.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

Provided foreign investors meet the necessary anti-money laundering requirements of the fund, there are no restrictions on their ability to invest in funds established or managed in the BVI, other than those imposed by the fund itself or by securities laws and other restrictions that may be applicable to certain investors in their jurisdiction of residence or establishment.

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

The Cayman Islands Monetary Authority (CIMA) is the main regulatory body in the Cayman Islands that oversees open-ended investment funds, fund managers and those marketing investment funds. The statutory framework under which CIMA derives its supervisory responsibilities (in respect of investment funds and investment managers) is set out in the Mutual Funds Law and the Securities Investment Business Law (the SIB Law).

2 Is fund administration regulated in your jurisdiction?

Only mutual fund administrators that are established in the Cayman Islands are required to be regulated by CIMA. Mutual fund administration is defined in the Mutual Funds Law as the management or administration of a 'mutual fund' (as defined in question 24), the provision of the principal office of the mutual fund in the Cayman Islands or the provision of an operator to the mutual fund.

If a mutual fund administrator is required to be regulated by CIMA it will need to apply for a licence, the granting of which will be based upon, among other things, the administrator's abilities and the expertise of its management team and employees.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

In broad terms, the Mutual Funds Law requires mutual funds to be licensed or regulated as such. Implicit in this is that closed-ended funds (or those that issue equity interests that are not redeemable at the option of the holder) are not required to be regulated as mutual funds by CIMA, although in practice CIMA will accept voluntary submission to regulation by closed-ended funds (and this is often attractive where, for marketing purposes, it is helpful for the fund to be subject to regulatory oversight in its jurisdiction of establishment). See question 25 for details on the authorisation and licensing process for funds.

Provided a fund manager of a Cayman Islands investment fund is not established or does not otherwise register itself in the Cayman Islands it will not be subject to any regulation by CIMA or any other authority in the Cayman Islands.

Operators of mutual funds, such as directors or trustees, are subject to registration or licensing requirements; see question 28 for more details as to the requirements that apply to managers and operators of investment funds.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

Fund regulation by the authorities in the Cayman Islands does not have extraterritorial effect. There is no requirement for an overseas manager that is performing management activities or providing services to Cayman Islands exempted companies (those that carry on business mainly outside of the Cayman Islands) to be authorised unless that manager formally establishes itself in the Cayman Islands.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

If the fund manager is licensed under the SIB Law, no shares or partnership interests (as applicable) in the fund manager may be issued, voluntarily transferred or disposed of without the approval of CIMA.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

There are no applicable restrictions, save in respect of a general partner of a Cayman Islands-domiciled limited partnership that may fall within scope of registration requirements if it acts as investment manager or adviser of the partnership and is remunerated separately (from the terms of the partnership agreement) for such activity.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

The Companies Law of the Cayman Islands (the Companies Law) restricts shares of an 'exempted company' (the most common corporate form adopted by investment funds in the Cayman Islands) from being offered to the public in the Cayman Islands unless those shares are listed on the Cayman Islands Stock Exchange. This statutory restriction is not one of regulation so much as of securities law and notably is not replicated in the statutory framework governing limited partnerships or unit trusts. For the purposes of the Companies Law, the term 'public in the Cayman Islands' should be taken as referring to a non-targeted group of prospective investors in the Cayman Islands.

A fund that is not established in the Cayman Islands and that wishes to offer its equity interests to the public in the Cayman Islands will need to either register as a mutual fund with CIMA (as above) or market its equity interests through a person who is appropriately licensed by CIMA under the terms of the SIB Law (provided that the equity interests offered to the public in the Cayman Islands are listed on a stock exchange approved by CIMA or the fund is regulated by an overseas regulatory authority approved by CIMA).

8 What marketing activities require authorisation?

If an entity is arranging deals in securities with a view to another person dealing in securities, or if it is participating in the arrangements for dealing in securities, then it will fall within the scope of the SIB Law and as such may be required to obtain a licence from, or otherwise register with, CIMA before engaging in such activities.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

An entity that is performing fund marketing activities from within the Cayman Islands (whether that entity is incorporated or registered in, registered as a foreign entity in or otherwise has established a place of business in the Cayman Islands) is required by the terms of the SIB Law to obtain a licence from, or otherwise register with, CIMA prior to engaging in such activities.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

There is no requirement for a local entity to be involved in the fund marketing process.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

There are no restrictions on intermediaries earning commission payments in relation to their marketing activities in the Cayman Islands.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

The statutory and regulatory framework in the Cayman Islands has typically attracted funds that seek investment from high net worth individuals and other sophisticated and institutional investors rather than funds aiming to raise money through retail channels, although there are regulatory categories that would facilitate the registration with, or licensing by, CIMA of funds wishing to raise money from sub-institutional investors.

The choice of vehicle and the approaches to their formation are the same for non-retail funds (see question 23).

13 What are the key laws and other sets of rules that govern retail funds?

The key statutory and regulatory provisions that apply in respect of retail funds are the same as those that apply in respect of non-retail funds.

The Retail Mutual Funds (Japan) Regulations (as amended) (the Regulations) apply specifically to Cayman Islands retail mutual funds marketed to Japanese investors. The Regulations allow for mutual funds that are licensed under the Mutual Funds Law that have been, or are intended to be, exclusively offered to Japanese retail investors to automatically comply with the securities laws and regulations of Japan.

See question 24 for further details.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

A retail fund is, for the most part, subject to the same regulation and licensing as a non-retail fund; however, the options for the regulatory class that a fund might fall under are more limited for retail funds. A retail fund can be a licensed mutual fund, an administered mutual fund or a registered mutual fund. For further details see question 25.

15 Who can market retail funds? To whom can they be marketed?

See questions 7 to 10.

16 Are there any special requirements that apply to managers or operators of retail funds?

As noted in question 13, the statutory and regulatory framework applying to investment funds in the Cayman Islands does not distinguish between retail funds and non-retail funds. Accordingly, there are no special requirements that apply to managers or operators of retail funds.

17 What are the investment and borrowing restrictions on retail funds?

There are no restrictions.

18 What is the tax treatment of retail funds? Are exemptions available?

The tax treatments and exemptions available to non-retail funds apply equally to retail funds. See question 29.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

There are no requirements for assets of a Cayman fund to be held by a separate custodian located in the Cayman Islands, although the fiduciary duties that the directors of the fund would have to safeguard the assets of the fund should be noted.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

The governance requirements for Cayman investment funds are discussed in question 31; again, no distinction is made between retail and non-retail funds.

21 What are the periodic reporting requirements for retail funds?

The periodic reporting requirements for non-retail funds apply equally to retail funds. See question 32.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

Yes, as with non-retail funds, such restrictions can be contained in the constitutive documents of the fund or otherwise in the terms of issue of the relevant equity interests.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

Open-ended funds

Companies

Companies are the most common vehicle for open-ended funds. Specifically, the exempted company limited by shares is the vehicle of choice, accounting for 68 per cent of regulated funds, with exempted segregated portfolio companies making up a further 9 per cent of the market (based on the 2014 Investments Statistical Digest produced by CIMA).

A standard exempted company limited by shares can be set up on a same-day basis with a filing of the company's memorandum and articles of association with the Registrar of Companies. No prior government consents or approvals are required. The memorandum of association must contain certain basic information about the company, including its registered office, its authorised share capital and the objects for which it is incorporated. Shares can be denominated in any currency and denomination. There is no minimum or maximum amount prescribed for authorised, issued or paid-up share capital (although at least one share must be in issue at the time of registration).

An exempted segregated portfolio company is a single legal entity within which may be established various segregated portfolios. The assets and liabilities of each segregated portfolio are legally separate from those of other segregated portfolios. A segregated portfolio company is formed in a similar manner to an exempted company limited by shares. The protection afforded by the use of segregated portfolios to separate share classes with different investment objectives and risk profiles has led to their increased popularity since they were introduced in late 2001.

Unit trusts

The second most common form of regulated fund is the exempted unit trust. Unit trusts are based on English trust law, but are modified by the Trusts Law of the Cayman Islands for suitability as investment fund vehicles. Under a unit trust arrangement, investors contribute funds to a trustee that holds those funds on trust for the investors, and each investor is directly entitled to share pro rata in the trust's assets. An advantage of the unit trust is that it may be structured as an 'umbrella' unit trust so that different investments may be allocated to different 'sub-trusts' with investors subscribing for units in a particular sub-trust. Unlike segregated portfolio companies, however, there is no statutory segregation of assets and liabilities of each sub-trust.

A unit trust is formed through a declaration of trust by the trustee alone or by a trust deed executed by both the trustee and the investment manager.

Limited partnerships

Exempted limited partnerships (ELPs) accounted for only 10 per cent of regulated funds in 2014. ELPs are most commonly used for closed-ended funds or private equity funds and are described in more detail below.

Closed-ended funds

The vehicles that can be used for closed-ended funds are the same as for open-ended funds. The most popular vehicle used for closed-ended funds is the ELP. Cayman ELPs are governed by a combination of equitable and common law rules (based on English common law) and also statutory provisions, pursuant to the Exempted Limited Partnership Law 2014. An ELP may be formed for any lawful purpose to be carried out and undertaken either in or from within the Cayman Islands or elsewhere upon the terms, with the rights and powers, and subject to the conditions, limitations, restrictions and liabilities set forth in the Exempted Limited Partnership Law 2014.

An ELP is a creature of contract (and thus does not have separate legal personality) and is constituted by an agreement of limited partnership and registered in the Cayman Islands by filing a registration statement with the Registrar of Exempted Limited Partnerships containing the following details:

- the name of the partnership;
- the general nature of the business and term of the partnership;
- the address of the registered office of the partnership;
- the name and address of the general partner; and
- a declaration that the partnership shall not undertake business with the public in the Cayman Islands other than so far as may be necessary to conduct business outside the Cayman Islands.

24 What are the key laws and other sets of rules that govern non-retail funds?

Open-ended funds

The Mutual Funds Law is the principal legislation relevant to the regulation of investment funds in the Cayman Islands. CIMA is the regulatory body responsible for compliance with these regulations and has broad powers to ensure the protection of investors.

The Mutual Funds Law refers to investment funds as 'mutual funds' and as such defines a mutual fund as a company, unit trust or partnership incorporated or otherwise carrying on business in the Cayman Islands that issues equity interests for the purpose of pooling investor funds, with the aim of spreading investment risk, and enables investors to receive profits or gains from investments. The reference to 'equity interests' is important because this excludes debt instruments (including warrants, convertibles and sukuk instruments); funds issuing such instruments will not be required to be registered with CIMA. The scope of regulation extends to Cayman incorporated or established master funds that have one or more CIMA-regulated feeder funds and hold investments and conduct trading activities.

There are exemptions that allow certain funds to fall outside the scope of the Mutual Funds Law. Funds with only one investor do not 'pool funds' and as such fall outside the definition of a mutual fund. Investment funds with 15 investors or fewer, the majority of whom have the power to appoint or remove the operators of the investment fund (ie, the directors, the general partner or the trustee, as the case may be), are exempt from the licensing and registration provisions of the Mutual Funds Law. This latter exemption does not apply to Cayman Islands-regulated master funds.

There are no restrictions imposed by the laws and rules of the Cayman Islands on investment strategies of hedge funds, or their use of leverage, shorting or other techniques. There is no concept of 'eligible investor' in a Cayman-registered fund.

Directors of funds regulated by CIMA that are companies are required to register with CIMA under the Directors Registration and Licensing Law 2014. This requirement does not extend to CIMA-registered partnerships and trusts and, as such, will not apply to the directors of their general partners or to trustees of a trust. The Directors Registration and Licensing Law is intended to allow CIMA to verify certain basic information in respect of directors of CIMA-registered funds and applies to directors wherever they are located, not just to Cayman Islands-based directors.

Closed-ended funds

Closed-ended funds or private equity funds that do not permit redemption or repurchase of interests fall outside the definition of a mutual fund and as such do not fall within the scope of the Mutual Funds Law. Closed-ended funds are therefore unregulated.

All investment funds must comply with relevant anti-money laundering legislation and regulations. The Cayman Islands government and CIMA actively work with the OECD, the Financial Action Task Force and regulators in numerous jurisdictions to ensure international standards of good practice are maintained and observed. Further, all funds, whether regulated by CIMA or not, are subject to the Proceeds of Crime Law, the Terrorism Law and the Misuse of Drugs Law.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

The following applies to funds that allow redemption of equity interests at the option of the investor. As noted in question 24, closed-ended funds (ie, those that do not permit redemption of equity interests at the option of the holder) fall outside of the Mutual Funds Law but may elect to become subject to regulation as if they were mutual funds.

Three categories of fund are required by the terms of the Mutual Funds Law to submit to regulation by CIMA: the licensed mutual fund, the administered mutual fund and the registered mutual fund.

The licensed mutual fund is the least common type of regulated mutual fund, as it involves an approval process such that the mutual fund itself is licensed (as opposed to being able to only rely on the licence of the administrator in the case of administered mutual fund or being exempt from obtaining the licence in the case of a regulated mutual fund). In granting a licence, CIMA will consider whether each promoter is of sound reputation, the administration of the fund will be undertaken by sufficiently experienced persons who are fit and proper to be directors, managers or officers (as the case may be) and the business of the fund and the offer of equity interests will be carried out in a proper manner.

Instead of applying for its own licence, a fund may seek to rely on the existing licence of a licensed fund administrator based in the Cayman Islands. This type of mutual fund is favoured by investment managers who wish to have a minimum initial subscription per investor that is lower than US$100,000, but who prefer not to go through the approval process for a licensed mutual fund outlined above. An administered mutual fund is the only type of regulated fund that must appoint an administrator based in the Cayman Islands; licensed and registered mutual funds may appoint an administrator in any jurisdiction.

The most common type of investment fund regulated by CIMA is the registered mutual fund, accounting for approximately 96 per cent of the funds regulated by CIMA (as of December 2016). Registered mutual funds are exempt from the requirement to be licensed or administered on the basis that either each investor must subscribe for equity interests in an amount not less than US$100,000 or the equity interests of the fund are listed on a stock exchange recognised by CIMA.

All mutual funds regulated by CIMA, other than master funds, must have a current offering document, which must describe the equity interests of the mutual fund in all material respects and must contain all material information to enable a prospective investor to make an informed decision as to whether to subscribe. The offering document must be filed with CIMA, together with the prescribed particulars that are set out in forms that summarise key provisions of the offering document.

26 Who can market non-retail funds? To whom can they be marketed?

Restrictions apply to the entity performing a marketing function as well as upon whom they target such marketing. See question 25.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

The hurdle to entry to registered mutual funds is a minimum initial investment (whether by subscription or transfer) of US$100,000; otherwise no other investor-qualification criteria apply.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

There is no requirement for the manager of a Cayman fund to be resident or domiciled in the Cayman Islands and no Cayman Islands laws or regulations will apply to that manager.

Update and trends

The past year has seen a number of legislative developments in the Cayman Islands. In addition, transparency and information exchange remain a top focus for the jurisdiction.

The EU's Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD)

In July 2016 the European Securities and Markets Authority (ESMA) released its latest advice on the extension of the AIFMD passport to non-EU alternative investment fund managers (AIFMs) and alternative investment funds (AIFs). The extension of the AIFMD passport (which is currently only available to EU entities) would allow non-EU AIFMs and AIFs to market and manage funds throughout the EU without needing to comply with the national regime of each EU country in which they market funds. ESMA advised that it will complete its assessment of the Cayman Islands once the Cayman Islands adopts new AIFMD-consistent legislation and related changes are implemented. The Cayman Islands has taken a number of steps in this regard. In September 2015, the Cayman Islands published amendments to the Mutual Funds Law to introduce the concept of a 'regulated EU connected fund'. A regulated EU connected fund is any type of investment fund (whether open-ended or closed-ended) that is either managed from or marketed in a member state of the European Economic Area as contemplated under AIFMD and elects to fall within the new regulated EU connected fund regime. The Cayman Islands also published amendments to the SIB Law to introduce the concept of an 'EU connected manager'. An EU connected manager is a person who falls within the existing scope of the SIB Law, conducts management, marketing or depositary activities as contemplated under the AIFMD and elects to fall within the new EU connected manager regime. In December 2016, the Cayman Islands published the Mutual Funds (EU Connected Fund (Alternative Investment Fund Managers Directive)) Regulations, 2016 and the Securities Investment Business (EU Connected Fund (Alternative Investment Fund Managers Directive)) Regulations, 2016, which set out the substantive provisions of the regulated EU connected fund and the EU connected manager regimes. It also published the Monetary Authority (Amendment) Law, 2016, which, once in effect, will introduce new enforcement powers to allow CIMA to impose substantial administrative fines upon individuals (whether or not resident in the Cayman Islands) and entities licensed and regulated in the Cayman Islands. In light of these legislative developments, it is expected that ESMA will re-visit its assessment of the Cayman Islands shortly, with a positive advice resulting for the Cayman Islands.

Cayman Islands limited liability company

In 2016, the Cayman Islands enacted the Limited Liability Companies Law, 2016 (the LLC Law), which provides for the formation and registration of a new vehicle, the Cayman Islands limited liability company (Cayman LLC). The introduction of the Cayman LLC is in response to a number of requests from the US investment funds industry that the Cayman Islands offer a vehicle more closely aligned with the US LLC vehicle (ie, a vehicle along the lines of a Delaware LLC). The Cayman LLC has separate legal personality like a Cayman Islands exempted company, but with features of a Cayman Islands exempted limited partnership in the sense that it is not limited by shares nor by guarantee but rather by reference to members' capital accounts and capital commitments, with freedom of contract among the members as to the internal workings of the company. Some advantages of a Cayman LLC would be to allow for simplified fund administration (ie, easier tracking and calculation of the value of a member's investment in the Cayman LLC), more flexible governance concepts and, possibly, a closer matching of the legal framework applicable between 'onshore' and 'offshore' investors (eg, where there are parallel onshore and offshore funds in a structure). The flexible nature of the Cayman LLC makes the vehicle also suitable for a broad range of general corporate and commercial uses, such as joint venture companies, management holding vehicles, carried interest distribution vehicles and general partner entities.

Transparency and information exchange

The Cayman Islands has signed two inter-governmental agreements to improve international tax compliance and the exchange of information – one with the United States (the US IGA), which gives effect to the automatic tax information exchange requirements of the US Foreign Account Tax Compliance Act (US FATCA), and one with the United Kingdom with respect to the automatic exchange of tax information relating to UK tax resident persons and entities (the UK IGA and, together with the US IGA, the IGAs). The Cayman Islands is also one of multiple jurisdictions that have agreed to the automatic exchange of financial account information on the basis of the standard published by the OECD (the common reporting standard (CRS)). In order to give effect to its obligations under the US IGA, the UK IGA and the CRS, the Cayman Islands has adopted regulations (the AEOI Regulations), pursuant to which, the Cayman Islands Tax Information Authority (the Cayman TIA) has published guidance notes on the application of the IGAs and the CRS. UK FATCA is expected to be replaced in its entirety by CRS during 2017. Under the AEOI Regulations, all Cayman Islands financial institutions (FIs) will be classified as 'reporting financial institutions' (reporting FIs) unless an FI may rely on an exemption, in which case it will be classified as a 'non-reporting financial institution'. Each reporting FI is required to do the following:

- register with the US Internal Revenue Service (IRS) to obtain a global intermediary identification number (under US FATCA);
- register with and notify the Cayman TIA of its status as a reporting FI;
- conduct due diligence on its investors to identify whether accounts are reportable under the AEOI Regulations; and
- report account information on reportable accounts to the Cayman TIA.

The Cayman TIA will exchange the information reported to it with the IRS and other foreign fiscal authorities annually on an automatic basis.

In November 2016, the Cayman Islands published draft legislation that, if adopted, would introduce a centralised platform of beneficial ownership information of Cayman Islands companies. Under the draft legislation, companies incorporated under the Companies Law and the LLC Law (subject to certain exclusions) will be required to establish and maintain a register of beneficial ownership information at the company's registered office. The registers will not be open to public inspection, but will be searched upon request from a senior official of a competent authority in the Cayman Islands. A search may only be carried out if the requesting senior officer certifies that the request is proper and lawful and in compliance with relevant legislation or is in response to a request from a designated law enforcement official from a jurisdiction that has entered into an agreement with the Cayman Islands government regarding the sharing of beneficial ownership agreement (currently only the UK), and is in compliance with that agreement. Under the draft legislation, certain companies are exempted from the requirement to maintain a beneficial ownership register, including the following:

- companies listed on the Cayman Islands Stock Exchange or an approved stock exchange;
- companies registered or licensed under a 'regulatory law', which includes regulated funds under the Mutual Funds Law and excluded persons under the SIB Law; and
- segregated portfolio companies, private equity or collective investment schemes or investment funds (or, where a fund is an ELP, its general partner) managed, arranged, administered or promoted by a person regulated in or listed on a stock exchange in the Cayman Islands or a 'Schedule 3' jurisdiction.

The foregoing developments demonstrate the continued commitment of the Cayman Islands to the implementation of global standards of tax transparency and information exchange as well as its willingness to evolve its statutory and regulatory framework to maintain the jurisdiction's position as a leading international financial centre.

Investment managers that wish to establish themselves in the Cayman Islands need to comply with the provisions of the SIB Law. The SIB Law regulates 'securities investment business', which broadly encompasses managing securities, arranging deals in securities and advising on deals in securities. 'Securities' are widely defined and include shares, partnership interests, trust units, debt investments, warrants, options, futures and contracts for differences.

Broadly, the SIB Law provides that the investment manager will need to be licensed under the SIB Law unless it is regulated in respect of securities investment business by a recognised overseas authority (eg, the Financial Conduct Authority), it is carrying on securities investment business exclusively to companies within the manager's group or it is managing the assets of only certain categories of high net worth or sophisticated investors, in which case it will be able to take advantage of an annual exemption filing instead. The definition of 'sophisticated investors' includes mutual funds regulated by CIMA, so the majority of investment managers are, in practice, able to take advantage of the exemption filing. At the end of 2016 there were 2,516 persons registered as exempted, whereas only 35 were fully licensed.

Open-ended funds

The requirements that apply to operators of a fund depend on the type of vehicle used for the fund. An exempted company or segregated portfolio company must have at least two directors if it is regulated by CIMA. As noted in question 24, directors of a company that is regulated by CIMA must also be registered with CIMA under the Directors Registration and Licensing Law 2014.

If a unit trust is regulated as a licensed fund, then the trustee will need to be licensed under the Banks and Trust Companies Law as a trust company.

Closed-ended funds

If a closed-ended fund is not regulated by CIMA then there are no requirements for its directors to be registered with CIMA. Investment managers must still adhere to the requirements under the SIB Law as discussed above.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

The Cayman Islands has no direct taxation of any kind. There are no income, corporation, capital gains or withholding taxes or death duties. It is possible for all types of fund vehicles – the company, the unit trust and the limited partnership – to apply to the government of the Cayman Islands for a written undertaking that they will not be subject to various forms of direct taxation, for a minimum period, which in the case of a company is 20 years and in the case of a unit trust and a limited partnership is 50 years.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

There are no requirements for assets to be held by a separate custodian located in the Cayman Islands.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

All corporate entities need to be registered with the Registrar of Companies to be legally formed. There is a registration fee, which must be paid annually, and if an entity is late in paying it may not be in good standing. The government must be informed of any changes to the fund's directors or officers.

As noted in question 25, some funds will need to register with CIMA and will be regulated as a result. Such funds will need to pay annual fees and file audited accounts and a summary form each year. Any material updates or amendments to the fund's offering document must also be submitted to CIMA. This can include changes to offering terms, the fund's directors and officers, the investment manager's principals or the fund's service providers.

While an exempted company is not required to hold annual general meetings of shareholders, CIMA has released a statement of guidance that establishes key principles of good governance that must be observed by each Cayman Islands-regulated mutual fund. Such principles require, inter alia, the board of directors or other governing body to properly oversee the activities of the fund's service providers; suitably identify, disclose and manage all conflicts of interest; and meet at least twice a year or otherwise more frequently as determined by the size, nature and complexity of the fund. The directors are also encouraged to maintain accurate and complete records of meetings and board decisions.

32 What are the periodic reporting requirements for non-retail funds?

All funds regulated by CIMA must, as long as there is a continuing offering, update their offering documents and prescribed particulars within 21 days of any material change, and must re-file the updated offering document or the prescribed particulars with CIMA within such 21-day period.

All funds regulated by CIMA must also have their accounts audited annually and such audited financial statements must be filed with CIMA within six months of the year end of the fund, together with an annual return form including prescribed details, signed by a director. Such audited financial statements must be signed off by an approved Cayman Islands-based auditor.

Funds regulated by CIMA must also pay an annual fee in January each year (currently approximately US$4,270 for funds other than master funds, for which the fee is approximately US$3,050).

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Since the financial crisis in late 2007 there has been an increase in demand by investors for greater control of, and transparency in respect of, their investments and, as a result, the Cayman Islands has seen an increase in separately managed accounts. The typical structure would be the use of an exempted company limited by shares or a segregated portfolio company, depending on whether the arrangement is a one-off or part of a platform operated commercially to warehouse many managed accounts.

34 What are the key legal issues to be determined when structuring a separately managed account?

The main issue is to ensure that appropriate transparency and control or input in management decisions is given to the underlying investor so as to ensure that their reasons for investing by way of a managed account – which is often more expensive to establish and manage than investing via a commingled fund – are adequately addressed.

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35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

The manager or entity marketing the separately managed account is regulated in the same fashion as for fund management. The separately managed account, however, is not regulated by CIMA as, by its very nature, it is not classed as a 'mutual fund' as there is no pooling of investor funds.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

The statutory and regulatory framework in the Cayman Islands has been built on the back of partnership between government, CIMA and industry, and there is every reason to expect the framework to evolve as demands on, and of, the industry evolve. See 'Update and trends'.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

The process of listing equity securities on a stock exchange would be driven by the rules of the relevant exchange; popular exchanges for the listing of equity interests of Cayman Islands funds include the Cayman Islands Stock Exchange, the Channel Islands Securities Exchange and the Irish Stock Exchange.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

Yes. This is most common in the context of companies, which redomicile into and out of the Cayman Islands with relative ease. The process for company redomiciliation is laid out in the Companies Law, and can be achieved for funds that are, or that will need to be, regulated by CIMA.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

Provided foreign investors meet the necessary anti-money laundering requirements of the fund, there are no restrictions on their ability to invest in funds established or managed in the Cayman Islands other than those imposed by the fund itself or by securities laws and other restrictions that may be applicable to certain investors in their jurisdiction of residence or establishment.

Cyprus

Elias Neocleous and Agathi Trakkidi
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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

The principal laws regulating fund managers in Cyprus are as follows:
- the Investment Services and Activities and Regulated Markets Law (Law 144(I) of 2007 ((the IS Law)), which transposes the provisions of the EU Markets in Financial Instruments Directive (MiFID);
- the Alternative Investment Fund Managers Law (Law 56(I) of 2013 (the AIFM Law)), which transposes the provisions of the EU Alternative Investment Fund Managers Directive (AIFMD);
- the Open-Ended Undertakings for Collective Investment Law (Law 78(I) of 2012 (the UCITS Law)), which transposes the provisions of the EU Undertakings for the Collective Investment in Transferable Securities Directive (Directive 2009/65/EC (UCITS IV Directive));
- the Alternative Investment Funds Law (Law 131(I) of 2014 (the AIF Law)), which regulates AIFs; and
- the Companies Law as amended.

The Cyprus Securities and Exchange Commission (CySEC) is the national authority primarily responsible for regulating funds, their managers and those marketing funds.

2 Is fund administration regulated in your jurisdiction?

While the relevant laws impose rigorous requirements on fund managers in relation to valuation, liquidity and risk management as well as reporting to regulators and investors, which can be delegated to third parties, they do not specifically regulate the service providers as such. However, they do indirectly affect their operation as fund administrators and so they must comply with the respective laws.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

Licensing of funds

There are currently two distinct regimes in relation to investment funds in Cyprus, namely, open-ended undertakings for collective investment funds (UCITS) and alternative investment funds (AIFs). CySEC is responsible for licensing both.

UCITS

For a licence to be granted to a local UCITS fund, a duly completed application form and supporting documentation must be provided to CySEC detailing, inter alia, the identity and particulars of the proposed directors of the management company, the directors of the fund, and the individuals that the depositary entrusts with the supervision of the fund. CySEC may request further clarifications or additional information as it deems appropriate in order to fully evaluate the application. CySEC is required to inform the management company of the UCITS whether its application has been approved or rejected within two months of submission of a complete application. For a variable capital investment company that has not designated a management company the time allowed for a decision is extended to six months.

AIFs

A local AIF wishing to be granted a licence must submit a duly completed application form together with the requisite supporting documentation, which requires the applicant to provide similar details to those described above. Similarly, CySEC may request further clarifications or additional information as it deems appropriate. The applicant must be notified of the outcome within three months of the submission of a complete application.

Key management company requirements

UCITS management company

A UCITS may either be externally managed or internally managed if formed as a variable capital investment company, the management of which is undertaken by its board of directors. In the event that the UCITS is self-managed it must comply with the following requirements:
- a minimum initial capital of €300,000;
- an appropriate organisational structure; and
- at least two directors with the necessary integrity and experience in relation to the business undertaken by the company.

When a UCITS is externally managed by a local management company, the management company must be a limited liability company with a share capital, with its registered office and central management situated in Cyprus and having as its main object the management of one or more UCITS. A licence must be obtained from CySEC before commencement of any business activities in or from Cyprus by the management company. Other requirements include the following:
- a minimum initial capital of €125,000, which must be fully paid up in cash. If the value of assets managed by the management company exceeds €250 million, the capital of the management company must be increased by 0.02 per cent of the excess over €250 million, up to a maximum increase of €10 million;
- an appropriate shareholder structure, organisational structure and proper staffing, with the requisite financial and technical means in order to be able to provide its services in accordance with the law and without putting at risk the interests of the retail funds under its management; and
- the persons managing the management company must have the necessary integrity and experience in relation to the UCITS managed by the management company.

Foreign management companies licensed in another EU member state may freely provide services in Cyprus either on a cross-border basis or by establishing a place of business in Cyprus, subject to notifying CySEC in accordance with the UCITS Law.

AIF management company

An AIF may either be externally managed, or internally managed if formed as an investment company the management of which is undertaken by its board of directors (either with fixed or variable share capital).

In the latter event, the principal requirements are as follows:
- a minimum initial capital of €125,000 for companies with assets under management, including any assets acquired through use of leverage, of up to €100 million in aggregate, or up to €500 million where the AIF is not employing leverage and the unitholders have

no redemption rights exercisable during a period of five years following the date of initial investment. In the event that the self-managed investment company falls under the provisions of the AIFM Law (either on an obligatory basis if the assets under management exceed the thresholds mentioned above, or on a voluntary basis by opting in to the AIFM regime) it must have an initial capital of at least €300,000;
- appropriate shareholding structure, organisational structure and proper staffing; and
- at least two directors with the necessary integrity and experience in relation to the business undertaken by the company.

If the AIF is externally managed, its manager should either be a licensed AIFM, UCITS management company or a Cyprus investment firm (CIF).

A local AIFM must be a limited liability company with a share capital, with its registered office and central management situated in Cyprus, and must obtain a licence from CySEC before undertaking any business activities. It must also have the following:
- a minimum initial capital as for a UCITS management company;
- an appropriate shareholding structure, organisational structure and proper staffing; and
- at least two directors with the necessary integrity and experience in relation to the business undertaken by the company.

As with UCITS, foreign management companies licensed in another EU member state may freely provide services in Cyprus either on a cross-border basis or by establishing a place of business in Cyprus, subject to satisfying notification requirements.

In the event that the AIF management company is a licensed UCITS management company, it must comply with the relevant organisational and other requirements imposed by the UCITS Law.

Finally, in the case of an external manager having the form of a CIF regulated by the IS Law, additional requirements apply that include, inter alia, the obligation to have own funds adjusted to the value of the portfolio of the AIFs under management.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

Fund regulation generally covers fund-related activities that are carried on in Cyprus. In this respect, the relevant laws allow fund managers authorised in one EU member state to market their funds in Cyprus or to manage Cyprus-based funds through a regulator-to-regulator electronic notification procedure (the 'passport'). More specifically:

UCITS

Cyprus law allows a management company authorised in another EU member state to pursue, within Cyprus, the activity for which it has been authorised (whether management or marketing) either by establishing a branch or under the freedom to provide services. However, it should be noted that a management company registered in another EU member state wishing to market a UCITS in Cyprus must comply with local rules regarding the distribution of the units. Finally, under the current UCITS regime, non-EU management companies may not manage or market their funds in Cyprus without a relevant licence from CySEC.

AIFs

Under the AIFM Law an AIF manager licensed in an EU member state is free to manage and market AIFs to professional investors in Cyprus. Non-EU managers require authorisation from CySEC before they can manage or market AIFs in Cyprus. CySEC Directive DI131/56/02 sets out the terms on which third-country managers may manage or market AIFs in Cyprus. In order for a third-country AIFM to market its units in Cyprus without a passport, appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards must be in place between CySEC and the supervisory authorities of the AIFM's home country, and the units may be marketed only to professional investors. The AIFM must notify CySEC of its intention to market the units and provide CySEC with a copy of its licence issued by the competent foreign authority. CySEC intends to put in place arrangements for a third-country passport in the near future, enabling non-EU AIFMs to manage an AIF established in Cyprus that is not marketed to professional investors in the EU, provided that they designate a 'member state of reference', which under certain conditions (including prior authorisation from CySEC) can be Cyprus. Finally, AIFs licensed in the EU cannot be marketed to retail investors in Cyprus without prior authorisation from CySEC. CySEC has recently published a directive stipulating the detailed requirements for marketing.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

UCITS management company

The UCITS Law, following the provisions of the IS Law, stipulates that any proposed acquisition whether direct or indirect, of a qualifying holding (defined as a direct or indirect holding representing 10 per cent or more of the capital or of the voting rights in the company), must be notified to CySEC. Furthermore, CySEC must also be notified of any proposed increase or reduction of a qualifying holding so that the proportion of the voting rights or of the capital that it represents would reach, fall below or exceed 20, 33 or 50 per cent. CySEC may request additional information to assess the suitability of the shareholders of the management company, including those who may not possess a qualifying holding.

AIF management company

Similar notification requirements apply as for UCITS management companies.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

UCITS management company

The UCITS Law requires the remuneration policies of the management company and the methods of calculating remuneration to be published in the constitutional documents of the fund. The recent implementation of Directive 2014/91/EU (UCITS V Directive) has resulted in detailed restrictions on the remuneration policies adopted by UCITS management companies. Furthermore, CySEC has adopted the guidelines on sound remuneration policies under the UCITS Directive issued by the European Securities and Markets Authority (ESMA) on 31 March 2016 (ESMA/2016/575), and therefore the principles set out in the guidelines regarding performance fees also apply to UCITS in Cyprus.

AIF management company

The AIFM Law includes a series of principles, which are to be established and applied in the manner and to the extent appropriate to the size and internal organisation of the AIFM and to the nature, scope and complexity of the AIFM's activities. These principles include the following:
- a remuneration policy that promotes sound and effective risk management consistent with the risk, profiles, rules and constitutional documents of the relevant AIFs;
- where remuneration is performance-related, the total amount of remuneration is based on a combination of the individual's performance and that of the business unit or AIF concerned and the results of the AIFMs, and includes financial as well as non-financial criteria;
- staff engaging in control functions are compensated in accordance with the achievement of objectives linked to their functions, independent of business performance;
- guaranteed variable remuneration is exceptional and is limited to new staff, in their first year of employment; and
- an AIFM that is significant in terms of its size or the size of the funds that it manages should establish a remuneration committee that can exercise competent and independent judgement.

Finally, as in the case of UCITS, CySEC has adopted the guidelines on sound remuneration policies under the AIFMD issued by ESMA (ESMA/2016/579), and the principles set out in the guidelines regarding performance fees will also apply to AIFMs or internally managed AIFs in Cyprus.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

See question 4.

8 What marketing activities require authorisation?

UCITS

The UCITS Law defines marketing broadly, as 'the distribution, marketing, promotion or display to the public by any means of units of UCITS or undertakings of collective investments in Cyprus'. Therefore, any activities aimed at attracting Cyprus-based investors will be deemed to be marketing within the meaning of the UCITS Law. CySEC requires a UCITS authorised in another EU member state to have complied with its requirements to notify CySEC before it undertakes any promotion, commercialisation or distribution of its units in Cyprus apart from private placement. Reverse solicitation (ie, where units in a UCITS are purchased at the initiative of the investor) will not be considered as marketing for the purposes of the UCITS Law and so no notification procedure or local marketing requirements apply.

AIF

According to the AIFM Law, marketing constitutes a 'direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the European Union'. Therefore any restrictions apply only to active marketing. No prohibitions or regulations apply to passive marketing or reverse solicitation.

CySEC Circular CI78-2012-02 sets out CySEC's interpretation of what qualifies as marketing, as the distribution, trading and promotion of units by any means aimed at attracting investors to invest. It does not include any of the following:

- the acquisition of units of UCITS or AIFs in the context of discretionary portfolio management;
- the proposal to invest in units of UCITS or AIFs in the context of provision of investment advice as well as the acquisition of units of UCITS or AIFs following a relevant investment advice; and
- the acquisition of units of a specific UCITS or of an AIF, on the client's own initiative, provided that the acquisition had not been preceded by an invitation to market units for the account of the UCITS or of the AIF.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

See question 4.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

There is no requirement for the involvement of a local entity in the fund marketing process.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

There are no restrictions on intermediaries earning commission payments in relation to their marketing activities in Cyprus, other than a generic prohibition on all persons contracted to market UCITS or AIFs in Cyprus from charging fees that are not justified by the quality and type of investment services provided to the unitholders of the UCITS or AIF.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

UCITS

There are two main legal vehicles used to set up a UCITS – a mutual fund and a variable capital investment company. Both require authorisation from CySEC to operate as a UCITS in or from Cyprus.

A mutual fund is a pool of assets that are jointly owned by its unitholders and deposited with a depositary, forming a collective fund managed by a management company in the interests of the unitholders. The mutual fund has no separate legal personality and its legal interests are represented by the management company.

A variable capital investment company has the following characteristics:

- a limited liability company with a share capital, registered with the Registrar of Companies;
- its principal objective is the collective management of its own portfolio, investing in transferable securities and other financial instruments in the interests of its shareholders, raising capital from the public for such investment; and
- shares may be bought or redeemed from its capital assets at the request of a shareholder and share capital may vary through the issue of new shares or the redemption of existing shares without following the procedure for the increase or decrease of share capital as prescribed by the Companies Law.

AIFs

There are four legal vehicles that can be used to set up a retail AIF fund: a fixed capital investment company, a variable capital investment company, a limited liability partnership and a common fund.

Both fixed and variable capital investment companies may be either self-managed or externally managed. They both have the legal form of a limited liability company with shares, with the principal object being the collective management of their portfolio.

A limited liability partnership operating as an AIF must be registered in accordance with the General and Limited Partnerships and Trade Names Law (the Partnerships Law) to collectively manage its portfolio through its general partner. Hence the duties and obligations of the external manager are undertaken by the general partner.

The common fund is a pool of assets that is the subject of collective management for the benefit of its unitholders who are co-owners of the portfolio and are liable only up to the amount of their contribution. It has no separate legal personality and its unitholders are legally represented by its external manager.

An AIF can be open-ended or closed-ended. An open-ended AIF is one in which unitholders have a right to buy out or redeem their units by application either at any time or at regular intervals of no longer than a year prescribed in the fund's constitutional documents.

In a closed-ended AIF unitholders have a right to buy out or redeem their units by application either at regular intervals of between one year and five years prescribed in the fund's constitutional documents or at a specific time prescribed in the fund's constitutional documents.

13 What are the key laws and other sets of rules that govern retail funds?

The key laws and regulations governing retail funds are:

UCITS

- the Companies Law;
- the UCITS Law; and
- CySEC Directives (particularly DI78-2012-01 to DI78-2012-35) and respective Circulars.

AIFs

- the AIF Law;
- the AIFM Law;
- the Companies Law;
- the Partnerships Law;
- the IS Law; and
- CySEC Directives (particularly DI-131-2014-01 to DI-131-2014-03, DI-131-2013-01 to DI-131-2013-05 and DI-131/56/02) as well as respective Circulars.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

See question 4.

15 Who can market retail funds? To whom can they be marketed?

UCITS

A licensed UCITS fund or its management company (as applicable) may market funds in Cyprus either itself or through a licensed investment firm or credit institution. EU licensed retail funds may market their funds freely in Cyprus provided that they have satisfied the CySEC notification requirements. Subject to the satisfaction of any requisite licence or notification requirement (as applicable) with CySEC, UCITS funds may be marketed freely to retail investors and the general public in Cyprus.

AIFs

The same applies as for UCITS subject to further requirements in relation to the marketing of AIFs to retail investors. The marketing of AIFs to retail investors requires a licence from CySEC and the continuing observance of additional requirements that include compliance with restrictions and rules regarding the investment policy of the AIF.

16 Are there any special requirements that apply to managers or operators of retail funds?

See question 3.

17 What are the investment and borrowing restrictions on retail funds?

UCITS

A UCITS fund may invest in the following:

- transferable securities and money market instruments admitted or traded in a regulated market in Cyprus or in another member state of the EU;
- transferable securities and money market instruments listed on a stock market or traded in a regulated market of a third country, which is either contained in a list of markets compiled by the Ministry of Finance on the recommendation of CySEC or that is provided for in the regulations or constitutional documents of the UCITS;
- newly issued transferable securities, provided that their terms of issue require them to be admitted to a regulated market within one year of their date of issue;
- units of UCITS authorised in accordance with the UCITS IV Directive or other collective investment undertakings that are subject to a comparable level of regulation and investor protection;
- deposits repayable on demand or with a term of no more than 12 months with credit institutions registered in an EU member state or in a third country with similar prudential supervision to the EU; and
- other money market instruments, where the issue or issuer are subject to regulations for the protection of investors and the instruments are guaranteed by a central, regional or local authority or central bank of an EU member state, the European Central Bank, the European Investment Bank or a third country or an international organisation whose members consist of one or more member states of the EU or such other undertaking approved by CySEC.

A UCITS may not invest:

- in precious metals;
- more than 10 per cent of its assets in any other transferable securities or money market instruments other than those prescribed by the UCITS Law;
- in general more than 10 per cent of its assets in transferable securities or money market instruments issued by the same undertaking; and
- more than 20 per cent of its assets in deposits made with the same undertaking.

As regards borrowing rules, a variable investment management company and a management company or depositary acting for a retail fund may generally not borrow, subject to the following exceptions:

- where the borrowing is in a foreign currency on the basis of a back-to-back loan;
- where the borrowing relates to a temporary credit facility for an amount not exceeding 10 per cent of the net asset value of the UCITS; and
- where the borrowing relates to loans not exceeding 10 per cent in value of the net assets of the variable capital investment company for the purposes of acquiring immoveable property.

AIFs

AIFs, being defined as funds that are non-UCITS, are free to invest in a variety of assets subject to the requirement that the risk profile of the AIF's investments corresponds to the size, portfolio structure, investment strategies and objectives of the AIF as laid down in its constitutional documents, prospectus and offering documents. However, certain restrictions apply depending on the category of investors to which the AIF is addressed.

In particular, AIFs aimed at retail investors may invest only in the following categories of assets:

- securities;
- money market instruments;
- units in collective investment undertakings;
- derivative financial instruments (under conditions);
- property and assets related to real estate;
- ownership and other registrable titles and prenotations of mortgages;
- titles incorporating receivables: up to 30 per cent of the total investment portfolio;
- commodities: up to 20 per cent of the total investment portfolio; and
- currency: up to 20 per cent of the total investment portfolio.

AIFs addressed to professional or well-informed investors can also invest in any of the following:

- money market instruments;
- venture capital;
- funds;
- loans; and
- real estate.

As regards leverage, the AIFM Law requires AIFMs to set a maximum level of leverage that they may employ on behalf of each AIF they manage taking account of factors such as the type of the AIF, its investment strategy and the leverage sources. The AIFM must be able to demonstrate that this leverage limit is reasonable and has been adhered to at all times. CySEC is required to assess the risks associated with the use of leverage by each AIFM with regard to the AIFs it manages and to impose limits where deemed necessary to avoid the build-up of systemic risk in the financial system so as to protect its stability and integrity. CySEC is required to notify ESMA, the European Systemic Risk Board and the competent authorities of the relevant AIF regarding any such limits it intends to impose.

18 What is the tax treatment of retail funds? Are exemptions available?

UCITS

The tax treatment of UCITS and persons (natural and legal) acquiring units in them is governed by the Income Tax Law of 2002 as amended and the Special Contribution for Defence Law of 2002 as amended.

UCITS are subject to the general corporate income tax rate in Cyprus, which is 12.5 per cent. In principle, any profits from the disposal of securities are exempt from taxation. Securities are very widely defined and include shares, bonds, debentures, founders' shares and other company securities or instruments such as preference shares, options on titles, short positions on titles, futures or forwards on titles, swaps on titles, depositary receipts on titles, such as American depositary receipts and global depositary receipts, index participations where these result in titles, repurchase agreements or repos on titles, participations in companies and units in collective investment schemes of all types.

Dividend income of UCITS is exempt from corporate income tax and is normally not subject to special contribution for defence (SDC tax). Liability for SDC tax (at a rate of 17 per cent) arises only if both the following conditions are met:

- more than 50 per cent of the paying company's activities result directly or indirectly in investment income; and
- the foreign tax on this income is significantly lower than the tax burden in Cyprus. The tax authorities have clarified through a circular that 'significantly lower' means a tax burden rate below 6.25 per cent.

Interest income received by a UCITS is subject to corporate income tax at 12.5 per cent. There is no withholding tax for dividend distributions to non-Cyprus tax residents and this ensures tax-efficient profit repatriation to investors.

Management companies are subject to corporate income tax on their profits at 12.5 per cent. Management fees are not subject to VAT.

The establishment of a UCITS and the subscription, redemption, repurchase or transfer of its units are exempt from stamp duty.

AIFs

The tax treatment of AIFs is identical to the tax treatment of UCITS funds.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

UCITS

The UCITS Law requires the assets of retail funds to be held by a custodian or depositary, who also acts as treasurer of the fund. These functions are restricted to credit institutions licensed or authorised to operate in Cyprus or other undertakings specifically licensed by CySEC for such purpose. Following a recent amendment to the UCITS Law, if the depository is not a credit institution it must comply with certain requirements including adherence to certain capital adequacy requirements that should be not less than the requirements calculated depending on the approach selected in accordance with articles 315 or 317 of Regulation (EU) No. 575/2013. It must also keep records of all services and transactions that it undertakes so as to enable CySEC to fulfil its supervisory obligations and perform the enforcement actions required by the UCITS Law.

Subject to certain conditions set out in the UCITS Law, the custodian or depositary may delegate its safekeeping function to a third party that has the necessary structures and expertise taking account of the nature and complexity of the assets entrusted to it.

A management company of a retail fund is not permitted to exercise the functions of managing the fund together with the functions of depositary or custodian of the fund.

With the implementation of the UCITS V Directive the activities and responsibilities related to safekeeping were brought into line with the provisions of the AIFMD. The UCITS Law requires depositaries to ensure that the value of the units of the UCITS is calculated in accordance with the UCITS Law and the internal rules of the fund, that any consideration relating to transactions concerning the assets of the fund is remitted to the UCITS within the specified time limits, and that the income of the fund is distributed according to applicable legislation and the regulations of the fund. The specific obligations are set out in the UCITS Law.

AIFs

Under the relevant laws, an AIF with an unlimited number of persons is required to have a depositary entrusted with the safekeeping of its assets and the monitoring of its cash flows if it is externally managed or if it is self-managed but falls within the scope of the AIFM Law or chooses to opt into it. The AIF may be exempted from the requirement to appoint a depositary if its assets are not suitable for safekeeping (eg, real estate). The depositary must have its registered office in Cyprus or another member state of the EU or a third country with whose competent authorities CySEC has concluded a memorandum of understanding and exchange of information. It must be either a credit institution or investment firm or another category of institution that is deemed by its home state as eligible to be a depositary. The same entity cannot exercise both the duties of the external manager and the depositary of the AIF. If the rules or the instruments of incorporation of the AIF specifically allow it, the depositary may delegate the safekeeping of all or part of the AIF's assets to a third party that is qualified to be a depositary in accordance with the legislation of its home country.

The depositary is obliged to ensure that the AIF's cash flows are properly monitored and that the assets are properly safeguarded. The AIFM regime distinguishes between depositary duties relating to financial instruments that can be held in custody and asset monitoring duties relating to other assets (eg, derivatives contracts). Assets belonging to the first category are required to be registered in the depositary's books in segregated accounts, whereas for the other assets, safekeeping obligations are confined to ownership verification and record-keeping (ie, maintaining an up-to-date record of these assets).

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

UCITS

Apart from authorisation by CySEC as described in question 3, the following are the main governance requirements applying to UCITS funds:

- there must be procedures for risk assessment in place that permit the continuous measurement and control of risks associated with the fund's positions and their contribution to the general risk profile of the fund's asset portfolio;
- the total risk exposure in relation to derivative instruments may not exceed the net asset value of the fund's portfolio;
- the manager of a UCITS fund must regularly report to CySEC and place at the disposal of investors the following documents:
  - a prospectus;
  - an annual report for every financial year;
  - a semi-annual report for the first six months of the financial year;
  - a summary of its assets and expenses for the first, second and third quarters of the year; and
  - a summary of assets and expenses for the final quarter of the financial year that contains an account of the use and disposal of profits for the whole of the financial year;
- the manager of the fund must calculate on every working day the net asset value of the fund, the net issue and redemption price of each unit of the fund and the number of units in circulation, and publish this information the next working day in the management company's website;
- there must be at least two persons (the law does not specify whether legal or natural) managing the management company possessing the necessary integrity and experience in relation to the type of fund managed; and
- a local management company must comply with the code of conduct issued by CySEC. This is to ensure that management companies act honestly, lawfully and with proper care and diligence in performing their functions for the benefit of the fund, that they make effective use of their resources for the proper exercise of their functions, and take measures to prevent and resolve any conflicts of interest that may arise.

AIFs

Apart from the fund management requirements set out in question 3, the following are the main governance requirements applying to AIFs:

- the external manager of the AIF, or the AIF itself if it is self-managed, must maintain and apply appropriate risk management systems to identify, measure, manage and duly monitor the risks related to the positions that it undertakes and the contribution of these positions to the overall risk profile of the AIF's portfolio. An external manager is required to maintain an appropriate organisational structure so as to minimise the risk of conflicts of interest arising;
- the assets of the AIF must be valued at fair values on the basis specified in the rules or instruments of incorporation of the AIF. The AIF must value its assets at any date on which distribution and redemption or repurchase of its units takes place, and also on the reference dates for the illustrative data specified in the annual and half-yearly report of the AIF;
- the management of the operations of the AIF must be conducted by at least two natural persons possessing the necessary integrity, experience and specialisation; and
- the management company of an AIF must submit to CySEC and place at the disposal of investors a prospectus, an annual report for the financial year and a semi-annual report for the first six months of the financial year.

21 What are the periodic reporting requirements for retail funds?

The reporting framework is described in question 20. Detailed requirements are as follows:

UCITS

The annual report must include a balance sheet, an analytical statement of income and expenses, a report on the activities of the fund, and any other important information that allows investors to formulate an informed opinion as regards the progress of the activities and the financial results of the fund. It must be published and submitted to CySEC no later than four months after the end of the financial year.

The semi-annual report must comply with IFRS 34 and contain an interim financial statement and other requisite information. It must be published and submitted to CySEC no later than two months after the end of the half-year.

AIFs

The prospectus of the AIF must be submitted to CySEC in the requisite form, together with any amendments that are made.

The annual report must include a balance sheet, an analytical statement of income and expenses, a report on activities of the fund, as well as any other important information that allows investors to formulate an informed opinion as regards the progress of the activities and the financial results of the fund. It must be submitted to CySEC and made available to investors at the points of distribution of the fund's units no later than six months after the end of the financial year.

The semi-annual report must comply with IFRS 34 and contain an interim financial statement and other requisite information. It must be published and submitted to CySEC no later than two months after the end of the half-year.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

UCITS

As regards the issue of units in retail funds, the UCITS Law requires the entire amount representing the full price for acquisition of units to be paid to the depositary or custodian. Payment may be made in cash or, if the management company or the fund itself (as applicable) accepts, in transferable securities or other money market instruments.

The redemption of any units of a UCITS fund is mandatory, upon the application of any unitholder. Conditional redemptions are not permitted. The value of the units redeemed must be paid in cash within four working days from the date of the valuation on which the redemption price is based. Payment of the amount due for the redemption of units of exchange-traded UCITS and on the basis of the composition of the index is permitted as long as this is provided for in the relevant documents constituting the fund. The redemption price of the units is calculated in accordance with the valuation date specified in the rules or incorporation documents of the UCITS and ascribed by law, and this price should not be calculated prior to the date of submitting the application. The redemption of units of the UCITS can be effected only on a valuation date.

In exceptional circumstances, where the interests of unitholders so require, the management company or the fund itself (as applicable) may suspend the redemption of units for up to one month, subject to CySEC's approval. CySEC may also require a UCITS to suspend the redemption of its units on its own initiative. CySEC may extend the suspension for a month and exceptionally, in order to protect the interests of unitholders and the effective operation of the market, CySEC may extend the suspension for a second month. However, the suspension period may not exceed three months in total.

There are no restrictions on transferability of interests in retail funds under the UCITS Law.

AIFs

The conditions under which units are issued must be clearly stipulated in the fund's constitutional documents. The AIF Law requires unitholders to pay the amount due for the acquisition of the units in full in cash, or, if agreed by the external manager or the AIF itself if it is self-managed, in the form of assets in which the AIF is allowed to invest in accordance with its investment policy.

As with UCITS the redemption of any units of an AIF is mandatory upon the application of the unitholder. Conditional redemption of units is not permitted. Units are redeemed at the redemption price of the next scheduled redemption date after the submission of the redemption application, calculated in accordance with the constitutional documents of the AIF. Unitholders in an open-ended AIF are entitled to redeem their units by application either at any time or at regular intervals of no longer than a year prescribed in the fund's constitutional documents. In a closed-ended AIF unitholders have a right to buy out or redeem their units by application either at regular intervals of between one year and five years prescribed in the fund's constitutional documents or at a specific time prescribed in the fund's constitutional documents.

In either case, the value of the redeemed units is paid in cash, or in the case of a tradeable AIF, in securities related to the composition of the index replicated in the AIF's portfolio, within the period specified in the AIF's constitutional documents. Redemption may be suspended in exceptional cases and only where necessary in the prevailing circumstances or if it is provided for in the AIF's constitutional documents and in the unitholders' interests. Any proposal by the external manager of the AIF or of the AIF itself if it is self-managed requires the approval of CySEC. CySEC may extend the suspension if this is in the interests of the unitholders.

Units of AIFs are freely transferable subject to any restrictions contained in the constitutional documents of the fund.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

The AIF Law provides for the establishment of non-retail AIFs having an unlimited number of persons on the condition that the constitutional documents specifically provide that the fund is addressed solely to professional or well-informed investors. Such an AIF may be set up as either a fixed capital investment company, a variable capital investment company, a limited liability partnership or a common fund.

In addition, the AIF Law also permits the establishment of an 'AIF with limited number of persons' (AIFLNP), subject to a significantly lighter legal and regulatory framework. It is outside the scope of the AIFM Law and does not have to be managed by an AIFM. Its constitutional documents should explicitly stipulate both that it is restricted to professional or well-informed investors and that throughout its duration the number of its unitholders is limited to 75. Assets under management cannot exceed the thresholds set out in article 3(2) of the AIFMD (€100 million with leverage or €500 million with no leverage and a five-year lock-in period). An AIFLNP can be established as a fixed capital investment company, a variable capital investment company or as a limited liability partnership.

24 What are the key laws and other sets of rules that govern non-retail funds?

See question 13 with regard to AIFs.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

See question 4.

26 Who can market non-retail funds? To whom can they be marketed?

A licensed non-retail fund itself or its management company (as applicable) may market funds in Cyprus, either on its own account or through a licensed investment firm, credit institution or a UCITS management company. EU licensed non-retail funds may market their funds to professional investors in Cyprus freely, provided that the mandatory notification has been given to CySEC. Subject to the satisfaction of any requisite licence or notification requirement (as applicable) with CySEC, non-retail funds that restrict their marketing to professional or well-informed investors may be marketed solely to such investors.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

Yes, the AIF Law contains rules that protect investors by restricting ownership in non-retail funds to certain classes of investor only. As described in question 23, AIFLNPs are restricted to professional or well-informed investors. The definition of a professional investor follows that of MiFID. A well-informed investor is an investor not considered to be a professional investor who confirms in writing that he or she is a well-informed investor and has been notified of the risks associated with investing in the AIF in question and fulfils certain further conditions in accordance with the AIF Law. An AIF with an unlimited number of persons may not market its units to retail investors unless it obtains the requisite authorisation from CySEC and complies with any further requirements stipulated by CySEC.

Update and trends

As an EU member state, Cyprus is obliged to implement legislation issued by competent EU authorities such as the MiFID II and the Bank Recovery and Resolution Directive (2014/59/EU). Cyprus is expected to transpose the MiFID II package into national law by July 2017, with all the new measures expected to apply from January 2018.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

An AIFLNP that is a company may be self-managed, in which case the portfolio management function is generally exercised by the board of directors. Alternatively, the AIFLNP may appoint an external manager, which is either:

- a UCITS management company authorised in accordance with the relevant law, a CIF regulated by the IS Law, or a company established in a third country that is authorised to provide portfolio management services and provided further that it is subject to prudential regulation regarding the provision of that service, where the portfolio of such an AIF includes one or more financial instruments; or
- any company that, in accordance with its instruments of incorporation, has the sole purpose of providing portfolio management services to the specific AIF, where the portfolio of the latter does not include any financial instruments. In this case CySEC assesses the appropriateness of the external manager on an individual basis. Any change in the information regarding the person to whom the portfolio management will be delegated must be communicated immediately to CySEC.

Any AIF that is managed by a manager that falls within the scope of the AIFM Law must comply with the AIFM Law.

With regard to all other types of AIF see question 3.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

The general tax regime described in question 18 applies to non-retail funds.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

Subject to the exemption in the following paragraph, the AIF Law requires the assets of an AIFLNP to be entrusted to a depositary having a registered office in Cyprus, another EU member state or a third country with whose competent authorities CySEC has concluded a memorandum of understanding and exchange of information. It must be either a credit institution or investment firm or another category of institution that is deemed by its home state as eligible to be a depositary. The depositary may not use the assets of the AIF under its custody, including any cash. Any changes in the information regarding the depositary must be notified to CySEC immediately.

An AIFLNP is exempt from the requirement to appoint a depositary in the event that:

- its total assets do not exceed €5 million, or its equivalent in another currency;
- its constitutional documents limit the number of its unitholders during the duration of the fund to five persons; or
- its assets are not subject to custody.

CySEC requires the assets of an AIFLNP that does not appoint a depositary to be deposited with a credit institution in the case of cash, or, in the case of other assets, with other entities authorised by law to undertake safekeeping duties.

No other requirements apply in relation to the safekeeping of the assets of an AIFLNP.

With regard to all other types of AIFs see question 19.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

Apart from the requirements set out in question 28, the manager of an AIFLNP (or the AIFLNP itself if it is self-managed) is required to maintain records with regards to all portfolio transactions, all records of orders and applications for subscription and redemption or repurchase as well as a special electronic registry (the 'unitholders register'), which records every subscription of the unitholder. These records must be retained for at least five years, or such longer period as CySEC may require for specific financial instruments or transactions, and must be kept in a way that enables CySEC to examine them. Tax or other legislation may require a longer retention period.

Furthermore, the AIFLNP manager (or the AIFLNP if it is self-managed) must annually report to unitholders, among other things, the following:

- the number of units in the possession of the unitholder, the value of their subscription and their net asset value as at the last working date of the calendar year for which the information is provided; and
- the percentage return of the units of the AIF, from the first to the last working date of the calendar year for which the information is provided.

With regard to all other types of AIFs see question 20.

32 What are the periodic reporting requirements for non-retail funds?

An AIFLNP must compile an annual report, audited by an independent auditor, which includes information on the financial condition of the AIF, its total assets and liabilities, and the net asset value of its units during the period covered by the report. The report must be submitted to CySEC within one month from the end of the year it refers to.

With regard to all other types of AIFs see question 21.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Separately managed accounts are generally structured as client accounts managed by portfolio management investment firms regulated under the IS Law, which permits licensed CIFs to undertake the management of clients' portfolios in accordance with mandates given by clients on a discretionary client-by-client basis. Additionally, the UCITS Law authorises management companies to manage investment portfolios, including those owned by pension funds and institutions for occupational retirement provision, on an individual basis. Furthermore, although the AIFM Law specifically provides that segregated managed accounts are not to be considered as AIFs, it nevertheless makes the same provision as the UCITS Law, allowing external AIFMs to engage in a discretionary client-by-client portfolio management under certain requirements.

34 What are the key legal issues to be determined when structuring a separately managed account?

CIFs or fund management companies (as the case may be) providing portfolio management services on a client-by-client basis are required to comply with the provisions of the IS Law, which imposes conduct of business rules based upon the following:

- the fiduciary duty of loyalty, requiring CIFs to act in good faith in the best interests of their clients;
- the informed consent principle, which requires them to disclose relevant material information in their dealings with their clients; and
- the 'know your customer' principle, which requires them to obtain information regarding their clients' financial situation, investment experience and objectives as regards the services requested.

Companies providing such services must be members of the statutory Investor Compensation Fund for Clients of Investment Firms. AIFMs must also have additional own funds or professional indemnity insurance to cover risks arising from professional negligence.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

As stated in question 34, portfolio management is regulated under the IS Law and the responsible supervising authority is CySEC.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

Amendments that are expected to be introduced include the following:
- a special regime for non-EU investment firms, including foreign managers, wishing to provide cross-border services to clients established in any EEA member state in relation to AIFMs, in line with Directive 2014/65/EU (MiFID II); and
- the introduction of more detailed requirements regarding the remuneration policies of UCITS management companies in line with the UCITS V Directive.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

Retail funds

The UCITS Law allows shares of a variable capital investment company or units of a common fund to be listed on a stock exchange market operating in Cyprus or another EU member state or in a third country whose competent authorities have signed a memorandum of cooperation and exchange of information with CySEC, in accordance with the provisions governing the market concerned, subject to the following:
- prior authorisation from CySEC;
- the appointment of a market maker; and
- the inclusion of relevant information into the constitutional documents, prospectus and reports issued by the fund.

The Cyprus Stock Exchange Law also provides for the listing of units in collective investment market schemes subject to approval by the Council of the Cyprus Stock Exchange. This requires adequate disclosure arrangements for investors and the proper constitution and clearing of transactions, particularly unrestricted payments from and to investors.

The AIF Law allows AIFs marketed to retail investors to be listed and traded on a recognised stock exchange in the EU or in a third country. As with UCITS, at least one special dealer must be appointed to take all measures to ensure that the market value of the shares of the AIF does not vary significantly from its net asset value. The Cyprus Stock Exchange Law, which previously provided only for the listing of UCITS, has recently been amended to provide for the listing of AIFs having the form of common funds, fixed or variable investment companies or limited partnerships, either in the negotiable collective investment schemes market or in the non-negotiable collective investment schemes market, subject to requirements regarding minimum capital and disclosure arrangements for investors.

Non-retail funds

The units of a non-retail fund that are addressed solely to professional or well-informed investors may not be listed on a stock exchange. However, the Cyprus Stock Exchange Law provides for the possibility of an AIF with a limited number of persons to be registered on a Cyprus stock exchange register, without the possibility of its units being traded.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

Yes. Foreign AIF management companies, as well as foreign funds of a statutory type, whether established in another EU member state or in a third state, may change their domicile to Cyprus. With regards to UCITS, such provision is made only with regards to UCITS management companies or UCITS funds of a statutory type established in another EU member state. Change of domicile may only take place if it is allowed under the constitutional documents and the law of the country where the foreign management company or fund, as the case may be, is currently domiciled, and is subject to compliance with the relevant provisions of the Companies Law. UCITS common funds registered in another EU member state may continue their operation in Cyprus, subject to authorisation by CySEC.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

No, the law does not limit foreign investors' freedom to invest in funds based in Cyprus, nor does it restrict domestic investors from investing abroad.

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

Investment funds in Denmark are primarily governed by the Danish Financial Business Act (FBA), the Alternative Investment Funds Managers Act (AIFMA), the Investment Associations Act (IAA) and the Securities Trading, etc Act (STA).

The Danish Financial Supervisory Authority (FSA) has primary responsibility for the regulation of funds, fund managers and those marketing funds in Denmark. In its capacity as regulator, the FSA has issued a number of executive orders that provide detailed regulation of funds, fund managers and marketing pursuant to the FBA, AIFMA, IAA and the STA.

2 Is fund administration regulated in your jurisdiction?

Yes, fund administration of retail funds (UCITS) and non-retail pooled funds (AIFs) is regulated in the AIFMA, the IAA and the FBA as well as in executive orders issued by the FSA.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

Retail funds (UCITS)

Application for authorisation as a UCITS shall be made to the FSA. The application should include information regarding the establishment and incorporation of the fund, its business activities, depositary, officers' fitness and propriety, any close links, documents showing that the fund has adequate policies and procedures and the memorandum of association. Investments can be made when authorisation by the FSA has been obtained.

Investment management companies authorised pursuant to the FBA can be appointed managers of UCITS. Authorised investment management companies must comply with organisational, business and capital requirements laid down in the FBA as well as specific governance requirements set out in executive orders on management of UCITS.

Non-retail pooled funds (AIFs)

There is no authorisation or licensing process in place for AIFs themselves since, pursuant to the AIFMA, only managers of AIFs must be authorised.

Key requirements for managers are authorisation by the FSA, including a fitness and propriety assessment of senior officers, adequate policies and procedures for risk management, conflict of interest management, compliance, remuneration, transparency, valuation, financial reporting, due diligence and other business functions and capital requirements.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

Danish law will apply in the case of placement of products with investors domiciled in Denmark and in the case of actions taken in Denmark or targeting the Danish market.

Danish law, however, will not apply merely based on the nationality of the investor.

Consequently, marketing may be carried out outside Denmark without consequences from a Danish fund-regulation perspective, provided that such marketing activities are not carried out in a way that specifically targets the Danish market, for example, if materials are available in Danish or on a web page accessible from Denmark.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

UCITS

Acquisition of a qualifying interest in an investment management company is subject to prior authorisation by the FSA. The FBA provides that a qualifying interest means a direct or indirect holding in an investment management company that represents at least 10 per cent of the capital or the voting rights, taking into account the conditions regarding aggregation of the holding, or a holding that makes it possible to exercise a significant influence over the management of the manager in which that holding subsists. A separate authorisation is required when a holding in an investment management company exceeds thresholds of 20, 33 and 50 per cent of the capital.

AIFs

Acquisition of qualifying interests in an authorised manager of AIFs is subject to prior authorisation by the FSA. The AIFMA provides that a qualifying interest shall mean a direct or indirect holding in a manager that represents at least 10 per cent of the capital or the voting rights, taking into account the conditions regarding aggregation of the holding, or a holding that makes it possible to exercise a significant influence over the management of the manager in which that holding subsists.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

UCITS

Investment management companies must have remuneration policies and practices for senior management and risk-takers whose professional activities have a material impact on the risk profile of the company and that are consistent with and promote sound and effective risk management. Such policies and practices shall, inter alia, restrict the size of variable remuneration relative to fixed remuneration.

AIFs

Managers must have remuneration policies and practices for those categories of staff including senior management and risk-takers, whose professional activities have a material impact on the risk profiles of the managers or of the AIFs they manage, that are consistent with and promote sound and effective risk management and do not encourage risk-taking that is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage.

The managers shall determine the remuneration policies and practices, including restrictions on carried interest and variable remuneration, in accordance with Annex II to Directive 2011/61/EU.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

UCITS

Marketing of a retail fund in Denmark requires authorisation as a UCITS by the FSA or, for foreign EU or European Economic Area (EEA) funds, authorisation as a UCITS from the fund's home state regulator. If the retail fund is marketed by the fund manager or other bodies acting on behalf of the fund, such managers, representatives or delegates must be authorised to carry out marketing of UCITS. Furthermore, marketing of foreign UCITS in Denmark requires that notification is made to the FSA pursuant to the standard model under the UCITS Directive as implemented through Regulation (EU) No. 584/2010 regarding, inter alia, the form and content of the standard notification letter and UCITS attestation.

AIFs

Marketing of Danish AIFs and foreign AIFs to retail investors in Denmark requires authorisation by the FSA pursuant to the AIFMA.

Marketing of Danish AIFs to professional investors may be carried out by Danish authorised fund managers, but also by registered fund managers without authorisation, provided that such managers are covered by the sub-threshold manager exemptions set out in Directive 2011/61/EU.

Non-Danish EU AIFs can be marketed to Danish professional investors by authorised EU fund managers by notification to the FSA via the EU marketing notification system under Directive 2011/61/EU. Non-EU fund managers must be authorised by the FSA in order to carry out marketing activities.

Marketing of non-EU AIFs in Denmark requires prior authorisation by the FSA.

8 What marketing activities require authorisation?

The concept of marketing or distribution is construed broadly in Denmark. According to the AIFMA, distribution or marketing means a direct or indirect offering or placement at the initiative of the AIF's manager or on behalf of the manager, of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the Union. This definition is consistent with the definition of marketing laid down in article 4 of Directive 2011/61/EU.

Marketing has not been given a more precise definition by the FSA than that set out in the AIFMA. However, it is apparent from a frequently asked questions list (FAQ) (which is currently being reviewed) prepared by the FSA that marketing covers both direct and indirect marketing. Definitions that have previously been applied by the FSA in relation to the activities of foreign collective investment schemes in Denmark, including non-UCITS, may serve as a proxy for the concept of marketing that will apply under the AIFMA. According to the FAQ, a manager of AIFs may rely on reverse solicitation if there has been no kind of marketing of the AIF.

According to the FSA's Executive Order No. 786 of 17 June 2014 on the Marketing of Foreign UCITS in Denmark, any form of announcement directed towards the Danish market in connection with performance of activities as a UCITS that has the purpose of promoting sales of units of the UCITS, either through direct sales or through distributors, is considered direct marketing. Indirect marketing is defined as any form of announcement directed towards the Danish market purporting to promote sales of UCITS' interests through insurance contracts or other securities, including, but not limited to, bonds, the price and risk profile of which track those of a UCITS on a linear or leveraged basis.

Indirect marketing has been given an extensive interpretation in the FSA's administrative practice regarding hedge funds, which are now treated as AIFs for purposes of the AIFMA and includes the marketing of financial products of which shares of foreign investment funds form a part.

As for UCITS, the extensive definitions of direct and indirect marketing laid down in the FSA's Executive Order No. 786 are directly applicable. Thus, any form of announcement directed towards the Danish market in connection with the performance of activities as a UCITS that has the purpose of promoting sales of UCITS' interests, either through direct sales from the investment undertaking, through distributors or indirectly, is considered direct marketing.

With regard to the prospectus requirements, the definition of public offering of securities (including structured products) is in line with the definition given in article 2(1)(2) of Directive 2003/71/EC, namely, communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to the securities. This definition also covers the placement of securities through financial intermediaries.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

Danish law will apply to the placement of products with investors in Denmark, although Danish law will not apply simply on the basis of the nationality of the investor. Consequently, Danish law will apply to actions taken in Denmark or actions targeting the Danish market.

Marketing activities performed by an overseas entity – namely, a non-EU manager – in Denmark require authorisation by the FSA.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

Foreign UCITS

Marketing of foreign UCITS, which are also marketed to retail investors, requires the appointment of a Danish local representative to protect investor rights to information and redemption of interests in the fund. In practice, the requirement is satisfied by the appointment of an authorised Danish investment firm, an investment management company or a Danish local branch of an EU or EEA-authorised credit institution or administration company.

Foreign AIFs

Marketing of non-Danish AIFs to retail investors in Denmark requires the appointment of a Danish local representative to protect investor rights to information and redemption of interests in the fund. The representative must be either an authorised Danish investment firm or an authorised Danish manager of AIFs.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

From 1 July 2017 credit institutions, investment firms, fund managers of UCITS and managers of AIFs who give independent investment advice or perform discretionary portfolio management on behalf of a customer may not receive fees, commissions or any other payments or benefit in kind paid by a third party or a person working on behalf of the third party in relation to delivery of such services to the customer. If such payments are received, the service provider must pass on the payment to the customer unless it is a benefit in kind of small value that enhances the quality of the service to the customer and that does not hinder the service provider to act in the best interest of its customer.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

Pursuant to the IAA, three different legal vehicles can be used to set up retail funds in Denmark, namely, investment associations, SIKAVs and securities funds.

Investment associations are self-administered associations. Anyone who has title to a share of an investment association's net assets is deemed an investor for the purposes of that investment association. Investors' liability is restricted to the amount of the investment in the investment association.

An investment association is formed by adoption of a memorandum of association. The investment association must be organised with one or more investment compartments, each covering specified parts of the investment association's assets.

A SIKAV is a distinct type of limited liability company that can be formed by one or more co-founders. A SIKAV must have a certain minimum capital as defined in its memorandum of association. It is formed by adoption of a memorandum of incorporation, including the SIKAV's memorandum of association. The SIKAV must be organised with one or more investment compartments, each covering specified parts of the SIKAV's assets. Anyone who has title to a share of a SIKAV's net assets is deemed an investor for purposes of that SIKAV.

Securities funds must consist of one or more investment compartments that operate as separate economic entities within the fund. Securities funds and investment compartments are not independent legal entities, but can only be formed, operated and managed by investment management companies or administration companies pursuant to the IAA and the FBA. The investment management company (or administration company) is responsible for the obligations imposed on the securities fund by regulation. The investors' financial liability is limited to the value of each investor's investment in the securities fund.

13 What are the key laws and other sets of rules that govern retail funds?

The key laws, regulations and other sets of rules governing both open-ended and closed-ended UCITS are as follows:
- the IAA;
- the FBA;
- the STA;
- Executive Order Nos. 138 of 17 February 2016 and 1434 of 30 November 2016 on information in prospectuses for Danish UCITS;
- Executive Order No. 623 of 24 April 2015 on Investor Protection in Connection with Securities Trading;
- Executive Order No. 865 of 2 July 2014 on Governance, Control and Management of Danish UCITS;
- Executive Order No. 786;
- Executive Order No. 668 of 17 June 2014 on Unit Classes of Danish UCITS; and
- Executive Order No. 681 of 17 June 2014 on Mergers and Divisions of Danish UCITS.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Establishment

Authorisation as a UCITS is required pursuant to IAA sections 3 and 9 to 11. The requirement for authorisation applies across the various types of retail funds, namely, investment associations, SIKAVs and securities funds.

Marketing

Danish retail funds must be authorised as UCITS by the FSA to be marketed in Denmark.

A foreign retail fund must be authorised as a UCITS by the fund's home regulator. Provided that authorisation is in place, marketing in Denmark of foreign UCITS can be carried out without a licence by following the standard passporting model under the UCITS Directive as implemented through Regulation (EU) No. 584/2010.

These provisions apply to both open-ended and closed-ended funds.

15 Who can market retail funds? To whom can they be marketed?

A Danish UCITS can be marketed in Denmark by the UCITS itself (excluding securities funds), by investment management companies acting on behalf of the UCITS and by credit institutions and investment firms or advisers authorised pursuant to the FBA.

Danish UCITS can be marketed to both retail and professional investors.

Subject to prior notification to the FSA, a foreign UCITS, authorised in an EU or EEA member state, can be marketed in Denmark by the following:
- the foreign UCITS itself;
- the management company that manages the UCITS;
- any other management company authorised under the UCITS Directive;
- credit institutions; and
- authorised investment firms or advisers.

Foreign UCITS, authorised in an EU or EEA member state, can be marketed to retail and professional investors. Marketing to retail investors requires that a Danish local representative be appointed to secure Danish retail investors' access to information and the redemption of interests.

16 Are there any special requirements that apply to managers or operators of retail funds?

Yes, special requirements apply to managers and operators of retail funds. Besides retail funds, only authorised investment management companies can act as managers or operators of retail funds. Special requirements are imposed on managers in the FBA, the IAA (section 22) and Executive Order No. 865.

Investment associations (one type of UCITS) may delegate certain administrative tasks to other entities pursuant to the IAA. Delegates must hold all necessary authorisations required to carry out the delegated functions, such as the authorisation to market retail funds.

17 What are the investment and borrowing restrictions on retail funds?

The UCITS Directive has been implemented into Danish law. Accordingly, the obligations concerning the investment policies of UCITS generally apply to UCITS in Denmark, including investment limits, investment prohibitions and risk-spreading principles laid down in the Directive. The UCITS Directive may, however, have been implemented differently in other EU member states and specific investment limits, investment prohibitions and risk-spreading principles should therefore be determined on a case-by-case basis.

A Danish UCITS may acquire moveable or immoveable property that is essential for the direct pursuit of its business (IAA section 71). Moreover, UCITS are generally restricted from acquiring either precious metals or certificates representing them. A UCITS is further restricted from entering into agreements limiting the liquidity of the financial instruments in which it invests.

A Danish UCITS is restricted from borrowing and lending pursuant to IAA sections 67 to 68. Limited exemptions to the restriction on borrowing apply subject to specific approval from the FSA.

These provisions apply to both open-ended and closed-ended funds.

18 What is the tax treatment of retail funds? Are exemptions available?

Investment funds can be treated as either investment companies, investment funds with a minimum taxation (previously known as 'distributing investment funds'), account-holding investment funds or accumulation trusts for Danish tax purposes.

Danish retail funds that fall within the scope of the UCITS Directive are, from a Danish tax point of view, typically structured as either investment companies or investment funds with a minimum taxation.

Danish investment companies are generally tax-free, apart from dividends received from Danish companies, which are taxed at a rate of 15 per cent. Investors in investment companies are taxed on distributed dividends and realised as well as unrealised gains or losses on the certificates (on a mark-to-market principle).

Investment funds are, for tax purposes, either bond-based or share-based, and are generally tax free on proceeds relating to their underlying securities or capital gains and losses thereon. Income from other business activities is generally taxable. The investors are taxed on the actual dividend income from the fund or a deemed dividend income from the fund. Further, depending on the investor gain on the ownership, interest in the investment fund is taxed when the gain is realised or taxed on a mark-to-market principle.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The assets of a Danish UCITS shall be administered by and entrusted to a depositary for safekeeping. A UCITS manager must ensure that a single independent depositary is appointed for each fund that it manages. The depositary shall be authorised by the FSA, which, inter alia, requires sufficient financial and professional guarantees that it will be able to effectively pursue its business as a depositary.

The IAA and the FBA set out certain commitments and obligations on depositaries and UCITS that mirror the obligations regarding depositaries laid down in the UCITS Directive and UCITS V Directive with a view to protecting UCITS' assets. The organisational and governance requirements on UCITS also contribute to the protection of funds' assets.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

Governance requirements for retail funds may vary depending on the legal vehicle used to set up the fund.

Investment associations shall have a board of directors of at least three members as well as a board of management. The members of the board of directors are appointed by the fund's general meeting, whereas the board of management is appointed by the board of directors. The board of directors may decide to appoint an investment management company to manage the fund instead of a board of management.

SIKAVs shall have a board of directors of at least three members appointed by the fund's general meeting. The board of directors shall in turn appoint an investment management company to administrate the fund.

Securities funds are managed by investment management companies under the supervision of the board of directors and the board of management of the responsible investment management company.

Pursuant to section 51 of the IAA, the board of directors' responsibilities and main governance requirements include the following:

- the adoption of written policies and procedures for the fund's business operation;
- management of conflicts of interest and internal reporting;
- determination of each investment compartment's main risks and risk profile;
- designation of a depositary; and
- filings to the FSA.

Members of the board of directors and the board of management of retail funds must fill in the FSA's fitness and propriety assessment form and satisfy the ongoing fit-and-proper requirements at all times.

Investment associations or SIKAVs or the responsible investment management company shall ensure that all material circumstances of decisive importance to the operation of the fund or any single investment compartment thereof are reported to the FSA pursuant to IAA section 56.

21 What are the periodic reporting requirements for retail funds?

Danish retail funds must prepare an annual report as well as half-yearly reports. The annual report shall include an annual financial report for each investment compartment, including a balance sheet, a detailed income statement for the financial year, a report on the activities of the financial year and such other information provided for in the UCITS Directive as well as any significant information that will enable investors to make an informed judgment on the development of the activities of the UCITS and its results.

In accordance with the requirements set out in the UCITS Directive, a Danish UCITS shall make public in an appropriate manner the issue, sale, repurchase or redemption price of its units each time it issues, sells, repurchases or redeems them, and at least twice a month. The FSA may, however, permit a UCITS to reduce the frequency to once a month on condition that it does not prejudice the interests of the investors.

A foreign UCITS marketed in Denmark shall make public the same documents and information in Danish, English, Norwegian or Swedish as is made public by the home regulator or the fund in its home state.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

Restrictions on the issue of interests

In investment associations and SIKAVs, the decision on whether to issue interests in the fund is made by the fund's board of directors pursuant to the IAA. Any restrictions would therefore have to be agreed with the board of directors. In securities funds, the decision to issue interests is made by the responsible investment management company or administration company (ie, the manager of the fund).

Restrictions on the transfer of interests

Restrictions on transfer of retail fund interests may be imposed under the articles of association of the fund.

Restrictions on the redemption of interests

According to the IAA, a Danish UCITS shall repurchase or redeem its units at the request of any investor. However, repurchase or redemption may be temporarily suspended where the fund's net asset value cannot be calculated because of market conditions or the equal treatment of investors requires that the calculation of the net asset value be suspended until all sales of assets necessitated by the redemption or repurchase of units have been made.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

The legal vehicles normally used to set up non-retail funds are limited partnerships (K/S) or limited partnership companies (P/S). A K/S is formed by entering into a limited partnership agreement among the investors as limited partners and a general partner and is – depending on the circumstances – subject to registration with the Danish Business Authority. A P/S is formed by the execution of a memorandum of association. The P/S must be registered with the Danish Business Authority.

24 What are the key laws and other sets of rules that govern non-retail funds?

The key laws and regulations governing AIFs are:

- the AIFMA;
- the FBA;
- the STA;
- executive orders issued by the FSA pursuant to the AIFMA; and
- Executive Order No. 623.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

The AIFMA requires that managers of non-retail pooled funds are either authorised as managers by the FSA (or, where applicable, by a foreign EU or EEA home regulator) or registered with the FSA (under the sub-threshold managers exemption). Non-EU and non-EEA managers must generally be authorised by the FSA before they begin to carry out marketing activities in Denmark.

However, there is no requirement that a non-retail pooled fund must be authorised to be licensed or marketed in Denmark by an authorised manager. If no external manager is appointed the non-retail pooled fund must obtain authorisation.

26 Who can market non-retail funds? To whom can they be marketed?

See question 7.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

No. Ownership in AIFs is not restricted to certain classes of investor. However, marketing to retail investors can only be carried out by fund managers specifically authorised to do so.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

In accordance with the AIFMA, authorised non-retail fund managers that have their registered office in Denmark shall be legal persons covered by the Danish Companies Act. Managers that have their registered office in a third country and that have Denmark as their EU member state of reference for the purposes of Directive 2011/61/EU shall be limited liability companies.

Authorised AIF managers shall not carry out any activities other than portfolio management, risk management, administration and marketing of AIFs, as well as activities related to the assets of the AIFs under management. However, the manager may also be authorised as an investment management company pursuant to section 10 of the FBA and carry out the activities for which such authorisation is granted. Furthermore, a manager may be authorised to carry out management of portfolios of investments and specific non-core services comprising investment advice, safekeeping and administration in relation to shares or units of collective investment undertakings, or reception and transmission of orders in relation to financial instruments.

Authorised managers must generally comply with the detailed business, organisational, reporting and governance requirements laid down in the AIFMA.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

A Danish non-retail fund is usually structured as either a K/S or a P/S. Both types of non-retail fund are regarded as transparent for Danish tax purposes, which means that no Danish tax liability is imposed on the fund. Instead, the investors in the fund are – from a Danish tax perspective – considered direct owners of a pro rata share of the fund's asset and liabilities, including of the underlying investments, corresponding to the investor's ownership percentage of the fund.

To prevent tax-leakage in Denmark, it is instrumental that the K/S or P/S is considered a tax transparent entity for Danish tax purposes.

The Danish Corporate Income Tax Act has an anti-abuse provision regarding hybrid entities, under which a K/S or a P/S becomes liable for Danish corporate taxation if limited partners with more than 50 per cent ownership rights or voting rights of the fund are resident in jurisdictions that regard the fund as a separately taxed entity, or are non-EU states that have not concluded a tax treaty with Denmark that reduces the right to source taxation of dividends to companies. In this respect, the general partner of a Danish K/S or P/S is not obliged to have any ownership of the K/S or P/S. Such lack of ownership interest is contrary to certain foreign jurisdictions where it is a requirement that, in order to recognise the fund as a K/S or P/S, the general partner has an ownership interest in the fund.

If the investments provide the possibility for the investor to obtain tax deductions (eg, a loss owing to tax depreciations) it is relevant for Danish investors to consider the Danish administrative rules requiring the investor to have a positive 'deduction account' in respect of the fund.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

A depositary shall hold in custody all financial instruments that can be registered in a financial instruments account opened in the depositary's books, and all financial instruments that can be physically delivered to the depositary. The depositary must verify the ownership of the non-retail fund's other assets.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

Non-retail funds must be self-managed or managed by an external manager. In either case, the manager shall comply with governance requirements set out in Directive 2011/61/EU, including the following:

- adoption of written policies and procedures for the business operation of the manager and the funds under management;
- management of conflicts of interest;
- internal reporting;
- determination of main risks and risk profile;
- remuneration;
- designation of a depositary; and
- filings to the FSA.

Members of the board of directors and the management board must fill in the FSA's fitness and propriety assessment form and satisfy the ongoing fit-and-proper requirements at all times.

32 What are the periodic reporting requirements for non-retail funds?

The periodic reporting requirements depend on the manager's total fund assets under management and whether the fund employs gearing. Consequently, periodic reporting may have to be made on a quarterly, half-yearly or yearly basis.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Separately managed accounts are typically structured as personal client custody accounts in Danish credit institutions in relation to which the manager (eg, an investment company or an investment management company) is given a trading proxy to buy and sell assets on behalf of each specific client's custody account through a tripartite agreement made between the specific client, the client's credit institution and the manager.

Separately managed accounts may also be structured as omnibus accounts for which the manager is the account holder, and is holding the investments on behalf of various clients in one account and where the manager trades on behalf of its client base.

34 What are the key legal issues to be determined when structuring a separately managed account?

Key legal issues to be determined include standard of care, indemnification, the parties' obligations to cooperate, fee structure, reinvestments, distributions, transparency and reporting requirements towards investors. For omnibus accounts, the investor cannot exercise individual rights such as the right to attend general meetings or the right to vote since the securities held in an omnibus account cannot generally be registered in the name of the holder. It is important that the terms of the omnibus account are agreed with each client to ensure that the client's

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rights to the securities held in the omnibus account are secured in case of the manager's insolvency.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

Management of separately managed accounts is regulated in the FBA, which requires that managers be authorised investment companies or investment management companies and comply with the rules and regulations for such entities. The regime differs from fund management.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

No.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

For UCITS listed on the stock exchange, specific requirements apply with regard to determination of emission and redemption prices.

Both UCITS and open-ended non-retail funds are exempt from the ordinary prospectus requirements and some of the ongoing reporting requirements that would otherwise apply in the case of stock exchange listing.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

No, it is not possible to redomicile an overseas vehicle in Denmark.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

No.

Germany

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

Fund management is regulated in Germany by the German Capital Investment Act (KAGB). The KAGB implements the EU Undertakings for Collective Investments in Transferable Securities (UCITS) Directive (2009/65/EC) and the Alternative Investment Fund Managers Directive (AIFMD).

Responsible for regulating funds, fund managers and those marketing funds is the Federal Financial Supervisory Authority (BaFin).

2 Is fund administration regulated in your jurisdiction?

Fund administration is not per se regulated in Germany. The regulation rather depends on whether the specific services fall within a specifically regulated environment.

As a general rule, general assistance in fund administration is not regulated, such as the preparation of reports or distribution notices.

Certain administrative services are regulated by professional services laws. Before offering bookkeeping services on the market, a minimum of three years' professional experience is required. Trade settlement is typically licensable as the financial service of the execution of orders on behalf of clients or the banking activity of trading on behalf of others.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

Regulation of funds is primarily exercised through regulation of managers. It requires that the manager is either fully licensed or registered with BaFin under the KAGB. If a fund is internally managed, then the fund itself needs a licence or registration.

Registered managers: registration process

Availability

The registration process is only available to certain small or medium-sized managers. The most important category of these small to medium-sized managers are known as 'sub-threshold managers' under the AIFMD/KAGB. In practice, most German fund managers fall within this category.

Sub-threshold managers under the KAGB are managers with assets under management of not more than €100 million (in the case of leverage) or not more than €500 million (no leverage) and who only manage special alternative investment funds (special AIFs). Special AIFs are AIFs whose interests or shares may only be acquired according to the fund documents by professional investors or semi-professional investors (ie, non-retail funds).

Professional investors are defined in the AIFMD and the Markets in Financial Instruments Directive (MiFID). A semi-professional investor is a person who:

- commits to invest at least €200,000;
- confirms in writing that he or she is aware of the risks; and
- has the expertise, experience and knowledge to participate in the investment opportunity. This must be assessed and confirmed by the manager.

In addition, senior management, risk-takers and other staff of the manager within the meaning of article 13 AIFMD are considered semi-professional. A person with a minimum commitment of €10 million is considered semi-professional as well.

Besides the requirements mentioned above, special AIFs managed by sub-threshold managers are in principle not regulated.

Registration procedure

The registration procedure is comparatively simple. It requires the submission of an informal registration request together with certain 'corporate' documents on the manager and the managed funds (such as the fund's limited partnership agreement (LPA) and the manager's articles of association). In addition to being a special AIF, the fund may not require the investors to additionally pay in capital beyond the investor's original commitment.

Ongoing issues

An advantage of the registration is that only few provisions of the KAGB apply to a 'registered-only' manager, mainly the provisions on the registration requirements, ongoing-reporting requirements and the general supervisory powers of BaFin. However, fund-specific requirements do not apply to 'registered-only' managers and their funds. In particular, the depositary requirements and marketing requirements as well as the additional requirements of the KAGB for fully licensed managers do not apply.

On the downside, the registration restricts the manager to the type of funds and investors for which the registration was obtained (ie, only special AIFs and professional or semi-professional investors). Furthermore, a registered manager does not benefit from the European marketing passport under the AIFMD. A registered manager can, however, opt in to become a fully licensed manager.

Fully licensed manager: licensing process

Availability

Fund managers who do not qualify for a registration or who opt out of a registration must apply for a full fund-management licence with BaFin under the KAGB.

A full fund-management licence opens the door for a manager to market funds to retail investors as well as to the marketing passport under the AIFMD or UCITS Directive. Retail investors are investors who are neither professional nor semi-professional investors.

Licensing procedure

The licensing procedure is a fully fledged authorisation process with requirements equivalent to the requirements for granting permission under article 8 AIFMD or article 6 of the UCITS Directive. The licensing procedure checks requirements, such as sufficient initial capital or own funds, sufficiently good repute of the directors and shareholders, and organisational structure of the manager.

Ongoing issues

The licensing of the manager results in the manager being subject to the entirety of the KAGB. This means, in particular, the following:

- the required appointment of a depositary for the funds;
- access to setting up contractual funds;

- adherence to the corporate governance rules for funds set up as investment corporations or investment limited partnerships (investment KGs);
- adherence to the fund-related requirements of the KAGB;
- adherence to the marketing rules of the KAGB;
- access to the marketing passport under the AIFMD/UCITS Directive;
- access to the managing passport under the AIFMD/UCITS Directive; and
- adherence to the reporting requirements of the KAGB.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

EU fund managers
EU fund managers are allowed to perform fund management services under the passport regime of the AIFMD or UCITS Directive. In addition, EU fund managers may use the EU passport regime to provide other services and ancillary services (such as investment advice or discretionary individual portfolio management).

Non-EU managers
Non-EU managers are currently not allowed to perform fund management services in Germany. This will change with regard to AIFMs in those countries for which the passporting regime under the AIFMD for third-country managers will eventually become effective.

Non-EU managers can provide regulated services outside of fund management (such as investment advice or discretionary individual portfolio management) but only if there is an existing relationship with a German client or if the relationship is established at the initiative of the German client.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

The acquisition of a material stake in a UCITS management company requires prior clearance by BaFin. The threshold for a material stake is 10 per cent of the capital or voting rights of the management company. The threshold also applies in the case of an indirect acquisition (eg, through acquiring a controlling stake in a financial holding company).

There is no prior clearance procedure with BaFin for the acquisition of a material stake in an AIFM. However, BaFin can take measures if shareholders with a material stake are not of sufficiently good repute or are otherwise not reliable enough to hold a stake in an AIFM.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

Germany follows the remuneration requirements of the European Securities and Markets Authority (ESMA) Guidelines on Sound Remuneration under the UCITS Directive and under the AIFMD.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

Overview
The marketing of investment funds requires an authorisation by BaFin or at least a European marketing passport under the AIFMD or under the UCITS Directive. A private placement regime is no longer available in Germany.

The only exception available applies to German-registered sub-threshold managers (see question 3). German-registered sub-threshold managers can market their funds using the private placement exemption available under the German implementation of the EU Prospectus Directive or, as applicable, the private placement exemption available under the Asset Investment Law.

The German funds marketing regime distinguishes between domestic funds, EU funds and non-EU funds as well as between domestic fund managers, EU fund managers and non-EU fund managers. It further distinguishes between UCITS and AIFs as well as – with regard to AIFs – whether the funds are marketed to professional investors, semi-professional investors or retail investors.

Marketing of UCITS
With regard to the marketing, in Germany, of non-German UCITS, Germany follows the passporting regime of the UCITS Directive. In addition to the standard notification procedure, the marketing of UCITS must comply with the German implementation of the UCITS passporting rules (articles 91 to 95 of the Directive). For instance, there must be a financial institution in Germany for making payments to unitholders, repurchasing or redeeming units and for making available the information that UCITS are required to provide under Chapter IX of the Directive.

UCITS can be marketed under the passport to professional, semi-professional and retail investors.

Marketing of EU AIFs by EU AIFMs
With regard to the marketing of non-German EU AIFs by EU AIFMs, the AIFMD marketing passport of article 32 AIFMD is available. The AIFMD marketing passport allows for the marketing of EU AIFs to professional and semi-professional investors in Germany.

Marketing of non-EU AIFs or EU AIFs by non-EU AIFMs
With regard to the marketing of non-EU AIFs managed by non-EU AIFMs, Germany allows for marketing under the regime of article 42 AIFMD to professional investors. The same regime applies to the marketing of EU AIFs managed by non-EU AIFMs to professional investors. Germany also applies the article 42 AIFMD regime to non-EU sub-threshold managers.

Germany has implemented the article 42 regime in a rather cumbersome way. Compared with some other EU member states, the process is a bit lengthy and costly. BaFin has at least two months (in some cases even longer) for review once the filed documents are complete and BaFin currently charges a fee of €6,582. The set of documents to be submitted to BaFin is rather extensive and includes the private placement memorandum (PPM), the fund LPA and certain constitutional documents.

There also some additional requirements (gold-plating) not readily discernible from the reading of article 42 AIFMD. For instance, Germany also applies the article 42 regime to non-EU sub-threshold managers.

To ensure that the article 42 requirement of cooperation agreements between the relevant competent authorities is effective, BaFin requires as part of the marketing authorisation procedure an express declaration from the non-EU AIFM that:
- the non-EU AIFM is registered with the competent authority with which BaFin has entered into a cooperation agreement or that the non-EU AIFM is registered in another register to which the competent authority has access; and
- the competent authority has information rights in relation to the non-EU AIFM.

Most importantly, Germany introduced the additional requirement of a 'depositary-lite'. The AIFM must appoint a depositary who performs the three depositary functions of article 21(7) to 21(9) AIFMD, namely, cash monitoring, safekeeping of assets and a general oversight over the AIFM and the AIF. The depositary can be located outside of Germany. The final draft of the depositary agreement together with a depositary confirmation must be submitted to BaFin.

The article 42 regime is also available for marketing to semi-professional investors. However, in such case, the non-EU AIFM and the management of the AIF must fully comply with the AIFMD.

EU sub-threshold AIFMs
EU sub-threshold AIFMs may use a simplified marketing notification procedure with BaFin. This notification procedure requires, among others, a confirmation of the registration status of the AIFM in its home member state and reciprocity. 'Reciprocity' means that the home member state must allow the marketing of AIFs managed by a German sub-threshold manager without imposing stricter requirements than Germany. Such reciprocity is currently recognised for instance with regard to the UK and Luxembourg, but not with regard to Austria, Denmark, France and the Netherlands.

Marketing of EU AIFs or non-EU AIFs to retail investors

The AIFMD deals only with the marketing of AIFs to professional investors. With regard to non-professional investors, the member states of the EU are free to impose stricter requirements (article 43, paragraph 2 AIFMD). Germany therefore introduced a strict retail marketing regime for EU and non-EU AIFs. The regime is based on the retail marketing regime of German AIFs. It requires full AIFMD compliance as well as full compliance with the German Products Regulation. Because of these high requirements, marketing an AIF to retail investors only makes sense if the relevant AIF is already set up with German retail investors in mind. A 're-tailoring' of an existing AIF is cost-prohibitive.

8 What marketing activities require authorisation?

Definition of marketing and pre-marketing

The key trigger of an authorisation is the term 'marketing'. 'Marketing' means the direct or indirect offering or placement of units or shares in an investment fund.

Marketing must therefore relate to units or shares in an investment fund. BaFin concludes that marketing in particular takes place with regard to a fund if:

- the fund has been established (ie, first closing with investors); or
- the terms of the fund are ready to be sent for acceptance to investors.

Consequently, there is no marketing if the fund has not yet had a closing with investors and only incomplete fund terms are distributed. This means that in practice marketing might start rather early in the investor relationship process.

However, marketing must also include an offering or placement. The term 'offering' includes offers to subscribe as well as the sending out of invitations to potential investors to make an offer to subscribe. The 'placement' alternative is in practice already included in the offering mechanism. Therefore, in our view marketing can only occur if the investor has a legal basis for a subscription or for making an offer to subscribe. Accordingly, an activity should still be pre-marketing (even if the investment fund has had a closing with certain investors) if: (i) the investor has no access to the final documents (PPM, LPA and subscription documents); and (ii) it is made clear that the fund manager is not currently seeking subscriptions and that offers to subscribe will only be possible after BaFin marketing approval on the basis of the final documents (eg, in a disclaimer in the documents).

Reverse solicitation

Germany recognises a reverse solicitation concept, albeit in a rather strict form. It requires that the offer or placement is genuinely initiated by the investor. In addition, the prospective investor must be a professional or semi-professional investor. The exact scope of the reverse solicitation concept as understood by BaFin is still not clear.

If the investor is a retail investor, the requirements on reverse solicitation are even less clear. In general, reverse solicitation will not work with regard to retail investors and the fund manager would be subject to the more cumbersome retail marketing regime in Germany.

In any case of reverse solicitation, the fund manager should have documentary evidence of how the relationship with the investor started and seek a confirmation from the investor that the contact has been initiated solely by the investor. In our experience, the requirements for reverse solicitation will be fulfilled only in limited instances.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

The German marketing regime described above applies to any inbound marketing in Germany.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

A local entity must only be involved with regard to UCITS (paying and information agent) and in the case of marketing AIFs to retail investors (paying agent and representative of AIFM). The position of the local entity is usually performed by a German credit institution.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

Germany follows the MiFID inducement rules on commission payments received by intermediaries. In practice, this means that such commissions need to be disclosed to the prospective client. Note, however, that with regard to cross-border services without a German branch, the supervision of the German MiFID rules of good conduct is primarily with the home country regulator.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

The fund-related requirements of the KAGB distinguish between UCITS, special AIFs and public AIFs. UCITS are UCITS funds within the meaning of the UCITS Directive. Retail funds are UCITS funds and public AIFs. Public AIFs are AIFs that can be subscribed by retail investors (as well as professional and semi-professional investors). Retail investors are investors who are neither professional nor semi-professional investors (see question 3).

Arrangements and vehicles for open-ended funds

For open-ended funds, the contractual fund and the investment corporation with variable capital structures are available. They can have different classes of units or shares. They can also establish sub-funds (umbrella structure).

The open investment limited partnership structure is only available to semi-professional or professional investors.

The contractual fund is established by the fund manager on a contractual basis with the investor. The contractual fund is a pool of assets separated by statute and contract from the (other) assets of the fund manager. The investment guidelines for contractual funds set out the details of the contractual relationship between the fund manager and the investors, in particular the applicable investment restrictions. The investment guidelines of retail funds require the approval of BaFin.

Investment corporations and the investment limited partnerships are basically corporations and limited partnerships with some modifications for investment law. They are established in accordance with the applicable procedures for establishing corporations and partnerships (with some modifications because of investment law). In addition to the articles of incorporation or the LPA, separate investment guidelines are necessary.

Vehicles for closed-ended funds

For closed-ended funds, the only available vehicles for retail funds are the investment corporation with fixed capital and the closed-ended investment limited partnership.

Both vehicles can issue different classes of shares or interests, but they cannot establish sub-funds (no umbrella).

In addition to the articles of incorporation and the LPA, separate investment guidelines are necessary.

13 What are the key laws and other sets of rules that govern retail funds?

The main law governing retail funds is the KAGB. The KAGB is supplemented by several ordinances (the Derivative Ordinance, the Organisational and Rules of Conduct Ordinance and the Mediation Ordinance). In addition, the AIFMD Level II Regulation applies to retail AIFs.

This set of laws is supplemented by self-regulatory standards, mainly the Rules of Good Conduct issued by the German Investment Funds Association and the Association's sample investment guidelines.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

The investment guidelines of retail funds as well as the marketing of retail funds each need BaFin approval. In addition, BaFin has to approve the selection of the depositary for the respective fund. The approvals are usually obtained in parallel with each other.

15 Who can market retail funds? To whom can they be marketed?

Retail funds can be marketed to any investor in Germany (regardless of whether the investor is professional, semi-professional or retail).

Retail funds can be marketed only by three categories of 'marketers':

- the fund manager itself can always market its 'own' funds. If the fund manager is fully licensed (ie, not only registered as a sub-threshold manager) the fund manager may also market investment funds of other managers;
- in addition to fund managers, MiFID firms are entitled to market investment funds (provided they have a MiFID licence or passport for investment advice and the transmission or receipt of orders); and
- Germany also allows the marketing of retail funds by firms or individuals with a financial intermediary licence under the German Commerce Act (GewO). The financial intermediary licence is a non-MiFID licence and based on the optional exemption from MiFID in article 3 MiFID.

16 Are there any special requirements that apply to managers or operators of retail funds?

The special requirements on retail funds are not the requirements applicable to managers. The manager requirements of retail funds are broadly similar to the requirements on managers of non-retail funds. The main differences between retail and non-retail funds are in stricter statutory investment guidelines (product regulation) and stricter marketing rules.

17 What are the investment and borrowing restrictions on retail funds?

Germany offers different types of retail funds (eg, UCITS, real estate funds, fund-of-funds, hedge funds and closed-ended funds). The fund types are based on the UCITS investment and borrowing restrictions as the default rules. The investment and borrowing restrictions are then modified to fit each fund type. For instance, real estate funds may only invest in real estate, but can also invest up to 49 per cent of the net asset value in money-market instruments or investment funds. The borrowing limits are increased for real estate funds from the UCITS' short-term borrowing of 10 per cent of the net asset value to a long-term borrowing for investment of 30 per cent of the net asset value.

18 What is the tax treatment of retail funds? Are exemptions available?

The German Investment Tax Act generally applies to UCITS and AIFs – both retail AIFs and special AIFs (see also question 29).

Current law (in force until 31 December 2017)

The German Investment Tax Act was revised in 2016 and most of the changes will take effect as of 1 January 2018. Currently, and in force until 31 December 2017, the law distinguishes between two different categories of funds for tax purposes. Such categories are tax-specific and do not mirror the regulatory categories of funds.

Qualifying funds

Certain funds fall under the category of 'qualifying funds' (investment funds). This category is applicable only to certain open-ended funds (UCITS and AIFs) that meet specific product regulation requirements under German tax law. In practice, this will mostly be the case for German open-ended retail funds and certain German special AIFs. Many foreign funds are not likely to be able to meet the German tax product requirements, unless they were specifically set up to be marketed to German investors (in practice mainly Luxembourg and to a lesser degree Irish UCITS products).

The taxation of qualifying funds and their investors is based on the principle of 'restricted transparency'. Accordingly, qualifying funds themselves are treated as corporate income tax subjects for German tax purposes, but benefit from a personal tax exemption (also applicable for German trade tax purposes), effectively avoiding taxes at fund level. German investors in qualifying funds are subject to German income or corporate tax on certain distributions, as well as retained income of the fund and capital gains upon a transfer of fund units. Certain exemptions are available (fund privilege) that make an investment in a qualifying fund more attractive from a tax perspective than a direct holding of the underlying assets by the investors.

Non-qualifying funds

All other funds that do not meet the requirements of qualifying funds, namely, that do not comply with the German product regulation for tax purposes, fall under the second category of non-qualifying funds. This second category captures closed-ended funds (in particular private equity funds and other closed-ended AIFs) as well as certain open-ended funds. The tax treatment of non-qualifying funds depends on their legal form (partnership or corporation).

Non-qualifying partnerships

For non-qualifying funds in the form of a partnership (a German KG or foreign limited partnership), the general rules of German taxation of partnerships apply. A partnership is generally tax-transparent for German tax purposes, namely, not subject to German income tax or local trade tax. This is only fully the case if the partnership is not considered to be in a trade or business owing to its structure ('deemed business' concept) or because of its activities. Depending on the relevant asset class, there are specific criteria developed by courts and in decrees of the German tax authorities to distinguish business activities from mere asset-management activities (eg, with respect to private equity funds, real estate and traded securities). In practice, this distinction is inherently factual in nature depending on all facts and circumstances. If the partnership is transparent, the allocable share of the partnership's income is (only) taxed at the level of the investors, which are taxable in Germany in accordance with the general rules of German taxation.

Non-qualifying corporations and contractual-type funds

For non-qualifying funds in a legal form other than a partnership, a specific tax regime is applicable. This regime not only covers funds in the form of a corporation (eg, a German stock corporation, Luxembourg SA/SCA SICAV or Irish PLC), but also funds of the contractual type (eg, a German *Sondervermögen*, Luxembourg *fonds commun de placement*, French FCPI/FCPR or Italian *fondo chiuso*).

Domestic non-qualifying funds other than partnerships are subject to German corporate income tax and German local trade tax. A foreign non-qualifying fund can only be subject to German taxation to the extent that it incurs German-source income. Investors in such a 'corporate' non-qualifying fund do not qualify for the partial income taxation or the tax exemption for dividends and capital gains, unless the income of the fund is subject to tax (in a sufficient degree; at least 15 per cent if based in a non-EU state) at the fund level. In the case of foreign 'corporate' non-qualifying funds, the German tax laws for controlled foreign corporations may also be applicable in certain circumstances.

For taxation of compensation of fund managers, see question 29.

Revised law

On 1 January 2018, the new rules under the revised Investment Tax Act become effective. The scope of application has been slightly reduced as partnerships will no longer be covered. Instead, the general rules of German taxation for partnerships are applicable (ie, resulting in the same treatment as currently is the case for 'non-qualifying partnerships'). Thus, only funds in the form of a corporation or of a contractual type are now covered by the new law. Also covered are certain other entities that do not qualify as 'investment funds' under the KAGB (in particular 'single-investor funds'). One major conceptual change is that the principle of 'restricted transparency' has been replaced by a newly introduced opaque tax regime where there are two levels of taxation: the fund and the investors. This new tax regime was designed for retail funds, but it is applicable to all investment funds (including non-retail funds) that do not satisfy the specific criteria for specialised investment funds under the new law (see also question 29).

Under the opaque regime, the fund is now subject to taxation in respect of certain domestic German income (in particular dividends and real estate income, but not capital gains from the sale of securities unrelated to real estate and unrelated to a permanent establishment in Germany) at fund level (15 per cent tax rate (ie, German corporate tax)). The exemption for dividends (section 8b of the German Corporation Tax Act) is not applicable at the level of the fund even if the relevant threshold (ie, 10 per cent) is exceeded. In addition, German trade tax may be triggered at the level of the fund, if it is engaged in trade or business in Germany (subject to a potential exemption if the fund does not engage in 'active entrepreneurial management' in relation to its assets).

At the investor level, there is a lump-sum taxation (which is designed for the needs of retail funds with a large number of investors, but applicable to all funds covered). Distributions from the fund, predetermined tax bases and capital gains realised upon sale or redemption of the fund interests, are covered, in particular. For individual investors, the actual rate of investor level taxation will depend on whether the investor holds the fund interests as part of their 'non-business' or 'business' assets. For corporate investors, the full amount of such items is subject to corporation tax. In addition, German trade tax may be triggered.

The partial income taxation and the exemption pursuant to section 8b of the German Corporation Tax Act do not apply.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

Germany requires a depository or custodian for both UCITS and AIFs. The rules for custodians for AIFs are an implementation of the rules of article 21 AIFMD. Germany made use of the option in article 21(3) AIFMD to provide for a special custodian for private equity funds. The requirements for UCITS custodians are based on the UCITS Directive.

A custodian is not required for funds managed by AIFMs who are only registered with BaFin (in particular, sub-threshold managers; see question 3).

There are rules in place to protect a fund's assets from liability incurred by the manager or by the activities of managing the fund (in case of an internally managed fund). For instance, a manager can, as a basic rule, not directly act on behalf of a contractual fund. Any arrangement a manager enters into on account of a contractual fund is binding only on the manager. The contractual fund will then indemnify the manager, but only to the extent allowed by law and the rules of the contractual fund. The contractual fund is therefore protected from claims of third parties unrelated to the management of the contractual fund. In the case of an internally managed investment KG, the KG must have two types of assets: administrative assets and investment assets. The investment assets are financed by the capital of the investors and are used for making investments. The administrative assets serve to finance the general operations of the investment KG. The administrative assets may not be financed by the investors' capital.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

The governance requirements distinguish between the fund vehicle and the fund manager.

With regard to a manager, several governance requirements apply. An (external) manager can only be set up in a corporate or corporate-like legal form (AG, GmbH and GmbH & Co KG). As a result, the basic governance rules of the respective legal form apply (such as registration requirements and rules for shareholders' meetings). To adapt these governance rules to a fund management environment, the KAGB supplements these rules with specific requirements. For instance, the manager must have at least two executive directors (officers) of good repute and with sufficient knowledge. In addition, there must be a supervisory board. Further, the KAGB requires a manager to obey several duties of good conduct, such as a duty of care, a duty to act in the best interests of the funds and the investors, a duty to avoid conflicts of interest and a duty to treat investors fairly. These duties are reinforced by organisational requirements on the manager, such as a duty to have adequate risk management or rules for personal transactions of employees in place.

The governance requirements applicable to the fund manager are the main governance protection rules applicable to contractual funds.

For a fund set up as an investment corporation with fixed or variable capital (investment AG) or an investment KG, the fundamental layer of governance is based on the governance of the legal forms these funds are based on (eg, with regard to registration requirements). In addition, the KAGB sets out funds-specific requirements, such as the appointment of at least two executive directors.

21 What are the periodic reporting requirements for retail funds?

A manager must report annually. Semi-annual reports are required for contractual funds and investment AGs with variable capital.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

A manager can restrict the issue, transfer and redemption of interests if there is a basis in the fund's investment guidelines. For instance, investment guidelines typically empower the manager to suspend redemption in extraordinary circumstances.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

With regard to vehicles used for non-retail funds (ie, professional or semi-professional investors only), Germany distinguishes between funds managed by fully licensed managers and funds managed by registered managers (sub-threshold managers). Non-retail funds are typically called special AIFs (see question 3).

In the case of a fully licensed manager, the following types are available: contractual fund, investment KG and investment AG. In our experience, the contractual fund is the most common vehicle used for non-retail investors by fully licensed managers.

In the case of a registered manager, the vehicle of choice is a simple limited partnership with a company with limited liability (GmbH) as the only general partner (GmbH & Co KG). However the legal forms of an investment KG or an investment AG are also available.

24 What are the key laws and other sets of rules that govern non-retail funds?

With regard to fully licensed managers managing non-retail funds, the same key rules apply to managers managing retail funds (see question 13).

Managers who are only registered benefit from a very light regulation. Besides the requirements mentioned in question 3, non-retail funds managed by sub-threshold managers are in principle not regulated.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

In contrast to retail funds, the investment guidelines of non-retail funds only need to be submitted to BaFin without BaFin having to approve the guidelines. The investment guidelines of non-retail funds can either mirror the investment guidelines of retail funds or can be freely specified as long as a fair market value of the assets can be determined. The marketing of non-retail funds requires BaFin approval.

In the case of registered managers, no investment guidelines are necessary and they do not need to be submitted to BaFin. BaFin has established in its practice a requirement to submit a commercial register excerpt of the fund once the fund is established. Once the manager is registered, the marketing of a fund does not need BaFin approval (on the assumption that the marketing takes place within the private placement regime of the German prospectus laws; see question 7).

26 Who can market non-retail funds? To whom can they be marketed?

Non-retail funds can in general be marketed by the same players as retail funds (see question 15). An exception applies to funds managed by registered managers. Such funds cannot be marketed by firms with a financial intermediary licence under the GewO.

Non-retail funds may only be marketed to professional or semi-professional investors (for the definition, see question 3).

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

Only professional or semi-professional investors may invest in non-retail funds.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

The distinction between retail and non-retail is in stricter investment guidelines and stricter marketing rules, at least with regard to funds managed by fully licensed managers.

With regard to registered managers, only a regulatory-lite regime applies (see question 3).

29 What is the tax treatment of non-retail funds? Are any exemptions available?

Current non-retail fund taxation (in force until 31 December 2017)
The tax treatment of retail funds (see question 18) is generally also applicable to non-retail funds. As the prior revision of the German Investment Tax Act became effective in late 2013, certain grandfathering rules are applicable (only until 31 December 2017) for those funds existing prior to the enactment of the 2013 revision. German special tax rules (including certain exemptions) apply at the level of the investors, depending on the tax status of the investor (eg, taxable corporation, insurance company and tax-exempt institution).

Revised law (in force from 1 January 2018)
As noted in question 18, the German Investment Tax Act was revised in 2016 and the new rules will become effective on 1 January 2018. As noted, funds in the form of a partnership are now outside the scope of the AIF (ie, in effect, no change compared to the current law for most non-retail AIFs as they are often structured as limited partnerships). Thus, the new law only applies to non-retail funds if they are structured in a corporate of contractual form. Under the new law, there is an option for certain qualifying specialised investment funds to opt out of the new 'opaque regime' and, instead, to apply the 'restricted transparency regime' (ie, the tax regime for investment funds under the law currently in force until the end of 2017 (see question 18)).

Specialised investment funds may only have a maximum of 100 investors (as is currently the case). Unlike the current law, there is a look-through approach with respect to partnerships as investors (ie, each partner of such partnership is counted as one investor of the fund). However, individuals may now invest directly in a specialised investment fund, provided that they hold such fund interests as part of their 'business assets' (previously, only indirect participations of investors were possible).

To qualify as a specialised investment fund, a fund must satisfy certain criteria with respect to regulation, redemption rights, eligible assets and investment restrictions. These are substantially similar to the criteria under the current law (although certain changes with respect to the definition of 'securities' apply).

Fund manager taxation
A 40 per cent exemption from German income tax applies to the carried interest received by managers of a private equity fund structured as a partnership (including limited partnerships) if certain cumulative criteria are fulfilled (in particular, the fund must qualify for asset management status and the carried interest must be paid only after the investors have had all their invested capital paid back). Otherwise, such income is fully taxable at normal German income tax rates. These rules are generally not affected by the revision of the German Investment Tax Act.

Update and trends

The German regulator BaFin is currently requesting comments on an interpretative letter with regard to the German Insurance Ordinance. The Insurance Ordinance is relevant for investments by non-Solvency II investors, such as local pension funds. The proposed BaFin interpretations will – if enacted in its current form – severely restrict investments in non-EU (managed) private equity and debt funds.

Regarding the issue of VAT on management fees, the reform of the Investment Tax Act has not yet included the anticipated improvement of the VAT situation for AIFs. However, there is still hope in the market that German VAT rules will be revised to expand the VAT exemption to AIFs (which is currently not the case in contrast to many EU member states) in order to reflect a court decision of the European Court of Justice in December 2015. Additional pressure on the legislature could come from new court litigation initiated by fund managers. In general, it remains true that the tax landscape is complex and subject to constant change.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

A separate custodian is necessary if the non-retail fund is managed by a fully licensed manager. A custodian is not necessary in case of a registered manager.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

The governance requirements with regard to non-retail funds managed by fully licensed managers are similar to retail funds (see question 20).

There are no special requirements on the governance of non-retail funds managed by registered managers.

32 What are the periodic reporting requirements for non-retail funds?

A manager must report annually.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Managed accounts are often structured as contractual funds provided by a fully licensed manager as the investment platform. The portfolio management is then typically delegated to a specialised portfolio manager.

34 What are the key legal issues to be determined when structuring a separately managed account?

Managing a separate account is usually deemed discretionary portfolio management in Germany. As a result, the MiFID rules of conduct apply.

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If a sub-delegation structure is used for the managed account, the sub-delegation must comply with delegation rules of the KAGB. This means that effectively the rules of conduct under the KAGB and the other provisions of the KAGB also apply to the delegate manager.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

Managing a separate account is usually deemed discretionary portfolio management in Germany and therefore regulated under the German MiFID implementation. If the account is managed in the form of a contractual fund, the manager must be a fully licensed manager under the KAGB (see question 3).

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

Germany currently implements the MiFID II. MiFID II will have an impact on marketers of funds. MiFID II's product governance rules will likely also have an impact on fund managers that use placement agents in Germany.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

The specific requirements for stock-exchange listing of funds depend on each exchange. For instance, there are exchanges that allow for the trading of closed-ended funds whereas other exchanges permit only open-ended funds.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

This is currently not possible in the context of funds.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

There are, in general, no special rules applicable. However, certain investors, such as German insurance companies, are restricted to a certain extent by regulatory law to invest in overseas or offshore vehicles.

Greece

Michael Tsibris and Giannis Koumettis

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

Fund management is governed by two main sets of rules, depending on the nature of the collective investment undertakings (funds) the fund manager purports to manage: more specifically the implementing regime of the EU Undertakings for Collective Investments in Transferable Securities Directive 2009/65/EC (UCITS IV) as amended by Directive 2014/91/EC (UCITS V) and the Alternative Investment Fund Managers Directive 2011/61/EC (AIFMD).

The Greek UCITS IV implementing regime consists of Law No. 4099/2012 as amended and in force and the Hellenic Capital Market Commission (HCMC) Decisions 15/633/20.12.2012; 16/633/20.12.2012; 17/633/20.12.2012 and 1/756/18.5.2016, as well as Circular No. 55 of the HCMC and regulates the management of funds that qualify as UCITS under the UCITS IV and V Directives and their managers.

UCITS include two basic types of collective investment undertakings: mutual funds and variable capital investment companies. Both fund types are open-ended and they will collectively be referred to below as 'UCITS'.

The Greek AIFMD implementing regime, consisting of Law No. 4209/2013, regulates the management of funds that qualify as alternative investment funds (AIFs) under the AIFMD. Certain types of locally regulated collective investment undertakings fall under the definition of an AIF, more specifically the following:

- closed-ended venture capitals regulated under Law No. 2992/2002 (AKESs);
- portfolio investment companies regulated under Law No. 3371/2005 (AEEXs); and
- real property management companies regulated under Law No. 2778/1999 (AEEAPs).

Other, non-regulated types of non-UCITS funds also fall under the definition of an AIF.

The supervisory authority for both types of funds and their managers, as well as those marketing funds, is the HCMC.

To the extent fund marketing includes the provision of investment services (eg, investment advice), persons engaged in this activity are also subject to the local Markets in Financial Instruments Directive 2004/39/EC (MiFID) implementing regime, namely, Law No. 3606/2007 and HCMC Decisions 1/452/1.11.2007 and 2/452/1.11.2007.

The local UCITS, AIFMD and MiFID regimes do not deviate from the respective EU Directives.

2 Is fund administration regulated in your jurisdiction?

Fund administration is included in the broader scope of the term 'fund management' in respect of both UCITS managers and AIFs. The functions consisting of fund administration are subject to the aforementioned laws and regulations, but are not per se regulated.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

The authorisation process depends on the type of the fund.

UCITS

For the establishment of a UCITS fund (mutual fund or variable capital investment company), the prior authorisation of the HCMC must be obtained. This requires filing the following documents, in Greek, with the HCMC:

- the fund's regulation or constitutional documents signed by the management company and the custodian;
- a statement of the credit institution about the acceptance of its appointment as custodian; and
- a detailed list of the fund's assets, the total of which must be at least €300,000.

The fund is granted a licence provided that the HCMC has approved the above documents after having ascertained that they are compliant with the provisions of Law No. 4099/2012.

AIFs (generally)

There is no obligation for AIFs to be authorised; the authorisation obligation applies to alternative investment fund managers (AIFMs).

AKESs

No licensing or authorisation procedure is provided for AKESs; however, these entities must comply with the provisions of Law No. 2992/2002.

AEEXs

An HCMC licence must be obtained before operating an AEEX. The procedure involves filing a set of documents with the HCMC proving that:

- the AEEX has the necessary technical and financial resources;
- the AEEX's directors have the necessary professional experience, skills and reliability (the criteria are also stipulated in HCMC Decision 4/452/1.11.2007);
- the AEEX's shareholders are also suitable for holding a shareholding in the AEEX;
- a credit institution authorised in Greece has accepted its appointment as custodian for holding the assets of the AEEX; and
- the AEEX has fully paid the initial share capital.

The HCMC must reply to the application by granting a licence or rejecting the application, within three months from its filing. Within six months of obtaining an authorisation, AEEXs are obliged to have achieved the listing of their shares on a regulated market operating in Greece. Otherwise authorisation is revoked by the HCMC.

AEEAPs

An HCMC licence must be obtained before establishing an AEEAP. This requires the prior granting of an authorisation to the fund management company and the approval of the appointment of the custodian, as well as the funds' regulation.

In order to obtain a licence, the AEEAP must file an application to the HCMC, accompanied by documentation proving that:
- the said requirements (authorisation of fund management company, etc) have been fulfilled;
- the managers or directors and the custodian of the fund have the necessary experience in the area of real estate investments; and
- the regulation of the fund includes sufficient provisions for the protection of the interests of its unitholders.

Furthermore, the AEEAP must submit a detailed list of its assets (which must have a minimum value of €10 million) and a detailed analysis of its investment plan. There are also certain requirements for the managers, which depend on whether each manager qualifies as a UCITS manager or an AIFM.

UCITS managers

Entities that intend to provide UCITS management services must obtain a prior authorisation by the HCMC. To this end, they must submit an application to the HCMC that must include, inter alia, a list of the services they intend to provide, details of their shareholders, information about their organisational structure and their technical and financial resources, so as to prove that they have in place appropriate and adequate administrative and accounting procedures and internal audit policies to reduce the risk of investors suffering losses. Simultaneously with such filing, the applicant must pay the HCMC initial fees that amount to €5,000 for the basic authorisation (fund management only) plus €2,000 for each additional service (such as portfolio management and investment advice). The HCMC must reply to this application within six months. UCITS managers authorised by the competent supervisory authority of another member state regarding their intention to market units or shares in Greece are subject to a set filing fee of €1,000 plus 2.4 per cent stamp duty per sub-fund or per UCITS with no sub-fund and annual (maintenance) fees of € 1,000 plus 2.4 per cent stamp duty per sub-fund.

AIFMs

Entities that intend to provide AIF management services in Greece must also obtain a prior authorisation by the HCMC, unless they fall within the exemption provided in article 3 of Law No. 4209/2013 (ie, the assets under their management do not exceed the amount of €100 million when leverage has been used, or €500 million when leverage has not been used). To this end, they must submit an application to the HCMC, which must include detailed information regarding, inter alia, the following:
- the natural persons conducting their operations;
- identities of their shareholders with qualified holdings;
- their programme of activities and information on their remuneration policies and practices; and
- information on arrangements for the delegation and sub-delegation of their functions to third parties.

Moreover, applicants must provide detailed information about the AIFs they intend to manage, including information about their investment strategies, rules of incorporation and place of establishment of their master and feeder AIFs, and information about their depositary. The above-mentioned filing fees apply accordingly to Greek AIFMs (ie, €5,000 for the basic authorisation (fund management only) plus €2,000 for each additional service) as well as the initial and maintenance fees (€1,000 plus 2.4 per cent stamp duty), which also apply to AIFMs authorised by the competent authority of another member state, regarding their intention to market units or shares in Greece.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

The fund regulatory regime is applicable to fund management services provided in Greece. An overseas manager performing fund management activities or providing services in Greece may not do so without the proper local authorisation, unless an EU passport is used.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

Any acquisition of a shareholding in a UCITS manager that results in a shareholder reaching, exceeding or falling below 20, 33.3 or 50 per cent of its share capital is subject to the prior approval of the HCMC. To this end, the respective shareholder must notify the HCMC in advance of the purported share transfer.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

UCITS funds

There are no regulatory restrictions. However, clear reference must be made in the fund's regulation as well as the key investor information document about the amount (or method of calculation) of the fund manager's compensation, and the timing and procedure of distributing profits to unitholders. The UCITS in both subscription and redemption forms must indicate the exact commission rate with which the unitholder is charged when subscribing or redeeming its units or shares.

AIFs

There are no regulatory restrictions. However, the fund manager must disclose to investors a description of all fees, charges and expenses and of the maximum amounts thereof that are directly or indirectly borne by investors. Extended rules have been laid down about remuneration of staff and senior management of fund managers, which are detailed in article 13 of Law No. 4209/2013, implementing Annex II of the AIFMD.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

Yes. Marketing of investment funds is permitted on the condition that the fund and the fund management company hold a licence granted by the HCMC. To the extent marketing activities involve the provision of one or more investment services (eg, investment advice), a MiFID licence is also required. The UCITS funds authorised in another member state intending to market units or shares in Greece must appoint, in writing, at least one paying agent and a distributor that will be responsible for the marketing in Greece.

The paying agent must be a credit institution domiciled either in Greece or in another country with a branch located in Greece. The paying agent is the intermediary responsible for providing the financial services of a UCITS fund, responsible for fulfilling the monetary elements of the subscription and redemption orders and other transactions necessary for the marketing activities. In particular, the paying agent has to provide at least the following financial services:
- receiving the cash equivalent funds for subscriptions and making payments for redemptions;
- making coupon and dividend payments; and
- dealing with any settlement differences arising when switching between compartments.

The distributor may take the form of a credit institution, management company, insurance company or investment firm, either domiciled in Greece or in another country with a branch located in Greece. The distributor is the intermediary responsible for providing at least the following marketing services: processing subscription and redemption forms to the paying agent and supplying a series of requisite information to unitholders. The distributor must also report to the HCMC the statistical data of the UCITS marketed in Greece.

A UCITS fund may appoint more than one paying agent or distributor, or both, and where the latter is a credit institution it may be appointed with both intermediary roles.

8 What marketing activities require authorisation?

There is no specific list of activities that qualify as 'marketing' and thus require authorisation. However, the regulatory position taken by the HCMC is that all active marketing activities (including, for example, sending fund material, making personal communications via telephone, fax, email, personal meetings or roadshows, using local media or websites dedicated to Greek investors to promote funds or making public announcements) must be deemed to constitute licensable marketing activities, as long as they are product-specific. Therefore, generic discussions about the manager or the general financial and investment environment, generic brand advertising (without naming a specific fund) as well as actions such as the distribution of business cards, the distribution of newsletters or other presentations or announcements not naming a specific fund, are not included in the scope of the authorisation requirement. Passive marketing (ie, responding to unsolicited requests submitted by investors or potential investors (reverse solicitation)) is not deemed to constitute marketing in this respect and therefore does not require authorisation. However, to be considered unsolicited, a client request must be product specific and the manager may only provide the requested product. It is advisable that reverse solicitation is evidenced in writing.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

All activities performed towards Greek residents when in Greece are included in the scope of the licensing requirement. Activities towards Greek residents when they are outside Greece are not included in the scope of the said requirement.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

All actual contact towards Greek investors or potential investors must be performed by licensed entities. In the case of AIFs, marketing activities may only be performed by the fund manager of the AIF or locally authorised investment firms and credit institutions.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

There are no specific restrictions regarding commission payments for intermediaries' marketing activity to the intermediary itself. However, according to fund management requirements, the procurement policy must be clearly defined in the UCITS rules (see question 6). For remuneration payable to intermediaries, in particular, the fund manager must disclose to the UCITS any procurement to third parties, accurately and reasonably, prior to the provision of the service. Such remuneration shall be paid in order to enhance the quality of the relevant service and does not preclude the fund manager to act in the best interests of the UCITS.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

The main legal vehicles for setting up a retail fund are: a UCITS open-ended fund, an AKES, an AEEX and an AEEAP. Since the recent amendment of article 109 of the AIFMD Implementing Law, all types of funds can now be marketed and sold to retail investors under the conditions set out therein. Therefore all existing fund types are retail funds. The main characteristics of the said fund types are the following:

UCITS

This is a fund that is compliant with the UCITS IV Directive. UCITS are structured as open-ended collective investment schemes and can take the form of a mutual fund or a variable capital investment company. The assets of a mutual fund must be managed by a dedicated fund management company whereas a variable capital investment company may be self-managed.

AKES

This is a closed-ended fund. Its manager must have been authorised as an AIFM. Its establishment requires the execution of an agreement between its unitholders, the fund manager and a custodian. The HCMC supervises the operation of AKESs. Its fund manager must have an initial share capital of at least €100,000 and the total assets of the fund must be at least €3 million.

AEEX

This is a closed-ended fund (in corporate form), whose initial share capital must be at least €500,000. Before establishment, an AEEX must obtain approval from the HCMC. To this end, it must file with the HCMC documentation about its internal policies and procedures and evidence about the appropriateness of its directors, managers and shareholders.

AEEAP

This is a closed-ended fund investing in real property. It is managed by a fund management company with an initial share capital of at least €25 million, which is fully payable upon establishment of the company. The fund management company must be 51 per cent controlled by an authorised credit institution or insurance company.

13 What are the key laws and other sets of rules that govern retail funds?

The principal laws governing retail funds are as follows:

- UCITS: Law No. 4099/2012 (implementing UCITS IV), HCMC Decisions 15/633/20.12.2012; 16/633/20.12.2012;17/633/20.12.2012 and 1/756/18.5.2016 and HCMC Circular No. 55 (in English);
- AIFs (generally): Law No. 4209/2013, implementing the AIFMD;
- AKESs: Law No. 2992/2002;
- AEEXs: Law No. 3371/2005; and
- AEEAPs: Law No. 2778/1999.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Yes. Retail funds must be authorised by the HCMC in order to be established or marketed in Greece.

15 Who can market retail funds? To whom can they be marketed?

Only authorised entities (fund management companies, investment firms and credit institutions) can market retail funds.

UCITS funds can be marketed to both retail and professional investors.

All funds that qualify as AIFs (ie, AKESs, AEEXs and AEEAPs) can be marketed to both professional and retail investors.

Professional investors are defined within the meaning of article 6 of the Greek MiFID Implementing Law. These are deemed to include the following:

- credit institutions;
- investment firms;
- other authorised or regulated financial institutions;
- insurance companies;
- collective investment schemes and management companies of such schemes;
- pension funds and management companies of such funds;
- commodity and commodity derivatives dealers;
- local corporations;
- portfolio investment companies and other institutional investors;
- large undertakings meeting at least two of the following requirements: a balance sheet total of at least €20 million, a net turnover of at least €40 million and ownership of at least €2 million in funds;
- national and regional governments, public bodies that manage public debt, central banks, international and supranational institutions such as the World Bank, the International Monetary Fund, the ECB, the European Investment Bank and other similar international organisations; and
- other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions.

Retail investors are investors other than those described above as professional investors, provided that the following conditions are met: the investors undertake to invest at least €100,000 per AIF and per investor; and they state in writing, in a document separate from the agreement concluded for the undertaking of the investment, that they are aware of, and fully understand the risks connected with, the relevant investment.

16 Are there any special requirements that apply to managers or operators of retail funds?

Other than those set out in question 3, there are no special requirements applicable to managers or operators of retail funds.

17 What are the investment and borrowing restrictions on retail funds?

Depending on their type, each fund is subject to different investment and borrowing restrictions.

UCITS

The UCITS IV rules on permitted investments and restrictions generally apply (articles 59 to 60 of Law No. 4099/2012, implementing articles 51 to 54 of UCITS IV).

AIFs

There are no specific investment or lending restrictions applicable to all AIFs. However, each particular type of fund (AKES, AEEX and AEEAP) has its own investment restrictions, as described below.

AKES

An AKES may invest in businesses established in Greece or another EU member state. It may also invest in businesses established in third countries provided that such businesses are active in the production or rendering of services in Greece. It may invest in listed or non-listed equity. In the case of investment in listed equity, the AKES may not participate in the share capital of an issuer with a percentage of less than 15 per cent. It may also invest in business bonds, also subject to the 15 per cent condition. Finally, it may deposit its reserves in bank accounts and money market instruments.

An AKES may not invest more than 20 per cent of its assets to transferable securities of the same issuer. It may also not invest to transferable securities of entities related to a unitholder or issuers whose share capital belongs to a unitholder or his or her relatives, to a percentage equal to or greater than 25 per cent. The aforementioned restrictions do not apply if the investment is approved by 100 per cent of the unitholders and on the additional condition that the said investment does not exceed 30 per cent of the total assets of the AKES.

AEEX

The investments of an AEEX shall comprise transferable securities, money market instruments, UCITS, non-UCITS, deposits and derivatives. AEEXs may not invest in precious metals and may not enter into borrowing to an extent greater than 35 per cent of the current value of their assets. AEEXs' investments are also subject to certain qualitative restrictions for the purpose of avoiding exposure to a single issuer and to the same type of financial instruments (eg, units of other collective investment schemes).

AEEAP

An AEEAP may only invest in the following assets: real estate at a rate of at least 80 per cent of its assets; money market instruments; and cash, deposits or equivalent liquidity credit securities, up to 10 per cent of its assets. An AEEAP is not permitted to invest in precious metals or warrants related thereto.

18 What is the tax treatment of retail funds? Are exemptions available?

The establishment of a UCITS, an AEEX or an AEEAP is generally exempted from any tax, duty and charges. Incomes of UCITS from transferable securities are also exempted from any tax or duty, with the exception of income from dividends distributed by Greek issuers, which is subject to a withholding tax with the respective rate of 10 per cent. In respect of interest rates from bond loans in particular, the exemption applies under the condition that the respective bonds have been acquired at least 30 days before their coupon date.

The UCITS manager is obliged to pay a tax calculated on a daily basis on the six-month average of its assets. The tax rate, depending on the type of investment of the fund, ranges between 10 and 11 per cent of the applicable 'main refinancing operations rate' determined by the European Central Bank (ECB).

Any income and capital gains obtained by unitholders from their participation in a UCITS fund is free of all taxes, duties and charges.

The AEEAP and its subsidiaries are obliged to pay an annual asset tax that is equal to the 10 per cent tax of the respective ECB current intervention rate (reference rate), incremented by one percentage point and calculated on the average of their investments, plus their reserves, at current market prices as shown in the biannual investment statements. This tax rate cannot be lower than 0.75 per cent on an annual basis. The tax is payable to the competent tax authority within the first 15 days of the month following the period recorded in the biannual investment statement. Upon payment of this tax, the tax liability of the company and its shareholders is exhausted.

There are no similar exemptions for other types of funds and therefore the respective revenues are taxed with the applicable income tax rate. Unitholders of an AKES are taxed as co-owners of the assets that belong to the AKES for any income obtained thereby.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The assets of funds must be held by a separate custodian, which must be a credit institution licensed either in Greece or in another EU member state and subject to the Capital Requirements Directive (CRD). The applicable provisions of the Greek CRD implementing Law No. 4261/2014 govern the keeping of the assets and cash of the funds.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

The main governance requirements for UCITS funds can be summarised as follows.

A UCITS must:
- be authorised by the HCMC;
- have in place adequate regulations or constitutional documents;
- adhere to specific rules regarding the evaluation of its assets;
- be managed by an authorised fund management company;
- appoint an authorised credit institution as custodian for holding its assets;
- provide specific information and documents to investors;
- adhere to specific investment rules and restrictions;
- have in place and comply with specific risk management rules and policies;
- adhere to specific transparency requirements (publication of annual and semi-annual reports); and
- adhere to specific promotion and advertising rules.

The main governance requirements for AIFs can be summarised as follows:
- AIFMs must ensure the proper and independent evaluation of all AIFs they manage;
- annual reports must be published for every AIF managed;
- proper procedures and policies must be in place for ensuring that delegation is not affecting compliance with the applicable provisions;
- appropriate information must be provided to investors;
- reports must be submitted to the HCMC; and
- notifications must be made in the case of significant shareholdings in non-listed companies and in the case of acquiring control over such companies.

21 What are the periodic reporting requirements for retail funds?

UCITS are obliged to make available to investors an annual and a semi-annual report with the content described in Law No. 4099/2012 (article 77), their prospectus (article 76) and a key investor information document. The prospectus shall consist of the documents specified in Schedule A of Annex I of Directive 2009/65/EC, whereas the annual and semi-annual report shall consist of all the information included in Schedule B of the said Annex (this is detailed in HCMC Decision 17/699/20.12.2012).

AIFMs must make available to investors an annual report for each fund they manage. The annual report must have the content specified in the AIFMD Implementing Law (article 23), including at least their balance sheet or statement of assets and liabilities, their income and expenditure account, an activities report and the total remuneration amount – both fixed and variable – of both ordinary staff and senior management.

AIFMs must also report to the HCMC on the principal markets and instruments in which they trade on behalf of the AIFs they manage. The information to be included in the said reporting is also specified in article 24 of Law No. 4209/2013, implementing article 24 of the AIFMD without significant changes.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

Restrictions on the issue, transfer and redemption of interests in funds are specified by the respective laws and regulations and the fund manager may not place additional restrictions.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

There are no types of fund under Greek law that are classified as non-retail because all fund types can be (and typically are) offered to both professional and retail investors.

24 What are the key laws and other sets of rules that govern non-retail funds?

See question 23.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

See question 23.

26 Who can market non-retail funds? To whom can they be marketed?

See question 23.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

See question 23.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

See question 23.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

See question 23.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

See question 23.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

See question 23.

32 What are the periodic reporting requirements for non-retail funds?

See question 23.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

This activity is described as 'portfolio management' and it is a MiFID investment activity that can be duly exercised by locally licensed investment firms or entities using their EU passport. This activity may also be exercised by UCITS fund managers and AIFMs on the condition that they hold a 'top-up' licence for this activity. This licence can be procured by application to the HCMC, on the condition that the respective fund manager already holds or has applied for a licence for its basic activity, namely, fund management.

34 What are the key legal issues to be determined when structuring a separately managed account?

The MiFID organisational and conduct of business rules apply when providing portfolio management services to clients. The level of liability of the portfolio manager can be contractually agreed between the parties in accordance with applicable law; note, however, that pursuant to the Greek Civil Code (article 332) liability owing to gross negligence or wilful misconduct cannot be contractually waived. The provisions of the Consumer Protection Law (No. 2251/1994) are also applicable when services are provided to persons qualifying as 'consumers'.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

The management of separately managed accounts is regulated as a MiFID investment service (portfolio management) in Greece. The provision of portfolio management to Greek clients must be in line with the provisions of Law No. 3606/2007 (implementing Directive 2004/39/EC) as well as HCMC Decisions 1/452/1.11.2007 and 2/452/1.11.2007.

Fund managers providing portfolio management via separately managed accounts are also subject to the aforementioned legal and regulatory provisions while exercising this activity.

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General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

No such proposals have been submitted to the Greek parliament for approval, nor are any currently under discussion.

However, upon issuance of the European Commission's delegated act referred to in article 67(6) of the AIFMD, certain changes may also occur in the provisions of Law No. 4209/2013. According to the Commission's letter addressed to the European Securities and Markets Authority (ESMA), the relevant decision is intended to be taken when a sufficient number of countries have been appropriately assessed; the first wave of countries has already been assessed by ESMA's advice, published in September 2016.

It is also possible that changes in the tax treatment of funds and unitholders will be effected in the near future.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

The listing of a UCITS on a regulated market operating in Greece (exchange traded funds) requires the appointment of a market maker and the full deposit of all assets of that UCITS to a custodian, as per the applicable UCITS IV rules. In the case of delisting, the unitholders may request the redemption of their units (sell-out right).

For the listing of an AEEX to a regulated market operating in Greece, the minimum amount of the initial public offering is €10 million. If an AEEX does not reach this subscription amount, the listing is cancelled and any amounts paid by investors for their participation therein are returned to them.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

Yes. To this purpose, the fund must obtain authorisation by the HCMC.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

There are no specific rules on this matter. There are generally no restrictions on the investment of foreign investors in Greek funds.

India

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

Fund management and marketing in India is regulated by the Indian securities market regulator, the Securities and Exchange Board of India (SEBI) and also, in the case of offshore funds, by the Reserve Bank of India (RBI). The regulations governing the various forms of fund activity and investment advisory services primarily include the following:

Regulation of onshore funds

- Alternative investment funds (AIFs): the SEBI (Alternative Investment Funds) Regulations, 2012 (the AIF Regulations);
- mutual funds: the SEBI (Mutual Fund) Regulations, 1996 (the MF Regulations);
- SEBI (Infrastructure Investment Trusts) Regulations, 2014;
- SEBI (Real Estate Investment Trust) Regulations, 2014;
- collective investment schemes: the SEBI (Collective Investment Schemes) Regulations 1999 (the CIS Regulations); and
- portfolio management: the SEBI (Portfolio Managers) Regulations 1993 (the PMS Regulations).

Regulation of offshore India focused funds

- Foreign portfolio investors: the SEBI (Foreign Portfolio Investor) Regulations, 2014 (the FPI Regulations);
- foreign venture capital investors: the SEBI (Foreign Venture Capital Investor) Regulations, 2000 (the FVCI Regulations); and
- foreign exchange management: the RBI Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000 (TISPRO).

Regulation of investment advisory and research analysis

- Investment advisory services: the SEBI (Investment Advisers) Regulations, 2013 (the IA Regulations); and
- research analysis services: the SEBI (Research Analysts) Regulations, 2014 (the RA Regulations).

2 Is fund administration regulated in your jurisdiction?

Yes, fund administration is regulated by the above-mentioned regulations in India. The AIF Regulations and MF Regulations require the funds registered thereunder to submit their books of accounts, which have to be audited annually by a qualified and independent auditor and also regulate the calculation of the net asset value, as may be applicable. Additionally, the regulations also require submission of periodic reports (quarterly and otherwise) to SEBI.

The PMS Regulations require portfolio managers to keep and maintain books of accounts, records and documents (including a copy of the auditor's report on the accounts of each accounting period). SEBI may appoint a qualified auditor to investigate into the book of accounts or the affairs of the portfolio manager under the PMS Regulations.

Pursuant to the FPI Regulations, SEBI has the power to appoint an auditor to look into the books and records of foreign portfolio investors. The FVCI Regulations also require the funds registered thereunder to maintain a book of accounts and submit periodic reports to SEBI.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

The AIF Regulations, MF Regulations, FPI Regulations and FVCI Regulations require funds to register and set out the respective registration processes for the same. The key requirements that apply to managers and operators include a minimum professional experience of five years in portfolio or investment management, meeting the 'fit and proper person' criteria, capital adequacy requirements and infrastructure requirements. These regulations largely aim to regulate the funds, as opposed to fund managers and operators.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

There are different regulatory regimes for the regulation of funds located in India and those based offshore. While the AIF Regulations do not specifically prohibit an overseas manager from performing management activities or providing services to clients in India, such a manager would be required to satisfy the adequacy requirements under the AIF Regulations. These specify that the manager should have necessary infrastructure and manpower to discharge its activities effectively. In case of a foreign manager who is managing a fund in India, SEBI may state that the manager does not have the necessary infrastructure onshore to discharge its activities effectively. The overseas manager may be required under the TISPRO, to set up an office in India for the purpose of carrying out business in India. Further, as per recent amendments in the exchange control regulations in India, if an AIF receives capital contributions from investors not resident in India and is managed or sponsored by a company or a limited liability partnership that is not Indian-owned and controlled, the investments made by such an AIF in portfolio companies in India will be regarded as 'foreign investments' and will have to comply with the extant foreign direct investment policy in India, which imposes sectoral caps and pricing restrictions on such foreign investments.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

The AIF Regulations require that if there is a change in control of the manager or sponsor of the AIF or the AIF itself, prior approval of the regulator (ie, SEBI) must be obtained. The incoming manager of an AIF must also satisfy the adequacy requirements set out in the AIF Regulations (see question 28).

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

No, there are no regulatory restrictions on the structuring of a fund manager's compensation and profit-sharing arrangement. However, SEBI requires AIFs to disclose the proposed fees to be provided by the AIF to the sponsor or manager to SEBI along with detailed tabular examples of how fees and other charges are calculated, how the distribution waterfall is structured and how certain identified 'key man' events are to be handled.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

There are no specific authorisation requirements in this regard. However, marketing of a retail fund requires the intermediary to satisfy certain criteria set out in question 15. Additionally, marketing of AIFs has to be on a private placement basis and cannot be marketed to the public. Also, the RBI mandates its prior approval for funds being marketed by Indian banks or foreign banks in India to Indian residents, either for the purposes of soliciting foreign currency deposits in foreign or overseas branches, or for acting as agents of overseas mutual funds or any other foreign financial services company.

8 What marketing activities require authorisation?

If a public placement is being considered by an investment fund, then prior authorisation from SEBI may be required. In addition, a prior approval from the RBI may be required, as explained in question 7.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

SEBI monitors the sale and placement of Indian securities only. Currently, India does not have a specific regulatory regime governing the sale of offshore funds on an unsolicited basis to Indian investors. Therefore, the sale of shares or units of an offshore fund on an unsolicited basis to a resident of India should not trigger manager-licensing issues or fund-registration issues under the laws of India. It is advisable to engage in reverse solicitation for marketing activities in India.

However, as stated in question 7, a prior approval must be sought from the RBI for offshore funds that are marketed by Indian banks or foreign banks in India to Indian residents either for the purposes of soliciting foreign currency deposits in overseas branches, or for acting as agents of overseas mutual funds or any other foreign financial services company.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

Indian or foreign banks must obtain approval from the RBI before marketing an offshore fund in India. Nevertheless, the marketing entity should always adhere to the rules of private placement as an abundant measure of caution.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

See www.gettingthedealthrough.com.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

As per the MF Regulations, only trusts can be used as legal vehicles for setting up a mutual fund. In 1964, the Unit Trust of India (a state body that used to be the sole vehicle for retail investments in Indian capital markets), launched its first open-ended equity scheme, Unit 64. This turned out to be one of the most popular mutual fund schemes in the country. In 1987, the government permitted other public sector banks and insurance companies to promote mutual fund schemes. In 1993, SEBI introduced the MF Regulations, which paved the way for the entry of private sector players in the mutual fund industry.

The entry of private sector mutual funds created competitive efficiencies in the industry and helped investors to choose from schemes with different maturity periods and different risk–return profiles. The mutual fund industry in India is highly regulated by SEBI through the MF Regulations.

In addition to domestic investors, the following are permitted to invest in mutual fund schemes under the MF Regulations:

- FPIs subject to their applicable investment limits;
- non-resident Indians; and
- long-term investors such as sovereign wealth funds, multilateral agencies, endowment funds, insurance funds, pension funds and foreign central banks registered with SEBI.

13 What are the key laws and other sets of rules that govern retail funds?

SEBI regulates mutual funds operating in India through the MF Regulations and related rules and circulars issued by it (in particular, the Master Circular on Mutual Funds). The latest Master Circular on Mutual Funds was issued on 1 October 2014.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Mutual funds operating in India must be registered with SEBI.

15 Who can market retail funds? To whom can they be marketed?

Mutual funds or mutual fund units may not be marketed or sold by an intermediary unless they have:

- passed the certification examination conducted by the Association of Mutual Funds of India (AMFI);
- obtained a certification from the National Institute of Securities Markets; and
- obtained an employee unique identification number from the AMFI and an AMFI registration number.

Intermediaries can include distributors, agents, brokers and sub-brokers. An intermediary can be an individual or a business entity.

If an intermediary is also a broker or sub-broker, registration must be obtained under the SEBI (Stock Broker and Sub-Broker) Regulations, 1992. An intermediary that is not a broker or sub-broker and has obtained an AMFI certificate does not require any additional registration with SEBI to sell or market mutual fund units.

16 Are there any special requirements that apply to managers or operators of retail funds?

The MF Regulations prescribe certain criteria for the appointment of an asset management company (AMC) to manage mutual funds registered thereunder. The MF Regulations require that the AMC be registered with SEBI under the MF Regulations. Additionally, the Regulations impose adequacy requirements regarding, among others, professional experience and net worth for applicants to obtain registration as AMCs before AMCs are eligible to manage mutual funds.

Separately, the TISPRO sets out capitalisation requirements if the AMC has foreign investment. The capitalisation requirements differ, depending upon the percentage of foreign investment in the AMC, as follows:

- up to 51 per cent foreign investment: US$500,000, to be brought upfront;
- between 51 and 75 per cent foreign investment: US$5 million, to be brought upfront; and
- above 75 per cent foreign investment: US$50 million, of which US$7.5 million must be brought upfront and the balance brought within 24 months.

17 What are the investment and borrowing restrictions on retail funds?

Mutual funds can invest in securities, money market instruments, private placed debentures, securitised debt instruments (either asset-backed or mortgage-backed securities), gold or gold-related instruments, real estate assets, infrastructure debt instrument and assets as set out in the MF Regulations.

Mutual funds cannot borrow, except to meet temporary liquidity demands for the purpose of repurchase or redemption of units, or payment of interest or dividends to unitholders. The amount of any such borrowing shall not exceed 20 per cent of the net assets of the scheme and the duration of the borrowing shall not exceed six months. However, under an exception to the general borrowing restrictions, a mutual fund can lend and borrow securities under the specific framework prescribed by SEBI.

18 What is the tax treatment of retail funds? Are exemptions available?

A mutual fund is exempt from income tax at the fund level on income and gains arising to the fund from its investments. Dividends distributed by a mutual fund (other than an equity-oriented fund) to its unitholders are taxed depending on the type of mutual fund.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

A mutual fund must place and maintain its assets with a custodian registered with SEBI. The custodians are governed by the SEBI (Custodian of Securities) Regulations, 1996.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

Mutual funds must provide investors with the following documents:
- the offering document;
- a statement of accounts, to be delivered within 30 days of the closure of a new fund offering; and
- annual and semi-annual reports.

In addition to the above, mutual funds are also subject to other ongoing disclosure requirements, which must be made via their websites, including disclosure of the following:
- the portfolio (along with its international securities identification number) as at the last day of the month for all their schemes. This must be displayed on a fund's website on or before the tenth day of the succeeding month;
- any large holdings, which should be disclosed in the half-yearly and annual results;
- the total commission and expenses paid to distributors satisfying certain conditions;
- an annual report containing accounts of the asset manager to the retail fund;
- the curricula vitae of key personnel; and
- details of investor complaints received by the fund from all sources and vetted by trustees of the fund.

21 What are the periodic reporting requirements for retail funds?

Mutual funds must file the following reports with SEBI:
- audited annual financial statements, including the balance sheet and profit and loss account;
- unaudited accounts, on a six-monthly basis;
- quarterly statements of movements in the net assets of the scheme; and
- quarterly portfolio statements, including changes from the previous period, for each scheme.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

Transfer of investments from one scheme to another scheme in the same mutual fund shall be allowed only if:
- such transfers are done at the prevailing market price for quoted instruments on spot basis. 'Spot basis' shall have the same meaning as specified by the stock exchange for spot transactions; and
- the securities so transferred shall be in conformity with the investment objective of the scheme to which such transfer has been made.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

An AIF in India can be set up in the form of a trust, a company or a limited liability partnership (LLP). Almost all AIFs in India are formed as trusts because the regulatory framework governing trust structures in India is stable and allows the management to write its own standard of governance.

24 What are the key laws and other sets of rules that govern non-retail funds?

In addition to the AIF Regulations, SEBI has also introduced a real estate investment trusts (REITs) regime as well as an infrastructure investment trust regime (InvITs). The SEBI (REITs) Regulations, 2014 and SEBI (InvITs) Regulations, 2014 were notified on 26 September 2014 and have been in force since October 2014.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

The pooling of non-retail funds is a regulated activity in India and an AIF must be registered with SEBI under the AIF Regulations before beginning its activities as an AIF.

However, the AIF Regulations prescribe a minimum investment amount of 10 million rupees, for all prospective investors of an AIF other than an 'angel fund' (a 2.5 million rupee minimum is available for the fund's employees, directors or manager). The minimum investment amount for an angel fund is 2.5 million rupees for the first three years and also a minimum sponsor commitment of 50 million rupees or 2.5 per cent of the corpus of the AIF, whichever is lower.

26 Who can market non-retail funds? To whom can they be marketed?

AIFs can only be marketed by private placement; however, there is no specific restriction on the class of investor to whom AIFs can be marketed under Indian securities laws. Nevertheless, if a person triggers the 'investment adviser' provisions in the IA Regulations, they must register with SEBI in accordance with the relevant provisions. The managers of an AIF are exempt from registration requirements under the IA Regulations.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

There are no specific restrictions. However, the minimum investment requirement in a hedge fund is 10 million rupees (a 2.5 million rupee minimum is provided to employees or directors of the fund).

28 Are there any special requirements that apply to managers or operators of non-retail funds?

Through the AIF Regulations, SEBI imposes adequacy requirements for the continuing involvement of the sponsor or manager in the AIF through requirements covering sponsor commitment, infrastructure, manpower and experience of AIF managers.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

The Indian Finance Minister, Arun Jaitley, announced the 2015 Union Budget Bill on 28 February 2015. In response to a long-standing demand of the investment funds industry in India, the Finance Minister has sought to extend pass-through status to AIFs that are registered as Category I AIFs or Category II AIFs (together, 'investment funds'). Before the Finance Minister's announcement, pass-through status was only available to Category I AIFs under the venture capital fund (VCF) subcategory and VCFs that were registered under the erstwhile SEBI (Venture Capital Funds) Regulations, 1996.

The Bill provides that any income accruing or arising to, or received by, a unitholder of an investment fund out of investments made in the investment fund shall be liable for income tax in the same manner as if the investments had been made directly by the unitholder. In other words, the income of a unitholder in an investment fund will take the character of the income that accrues or arises to, or is received by, the investment fund.

The Bill also proposes to exempt the income of an investment fund other than income chargeable under the title 'Profits and gains of business or profession'. The memorandum to the Bill also announced that income received by investment funds would be exempted from the collection of tax at source by portfolio companies.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The sponsor or manager of an AIF under the AIF Regulations is required to appoint a custodian registered with SEBI for safekeeping of its securities if the AIF is a Category III AIF or if the corpus of the AIF is more than 5 billion rupees.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

To register with SEBI as an AIF, pursuant to the AIF Regulations, a fund must fill in Form-A. Schedule II of the AIF Regulations provides for the amount to be paid as fees for registration as an AIF under the relevant category. The AIF Regulations also provide for submission of periodic reports concerning the activities and returns of the AIF to SEBI and the investors. As specified above, the AIF Regulations provide for the following:

- minimum experience of key personnel of the manager;
- requirement of the manager or sponsor to have a continuing interest in the AIF;
- imposition of certain restrictions on co-investment by the manager in portfolio companies of the AIF;
- requirement of the manager or sponsor to act in a fiduciary capacity towards its investors and disclose any conflicts;
- requirement for all investor complaints to be addressed;
- maintenance of records; and
- ensuring transparency.

The manager of an AIF is also required to establish and implement written policies to identify, monitor and appropriately mitigate conflicts of interest.

32 What are the periodic reporting requirements for non-retail funds?

The periodic reporting requirements for non-retail funds are as follows:

- AIFs are required to provide reports to investors at least on an annual basis, within 180 days of the year end, containing financial information of the portfolio companies, material risks and their management, etc;
- the management fees or fees for the sponsor and any fees charged to the AIF or any portfolio company by an associate of the manager or sponsor have to be periodically disclosed to investors;
- Category III AIFs are specifically required to provide quarterly reports to investors within 60 days of the end of each quarter, containing financial information of the portfolio companies, material risks and their management, among other things;
- any significant change in control of the manager, sponsor or any portfolio company has to be announced to investors;
- any breach of a provision of the private placement memorandum or agreement made with any investor or any other fund documents, as and when such breach occurs, must be announced to investors;
- any operational, portfolio and transaction information regarding the investments of the AIF must be periodically notified to investors; and
- any material liability, legal proceedings, inquiries and actions by legal or regulatory bodies, as and when they may arise, must be notified to the AIF.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

The PMS Regulations regulate separately managed accounts in India. Under the PMS Regulations, the portfolio manager advises, directs or undertakes on behalf of its client the management or administration of a portfolio of securities or the funds of the client pursuant to a contract or arrangement with the client and the underlying assets are held by the clients directly. Portfolio management services under the PMS Regulations can be discretionary (where the portfolio manager has the discretion to make investments) and non-discretionary (where the discretion lies with the clients). FPIs registered under the FPI Regulations may also avail themselves of the services of a portfolio manager.

Separately managed accounts can also be an unregulated activity in India if the manager is not undertaking such activities under the PMS Regulations. An alternative is to enter into an investment advisory agreement with the clients to separately manage their accounts. However, this approach may potentially trigger the recently notified IA Regulations, wherein an investment adviser is required to register under said Regulations for providing investment advisory services to clients.

34 What are the key legal issues to be determined when structuring a separately managed account?

The key legal issues pertaining to a separately managed account may include the following:

- if the separately managed accounts are not covered under the PMS Regulations then, as indicated in question 33, an investment advisory agreement could trigger the IA Regulations;
- while structuring separately managed accounts of foreign investors, it is important to consider the treaty benefits that can be availed from the double taxation avoidance treaty between India and the jurisdiction where such foreign investors are resident; and
- if the clients whose accounts are being managed are foreign investors, and the manager is in India, then there is a tax risk involved concerning permanent establishment. The tax authorities may claim that the presence of the manager in India for foreign investors is a permanent establishment of such investors in India. In this case, the treaty benefits will not be applicable to the foreign investors and their gains from such separately managed accounts may be taxed as business profits arising in India.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

The management of separately managed accounts is regulated by SEBI through the PMS Regulations. A portfolio manager looking to manage separately managed accounts falling under the PMS Regulations is required to seek registration under the Regulations. This regime is separate from the AIF regime and the MF regime, the management for which is regulated separately.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

In January 2015, SEBI proposed to remove certain restrictions to allow Indian asset management companies registered under the MF Regulations (AMCs) based in India to be able to manage FPIs registered as either Category I FPIs or Category II FPIs under the FPI Regulations.

In the 2015 Union Budget, the Finance Minister proposed amendments to encourage fund management activities in India. Under the proposal, an offshore fund having an eligible manager in India should not create a tax presence (business connection) for the fund in India unless certain objective defined parameters have been met.

Under current Indian treaties and domestic law, the presence of a fund manager in India increases the risk of the offshore fund constituting a permanent establishment (PE) or tax presence in India and thereby being subject to tax in India, to the extent attributable to the PE. Today, India-focused offshore funds deal with this risk by engaging managers outside the country, or engaging Indian residents on an advisory basis.

The Finance Minister, in his budget speech, also announced that foreign investment will be allowed in AIFs.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

Retail funds

Under the MF Regulations, all closed-ended funds (other than an equity-linked savings scheme) must be listed on a recognised stock exchange. Therefore, the secondary market provides an exit route for closed-ended funds. In an open-ended mutual fund, investors can enter and exit the open-ended mutual fund at any point in time, at a price linked to the net asset value of the fund.

Non-retail funds

Closed-ended AIFs can be listed on stock exchanges after final close of the AIF or its scheme with a minimum tradeable amount of 10 million rupees. However, the AIF Regulations prohibit 'angel funds' from listing on any recognised stock exchange and no AIF has been listed on a stock exchange so far.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

Current Indian laws do not provide for redomiciling an overseas vehicle in India.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

For foreign investors investing in funds established or managed in India, the exchange control regulations in India currently do not contemplate or provide for investment in funds registered under the new AIF Regulations. In practice, however, we have seen that foreign investors have been permitted to invest in Category I and II AIFs, after obtaining prior regulatory approvals and subject to certain conditions and restrictions. Foreign venture capital funds registered under the FVCI Regulations are permitted to invest into VCFs that were registered with SEBI under the erstwhile SEBI (Venture Capital Funds) Regulations, 1996.

In the 2015 Union Budget, the Finance Minister announced that foreign investment will be allowed in AIFs in the future (see question 36). Although this is a positive development, one has to wait and see how this measure will be implemented.

For Indian investors investing in foreign funds established or managed abroad, the liberalised remittance scheme (LRS) allows Indian-resident individuals to undertake permissible capital and current account transactions. At present, the limit for overseas investments by resident individuals under the LRS is US$250,000 per person.

Companies incorporated in India or bodies created under any act of Parliament or a partnership firm registered under the Indian Partnership Act, 1932 or an LLP incorporated under the Indian Limited Liability Partnership Act, 2008 (body corporate), are allowed to make overseas direct investment under either the automatic route or the approval route by way of contribution to the capital or subscription to the memorandum of a foreign entity. The current overseas direct investment limit for a body corporate under the automatic route is 400 per cent of its net worth as per the body corporate's last audited balance sheet.

* *The content of this chapter is accurate as of April 2016.*

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

The Central Bank of Ireland (the Central Bank) is responsible for the regulation of fund management and marketing in Ireland pursuant to EU and domestic legislation and guidance issued and conditions imposed by the Central Bank itself. The Central Bank has responsibility for the authorisation and ongoing supervision of all types of funds domiciled in Ireland (ie, both Undertakings for Collective Investment in Transferable Securities (UCITS) and alternative investment funds (AIFs)) and for Irish-domiciled UCITS management companies, investment managers and alternative investment fund managers (AIFMs).

2 Is fund administration regulated in your jurisdiction?

Yes, the Central Bank is responsible for the authorisation, regulation and supervision of administrators in Ireland under the domestic Investment Intermediaries Act 1995 regime. Fund administration activities include the calculation of the net asset value (NAV), preparation of periodic reports, calculation and payment of distributions, payment of expenses and maintenance of a fund's financial books and records. It is possible for the administrator to delegate certain elements of the administration process outside of the jurisdiction.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

As noted above, the Central Bank is responsible for authorisation of both UCITS and AIFs. The documentation, process and timelines for approval differ depending on the fund structure and regulatory status. However, the following documentation would be required, at a minimum, in support of an application for approval for all types of funds:

- prospectus or offering document;
- constitutional document;
- depositary agreement;
- administration agreement;
- management agreement; and
- investment management agreement or AIFM agreement (as appropriate).

For UCITS and retail investor alternative investor funds (RIAIFs), the documents are required to be submitted to the Central Bank for prior review and comment. However, qualifying investor alternative investment funds (QIAIFs) can avail of a fast-track procedure under which the fund documents are simply filed the day before approval is required.

Irish-domiciled UCITS management companies, investment managers and AIFMs are also required to be authorised by, and are supervised by, the Central Bank. Such entities are subject to organisational, conduct of business, capital adequacy and corporate governance requirements as well as having other obligations in areas such as risk and liquidity management, record keeping, financial control and conflicts of interest. As part of the authorisation process, a business plan or programme of activity satisfying these requirements must be submitted to the Central Bank for consideration.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

UCITS management companies, EU AIFMs and investment managers authorised under the Markets in Financial Instruments Directive (MiFID) may passport their services into Ireland and will not be subject to an additional regulatory review process by the Central Bank.

Non-EU discretionary investment managers that are not one of the entities listed above may only be appointed where a memorandum of understanding is in place between the Central Bank and the competent authority in the home jurisdiction of the investment manager, and where the Central Bank has approved the investment manager following receipt of a completed investment manager clearance form.

Where the firm is regulated in a jurisdiction not previously considered by the Central Bank, it should be demonstrated, by way of a formal submission, that the regulatory regime for asset management in the relevant jurisdiction is comparable to the model of prudential regulation applicable to firms included in the above categories. The Central Bank has accepted the following jurisdictions as having a comparable regulatory regime: Australia, the Bahamas, Bermuda, Brazil, Canada, Dubai, Guernsey, Hong Kong, India, Japan, Jersey, Singapore, South Africa, Switzerland and the United States.

The Central Bank does not apply an approval process to non-discretionary investment advisers to Irish funds, provided that the manager or directors of the fund confirm that the adviser in question will act in an advisory capacity only and will have no discretionary powers over any of the assets of the fund.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

Changes to qualifying holdings in UCITS management companies, MiFID firms and AIFMs are subject to the approval of the Central Bank. Approval is sought by completing and submitting an Acquiring Transaction Notification Form, which is used to provide prior notification to the Central Bank of a proposed acquisition or disposal of, or increase or decrease in, a direct or indirect qualifying holding (within certain thresholds). The Central Bank review process must be carried out within prescribed timelines. It is important in this regard to note that acquiring transactions and increases in qualifying shareholdings, if completed without prior notification to, or assessment by, the Central Bank will not have legal validity in Ireland. Irish UCITS and AIFMs are also obliged to advise the Central Bank of their ownership structure on an annual basis.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

Yes, the key regulatory guidance in respect of remuneration is contained in the European Securities and Markets Authority (ESMA) final report on Guidelines on Sound Remuneration Policies under Directive 2009/65/EC, as amended (the UCITS Directive) and the Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD) (the Guidelines). The Guidelines are intended to provide clarity on the requirements for managers when establishing and applying a

remuneration policy for its key staff and applies to managers of UCITS and AIFs. At a minimum, managers must put in place remuneration policies and practices as follows:
- that are consistent with, and promote sound and effective, risk management;
- that do not encourage risk-taking that is inconsistent with the risk profile or fund rules governing the relevant fund; and
- that do not impair compliance with the manager's duty to act in the best interest of the fund.

In addition to these general principles, there are specific requirements that deal with the following:
- governance of remuneration;
- pay structure and risk alignment;
- the establishment of a remuneration committee in the case of 'significant' management companies; and
- disclosure of remuneration-related information to investors.

The remuneration rules were introduced as a reaction to the global financial crises and in an attempt to temper inappropriate risk-taking on the part of those who may materially impact the risk profile of a management company or the fund under management. Certain MiFID firms are subject to even more stringent remuneration rules.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

Yes, the marketing of investment funds in Ireland (UCITS and AIFs) requires certain authorisations and approvals to be granted by relevant regulatory authorities before such investment funds can be marketed. See question 8.

8 What marketing activities require authorisation?

UCITS

Under the framework described in question 7, UCITS established and authorised in one EU member state can be sold across the border into other EU member states without the requirement for additional authorisation. The 'European passport' is central to the UCITS product as it enables fund promoters to create a single product for the entire EU rather than having to establish an investment fund product on a jurisdiction-specific basis. Therefore, on the completion of the appropriate notification procedure, a UCITS established in one member state can be sold in any other member state. If the notification is complete, the home state regulator must transmit the file to the host regulator within 10 working days, after which time the UCITS may commence marketing.

RIAIFs and QIAIFs

Regulation 44 of the EU (Alternative Investment Fund Managers) Regulations 2013 (the Irish AIFMD Regulations) permits the marketing of AIFs to retail investors in Ireland. An Irish RIAIF authorised and regulated by the Central Bank may be marketed to Irish retail investors by the relevant AIFM of the RIAIF. An AIF situated in another jurisdiction that proposes to market its shares or units to retail investors in Ireland must make application to the Central Bank in writing and such an application is required to include certain prescribed documentation and disclosures. The relevant AIF that proposes to market its shares or units to retail investors in Ireland must be authorised by a supervisory authority set up in order to ensure the protection of shareholders and unitholders and which, in the opinion of the Central Bank, provides an equivalent level of investor protection to that provided under Irish laws, regulations and conditions governing RIAIFs.

The following AIFs will receive approval to market their units to retail investors in Ireland on completion of the information and documentation requirements of the Central Bank:
- those established in Guernsey and authorised as Class A schemes;
- those established in Jersey and authorised as recognised funds; and
- those established in the Isle of Man as authorised schemes.

Other AIFs must demonstrate that the AIF arrangements are such that they provide an equivalent level of investor protection to that provided under Irish laws, regulations and conditions governing RIAIFs. Marketing of shares or units or other interests to retail investors in Ireland may not take place until the relevant AIF has received a letter of approval from the Central Bank and the AIF marketing its units in Ireland must comply with the law, regulations and administrative provisions in force in Ireland.

The marketing of EU AIFs (including Irish QIAIFs) by an Irish AIFM to professional investors in Ireland is required to be notified to the Central Bank in accordance with Regulation 32 of the Irish AIFMD Regulations. Where the AIF is regulated by the competent authorities of another EU member state, the Central Bank is required to inform those competent authorities that the Irish AIFM may start marketing units or shares of the EU AIF in Ireland.

When an AIFM from another EU member state proposes to market shares or units of an EU AIF to professional investors in Ireland it must comply with the requirements set out by the respective national competent authority.

Irish AIFMs or AIFMs from other EU member states proposing to market non-EU AIFs to professional investors in Ireland must apply to the Central Bank for approval in accordance with the requirements of Regulation 37 of the Irish AIFMD Regulations.

A Non-EU AIFM proposing to market an AIF to professional investors in Ireland must apply to the Central Bank for approval in accordance with Regulation 43 of the Irish AIFMD Regulations and the marketing can only commence once the Central Bank has informed the relevant non-EU AIFM that it can start marketing. The relevant AIFM is required to comply with basic depositary and custody requirements under AIFMD (such as the safekeeping of assets and the supervision of administrative functions). In addition, there must be a cooperation arrangement for the purpose of systemic risk oversight in place between the authorities of each EU member state where the non-EU AIF is marketed and those in the third countries where the AIFM and the AIF are established and finally, the non-EU country where the AIF is established must not be listed as a non-cooperative country and territory by the Financial Action Task Force on anti-money laundering and terrorist financing.

The marketing of units in collective investment schemes (CIS) in Ireland, other than in accordance with the requirements of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011, SI No. 352/2011 (UCITS Regulations) and the Irish AIFMD Regulations, must only be undertaken by entities authorised to provide such marketing services. The regulation of the receipt and transmission of orders in relation to, and the placing of financial instruments (including shares and units in CIS) by, Irish entities is regulated by the European Markets in Financial Instruments and Regulations 2007 (the MiFID Regulations), the Investment Intermediaries Act 1995 and consumer protection legislation.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

See question 8.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

Although a UCITS manager from another EU member state could market the shares of, for example, a Luxembourg UCITS in Ireland on a freedom of shares basis, or an EU AIFM could market an EU AIF to professional investors in Ireland likewise, most non-institutional investors domiciled in Ireland will buy through an intermediary (ie, a wealth manger, stockbroker or via a wrapper).

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

The form of remuneration paid to intermediaries, whether commission or fixed fees, is driven by the authorisation of the entity making the payment and its duty to ensure investors are aware of the forms of remuneration it is paying to others to distribute or market the fund product.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

There are several different legal vehicles that can be used to set up retail funds (ie, UCITS and RIAIFs). QIAIFs (which are dealt with separately below) can also be formed using these legal vehicles.

The principal legal structures of UCITS, RIAIFs and QIAIFs are as follows:

Unit trusts

Unit trusts (formed under the UCITS Regulations or under the Unit Trusts Act 1990, or both) are contractual arrangements created under a trust deed made between a management company and a depositary. Unit trusts do not have their own legal personality and contracts are entered into by the management company and, in certain cases, by the trustee. A unit represents an undivided beneficial interest in the assets of the unit trust.

Investment companies

Investment companies (formed under Part 24 of the Companies Act 2014) are public limited liability companies incorporated with variable capital (ie, the actual value of the paid-up share capital is equal at all times to the value of the NAV of the company). Shares issued do not represent a legal or beneficial interest in the company's assets.

Investment limited partnerships (ILPs)

ILPs (formed under the Investment Limited Partnerships Act 1994) are partnerships between one or more general partners and one or more limited partners, constituted by written agreements between the parties known as partnership agreements. A general partner is personally liable for the debts and obligations of the partnership and a limited partner contributes or undertakes to contribute a stated amount to the capital of the partnership.

Common contractual funds (CCFs)

CCFs (formed under the UCITS Regulations or the Investment Funds, Companies and Miscellaneous Provisions Act 2005) are funds constituted under contract law by means of a deed of constitution executed under seal by a management company. The CCF is an unincorporated body and does not have a legal personality, and therefore may act only through the management company. Participants in the CCF hold their participation as co-owners and each participant holds an undivided co-ownership interest as a 'tenant in common' with other participants.

Irish collective asset-management vehicles (ICAVs)

ICAVs (formed) under the Irish Collective Asset-management Vehicles Act 2015 are corporate bodies with limited liability where the actual value of the paid-up share capital is at all times equal to the NAV of the ICAV and the share capital is divided into a specified number of shares without assigning any nominal value to them. The assets of the ICAV belong exclusively to the ICAV and no shareholder has any interest in these assets.

Each of these fund vehicles (with the exception of ILPs) may be established as either standalone entities or as an umbrella fund with separate sub-funds. ILPs are not currently capable of being established as umbrella funds.

It is also possible to have unauthorised AIFs (ie, AIFs that are not authorised by the Central Bank under Irish funds legislation), the principal legal structures of which include real estate investment trusts, exempt unit trusts and limited partnerships established under the Limited Partnerships Act 1907.

13 What are the key laws and other sets of rules that govern retail funds?

In addition to the legislation outlined in question 12, there is a significant amount of legislation at both European and domestic level applicable to retail funds that will vary depending on the fund structure and status. ESMA and the Central Bank have also issued guidance applicable to retail funds.

In summary, for UCITS, the key laws and regulations include the following:

- the UCITS Directive;
- the UCITS Regulations; and
- the Central Bank (Supervision and Enforcement) Act 2013 (section 48(1)) (Undertakings for Collective Investment in Transferable Securities) Regulations 2015, SI No. 420 of 2015 as amended (Central Bank UCITS Regulations).

For RIAIFs, the key laws and regulations include the following:

- AIFMD;
- the Irish AIFMD Regulations;
- Commission Delegated Regulation (EU) No. 231/2013 supplementing the AIFM Directive with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision;
- the Prospectus (Directive 2003/71/EC) Regulations 2005 (for certain categories of closed-ended funds); and
- the Central Bank AIF Rulebook.

In addition, Commission delegated and implementing regulations have been adopted by the European Commission in specific areas in order to ensure that the UCITS Directive and AIFMD are implemented consistently across the EU.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Yes, retail funds domiciled in Ireland must be authorised by the Central Bank. Once authorised, these retail funds may market to Irish investors by virtue of their authorisation.

15 Who can market retail funds? To whom can they be marketed?

The marketing and distribution of retail funds can be carried out by the fund or the management company (UCITS or AIFM) or delegated to the investment manager, distributor or any other entity authorised to carry out such function, such as regulated intermediaries. There are no minimum subscription or investor qualification requirements, imposed by regulations, for retail funds and they may be marketed to any investors who fulfil the criteria set out in the offering document.

16 Are there any special requirements that apply to managers or operators of retail funds?

Managers of retail funds are subject to the regulatory requirements that derive from European legislation as transposed in Ireland (UCITS Directive and AIFMD). In addition, managers are subject to the applicable Central Bank rules and regulations. See question 3.

17 What are the investment and borrowing restrictions on retail funds?

UCITS

In order to seek to ensure investor protection, UCITS are subject to specific investment restrictions, relating both to the type of investment that may be made and the extent of such investment.

Permitted asset classes

In summary, UCITS are permitted to invest in the following:

- transferable securities and money market instruments that are either admitted to official listing on a stock exchange in an EU member state or non-EU member state or that are dealt on a market that is regulated, operating regularly, recognised and open to the public;
- recently issued transferable securities that will be admitted to official listing on a stock exchange or other market (as described above) within a year;
- money market instruments, other than those dealt in on a regulated market provided that the issue or the issuer is itself regulated for the purpose of protecting investors and savings;
- units of UCITS;
- units of non-UCITS CIS (in certain cases);
- deposits with credit institutions;
- financial derivative instruments that meet certain criteria; and
- transferable securities and money market instruments other than those referred to above (subject to a maximum aggregate limit of the NAV).

Investment and borrowing restrictions

The UCITS investment and borrowing restrictions are set out in the UCITS Directive, UCITS Regulations and Central Bank UCITS Regulations. However, in summary, the following should be noted:

- UCITS are required to provide high levels of portfolio diversification and liquidity;
- no more than 10 per cent of UCITS' net assets may be invested in transferable securities or money market instruments issued by the same body, with a further aggregate limitation of 40 per cent of net assets on exposures of greater than 5 per cent to single issuers (otherwise known as the '5/10/40' rule);
- there are exceptions to the above for investments issued or guaranteed by governments, local authorities or certain public international or supranational bodies;
- certain index replicators can take exposures of up to 20 per cent of net assets to single issuers, with up to 35 per cent to a single issuer in exceptional market conditions;
- up to 100 per cent of net assets can be invested in other CIS, provided no more than 20 per cent is invested in any one CIS, with an aggregate restriction of 30 per cent of net assets applying to investment in non-UCITS CIS as well as strict rules applying to the nature of the CIS in which a UCITS can invest, as well as limiting investment to a maximum of 25 per cent of the units of the underlying CIS;
- master-feeder structures are permitted under which a UCITS may invest by way of derogation from the above limits at least 85 per cent of its assets in the units of another UCITS;
- no more than 20 per cent of net assets can be invested in cash deposits with any one credit institution as permitted by the Central Bank and up to 10 per cent of net assets may be held for ancillary liquidity purposes with other credit institutions (which 10 per cent limit is raised to 20 per cent in the case of deposits made with the custodian or trustee);
- investments in or through derivatives may be made or taken to assets into which a UCITS can invest directly including financial instruments having one or several characteristics of those assets, and to financial indices, interest rates, foreign exchange rates and currencies (the maximum exposure to a single over-the-counter derivative counterparty is 5 per cent, increasing to 10 per cent for certain credit institutions) – various aggregations of the above restrictions apply;
- the maximum aggregate exposure to securities and instruments (other than CIS, derivatives and cash) not listed or traded on a recognised market is 10 per cent of net assets;
- additional general provisions apply including concentration limits, prohibitions on taking legal or management control of issuers or prohibitions on uncovered sales; and
- borrowings are limited to 10 per cent of net assets and can only be used for temporary purposes (for liquidity).

Efficient portfolio management techniques and instruments

UCITS are also permitted to use techniques and instruments relating to transferable securities and money market instruments for efficient portfolio management (EPM) purposes, which is taken to mean that they are economically appropriate and are entered into with the aim of reducing risk, reducing cost or generating additional capital or income (with a level of risk consistent with the UCITS risk profile).

Derivatives used for EPM purposes must comply with normal rules for investment in financial derivative instruments.

Repos or reverse repos and stocklending are expressly permitted with strict rules regarding collateral including acceptable forms of collateral, levels provided, diversification of collateral, valuation of collateral and how and where it is held and maintained.

RIAIFs

RIAIFs are subject to investment and eligible asset restrictions that are less restrictive than for UCITS funds but are far more restrictive than under the QIAIF regulatory regime. In particular, RIAIFs are subject to the following key investment and borrowing restrictions:

- investment in unlisted securities may be up to 20 per cent of the NAV of the RIAIF;
- investment in securities issued by the same institution may be up to 20 per cent of NAV;
- index-tracking RIAIFs are subject to a limit of 35 per cent of the NAV of investments in securities by the same institution;
- no more than 20 per cent of NAV may be invested in any class of security issued by a single issuer (does not apply to investment in other open-ended funds);
- investment of more than 20 per cent and up to 100 per cent of the NAV of the relevant RIAIF in government-backed securities requires the prior approval of the Central Bank;
- no more than 10 per cent of NAV may be held in deposits with any one institution (this limit may be raised to 30 per cent for EEA institutions or certain other credit institutions or the depositary of the RIAIF);
- up to 30 per cent of NAV may be invested in any one open-ended regulated fund (this rule may be disapplied for certain categories of regulated funds under the AIF Rulebook);
- RIAIFs investing over 30 per cent of NAV in other investment funds must ensure that the investment funds in which they invest are prohibited from investing more than 30 per cent of their NAV in other investment funds; and
- no more than 20 per cent of NAV may be invested in unregulated, open-ended funds (this limit may be disapplied subject to further conditions in accordance with the requirements of the AIF Rulebook).

In addition, a RIAIF may borrow up to 25 per cent of its NAV but it is not permitted to offset credit balances against borrowings when determining the percentage of borrowings that remains outstanding. Repurchase or reverse repurchase contracts, securities borrowing or securities lending do not constitute borrowing for the purposes of the 25 per cent limit.

Unlike UCITS funds, RIAIFs are permitted to invest in certain types of alternative assets such as real estate and hedge funds.

18 What is the tax treatment of retail funds? Are exemptions available?

Irish retail funds are not subject to any Irish taxes on the income (profits) or gains arising on their underlying investments.

While dividends, interest and capital gains that the fund receives with respect to its investments may be subject to taxes, including withholding taxes, in the countries in which the issuers of investments are located, these foreign withholding taxes may, nevertheless, be reduced or eliminated under Ireland's network of tax treaties to the extent applicable.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

Yes, a retail fund must appoint a depositary located in Ireland. The depositary is responsible for the safekeeping of assets, cash monitoring and oversight duties. A depositary must be one of the following:

- a credit institution;
- an investment firm subject to EU capital adequacy requirements and authorised under MiFID; or
- another category of institution subject to prudential regulation and ongoing supervision.

Under AIFMD and the UCITS Directive, the depositary has restitution liability throughout the custody network for financial instruments lost while in custody and has or will have more prescriptive duties relating to daily monitoring of all cash flows, reconciliations and verifications, due diligence and risk assessments, segregation arrangements and sub-custody oversight.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

Retail funds are – whether UCITS or RIAIF – broadly subject to the same governance requirements. The formalities of registration and incorporation are discussed in question 12. Each of the legal structures available in Ireland is required to have detailed and accurate records kept in order to be able meet their relevant statutory and regulatory obligations. Irish UCITS funds must comply with the record-keeping requirements set out in the UCITS Regulations and Irish AIFs and Irish AIFMs must comply with the provisions of the AIF Rulebook.

Irish retail funds are required to have independent fund administrators appointed who are authorised and supervised by the Central Bank. In addition, UCITS funds and RIAIFs are required to have depositaries appointed for the purposes of holding the assets of the UCITS or RIAIF in custody in accordance with the requirements of the UCITS Regulations and the Irish AIFMD Regulations. A depositary of a RIAIF or QIAIF must enquire into the conduct of Irish corporate UCITS and RIAIFs or the management companies or general partners of non-corporate UCITS and RIAIFs in each annual accounting period and report thereon to the investors via a depositary report included in the annual report of the UCITS or the RIAIF.

Throughout the life of the relevant retail fund, there will be ongoing filing obligations to be made with the Central Bank and other relevant statutory authorities (ie, Companies Registration Office and the Irish Revenue Commissioners (tax authority)).

In addition to complying with regulatory obligations imposed by the UCITS Regulations or the Irish AIFMD Regulations, or both, management companies to UCITS funds, AIFs, self-managed UCITS funds and internally managed AIFs in Ireland are also required to comply with and adhere to the requirements of the Central Bank's 'Fund Management Company – Guidance' published in December 2016 (the Guidance). The Guidance details the Central Bank's requirements with respect to the following matters:

- delegate oversight;
- organisational effectiveness;
- directors' time commitments;
- managerial functions;
- operational issues; and
- procedural matters.

All Irish UCITS and RIAIFs that are structured as corporate entities (ie, ICAVs and PLCs) are required to have a minimum of two Irish-resident directors and an Irish company secretary. The directors of an Irish corporate UCITS or RIAIF or the management companies or general partners of non-corporate UCITS and RIAIFs are required to comply with the Central Bank's Fitness and Probity Standards issued under section 50 of the Central Bank Reform Act 2010 and must be pre-approved by the Central Bank.

Applications to become a director of a UCITS or RIAIF or a management company or general partner of non-corporate UCITS and RIAIFs must be made to the Central Bank via an online individual questionnaire (IQ). The IQ application requires applicant directors to provide detailed information on their educational and professional experience and expertise together with, inter alia, details of the proposed time commitment (in days) that they will provide per year in respect of that directorship. In addition, the appointing entity, in validating the IQ, is required to confirm its expectation regarding the proposed director's time commitment per year.

Finally, corporate UCITS and RIAIFs or the management companies or general partners of non-corporate UCITS and RIAIFs are recommended to adhere to a voluntary corporate governance code for funds put in place by the Irish Funds Industry Association at the request of the Central Bank.

21 What are the periodic reporting requirements for retail funds?

Retail funds are required to publish an annual audited report for each financial year and an unaudited semi-annual or half-yearly report. The annual report must be published within four months of the year end, the semi-annual report must be published within two months of the period end and both must be sent to the Central Bank. Both must also be offered free of charge to investors before the conclusion of a contract and supplied free of charge to investors upon request.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

For retail funds, there is a general entitlement to refuse an application for shares or units at the discretion of the board of directors or the fund or the relevant management company. In addition, shares or units may not be issued to the following persons:

- those located in jurisdictions where the fund cannot be sold or marketed;
- those who do not provide anti-money laundering or counter-terrorist financing documentation; or
- those that would cause negative legal, tax or regulatory consequences for the fund or other investors.

For UCITS funds, there are no redemption restrictions other than gating the fund in certain prescribed circumstances or suspending it in more extreme cases.

A closed-ended RIAIF does not facilitate redemptions requests during the life of the RIAIF. Fund documentation may also provide for temporary suspension in specified circumstances. The Central Bank must be notified immediately of any such suspension.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

See question 12.

24 What are the key laws and other sets of rules that govern non-retail funds?

See 'RIAIFs' in question 13.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

See question 14.

26 Who can market non-retail funds? To whom can they be marketed?

The marketing and distribution of non-retail funds can be carried out by the fund or the AIFM or delegated to the investment manager, distributor or any other entity authorised to carry out that function.

There are regulatory minimum subscription and investor qualification requirements for non-retail funds and they may be marketed to any investors who fulfil the regulatory criteria. Non-retail AIFs may only be marketed to professional investors in Ireland. QIAIFs may only be marketed to qualifying investors (as defined in the AIF Rulebook).

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

A QIAIF may only be sold in Ireland to qualifying investors and a minimum subscription of €100,000 applies.

A qualifying investor is as follows:

- an investor who is a professional client within the meaning of MiFID;
- an investor who receives an appraisal from an EU credit institution, a MiFID firm or a UCITS management company to the effect that the investor has the appropriate expertise, experience and knowledge to adequately understand the investment in the QIAIF; or
- an investor who certifies that they are an informed investor by providing the following:
  - confirmation (in writing) that the investor has such knowledge of, and experience in, financial and business matters as would enable the investor to properly evaluate the merits and risks of the prospective investment; or
  - confirmation (in writing) that the investor's business involves, whether for its own account or the account of others, the management, acquisition or disposal of property of the same kind as the property of the QIAIF.

Qualifying investors must self-certify in writing to the QIAIF that they meet the minimum initial investment per investor and appropriate expertise and understanding tests and are aware of the risk involved in the proposed investment and of the fact that inherent in such investments is the potential to lose all of the sum invested. When marketing a QIAIF in another EU member state under the AIFMD marketing passport, the AIFM may only market units or shares in the relevant QIAIF to professional investors (as defined in MiFID).

28 Are there any special requirements that apply to managers or operators of non-retail funds?

See question 16.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

Irish non-retail funds are not subject to any Irish taxes on the income (profits) or gains arising on their underlying investments.

While dividends, interest and capital gains that a fund receives with respect to its investments may be subject to taxes, including withholding taxes, in the countries in which the issuers of investments are located, these foreign withholding taxes may, nevertheless, be reduced or eliminated under Ireland's network of tax treaties to the extent applicable.

An amended tax regime to that above applies to non-retail funds that invest significantly in Irish real estate assets.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

See question 19.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

See question 20.

32 What are the periodic reporting requirements for non-retail funds?

QIAIFs are required to publish an independently audited annual report for each financial year. The deadline for the publication of the annual report of an AIF is within six months of the year end. In addition, QIAIFs that are structured as unit trusts must also prepare an unaudited half-yearly report, which must be published within two months of the relevant half-yearly reporting date. In addition, QIAIFs are required to report their NAV, units in issue, subscription or redemption, profit or loss, fee and expenses data to the Central Bank on a monthly basis and also submit quarterly statistical returns.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Typically, a client who requires a separately managed account will enter into a discretionary investment management agreement with a MiFID-authorised investment firm who has the authority to engage in portfolio management and who will buy or sell financial instruments on the client's behalf. Where the MiFID-authorised investment firm is authorised to hold client assets it will hold these assets on the client's behalf with an eligible custodian in accordance with the Client Asset Regulations that are designed to protect and safeguard client assets. Where the MiFID-authorised investment firm is not authorised to hold client assets, the client will appoint a third-party custodian and grant the MiFID-authorised investment firm a mandate to issue instructions to the custodian on the client's behalf.

34 What are the key legal issues to be determined when structuring a separately managed account?

The terms for a separately managed account will be set out in the discretionary investment management agreement between the client and the MiFID-authorised investment firm. The level of protection afforded to the client is driven by the client's categorisation by the MiFID-authorised investment firm with a retail client receiving the highest level of protection under MiFID in terms of how the product is sold to the client, the level of information provided to the client and the duty of care owed to the client. If, on the other end of the spectrum a client is categorised as an eligible counterparty, it will be afforded very little protection under the MiFID conduct of business rules and the agreement will be based on negotiation between the parties. Where a MiFID-authorised investment firm has the authority to hold the client's assets it must do so in accordance with the Client Asset Regulations and this will be referenced in the discretionary investment management agreement.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

For an entity to be in a position to offer a client the service of separately managed accounts it must be regulated either as a MiFID investment firm authorised to engage in portfolio management or an AIFM authorised to provide the additional service of individual portfolio management in accordance with mandates given by investors on a discretionary client-by-client basis.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

MiFID II, which is scheduled to take effect in January 2018, will create significant new rules that will impact EU entities manufacturing and distributing funds in terms of product design, how such funds are sold to customers (eg, retail investors will need to seek advice in order to access 'structured UCITS' (deemed a complex product under MiFID II)), the effective ban on inducements and greater transparency on fees.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

While there is no requirement for retail or non-retail funds authorised by the Central Bank to be listed, the Irish Stock Exchange (ISE) operates a streamlined listing regime for retail and non-retail funds authorised and regulated in an EU member state. The ISE also lists funds from many non-EU jurisdictions. In order to list an investment fund on the ISE, a listing sponsor must be formally appointed and listing particulars must be drafted and published in compliance with the ISE listing regime. In order to list a closed-ended fund on the Main Securities Market of the ISE, application must also be made to the Central Bank (as competent authority under the Prospectus Directive).

An ISE listing increases distribution capacity and meets the needs of institutional investors and pension funds that have limited capacity to invest in unlisted securities. Investors take comfort that an ISE-listed fund has met the suitability, diversification and ongoing compliance and reporting requirements of an internationally recognised listing authority with specific expertise in investment funds. Another benefit of listing to investors is the transparency that comes with complying with the ongoing reporting requirements: the NAV of the listed fund must be

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published on the ISE upon calculation, market announcements must be made in relation to material changes and the audited financial statements of the fund must be filed with the ISE.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

Yes. Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, the Isle of Man and Jersey are approved as jurisdictions from which corporate funds can redomicile to Ireland pursuant to this legislation. The Central Bank has issued guidance on the practical steps involved in the redomiciliation process for both corporate funds and unit trusts. Redomiciliation can be a more efficient alternative to a cross-border merger as it does not involve setting up a new fund or selling or transferring assets, shares or investors. The legal framework seeks to avoid unnecessary administrative burdens and expressly recognises that a migrating fund will not be treated as a new entity in Ireland, so that its existing identity and track record may be preserved. Furthermore, there is no other taxable event as a consequence of the redomiciliation.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

Other than those outlined above, there are no specific rules.

Japan

Kiyomi Kikuchi and Kazuyuki Wakasa

TMI Associates

Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

In Japan, fund management activities including investment of fund assets and offering and marketing of fund interests are regulated principally by the Financial Instruments and Exchange Act (Law No. 25 of 1948, as amended (FIEA)). The Financial Services Agency of Japan (FSA) has the primary responsibility for the oversight, supervision and inspection of funds and fund managers and those marketing the funds.

Under the FIEA, the scope of 'investment management business' is considered to include provision of investment management services:

- to counterparties (customers) to a discretionary investment management contract, pursuant to which an investment management business operator manages the assets of such parties on a discretionary basis;
- for the benefit of investors of an investment trust established under the Laws on Investment Trust and Investment Corporation (Law No. 198 of 1951, as amended (LITIC)) as the operator of the trust;
- to an investment corporation incorporated under the LITIC under an asset management contract between an investment management business operator and the investment corporation; and
- for the benefit of investors of a collective investment scheme (CIS) such as an investment limited partnership formed under the Investment Limited Partnership Act of Japan.

In addition, there is also a category of business aimed at managing the assets of specific professional investors (qualified investor businesses), which was introduced in Japan in 2012. Under this category of business, an investment manager can provide services solely to 'qualified investors', including qualified institutional investors (QIIs) and certain other qualified pension fund, corporate or individual investors who satisfy certain criteria, with a ¥20 billion limitation on the total amount of assets to be managed.

Pursuant to the FIEA, to engage in one of the investment management businesses above, fund managers are required to register with the FSA. There is, however, an exception to the registration requirement under article 63 of the FIEA in relation to investment management services provided to CISs (the article 63 exemption). Owing to the recent amendment of the FIEA, which became effective on 1 March 2016 (the 2016 amendment), the requirements for the article 63 exemption have been tightened as outlined in question 36.

It should also be noted that in Japan, non-discretionary investment advisory business is a separate business from the investment management business, and accordingly, those intending to provide non-discretionary investment advisory service must be registered separately under the FIEA.

2 Is fund administration regulated in your jurisdiction?

Under the FIEA, a registered investment manager is responsible for preparing and maintaining the books and records in relation to its business, including investment management contracts entered into with the customer, statutory documents to be delivered to the customer before and upon entering into investment management contracts, investment management reports regarding the fund assets, detailed statements regarding investments and trade orders, etc. As a general rule, investment management reports must be delivered periodically to customers at least every six months. Investment managers are also required to prepare a business report annually and submit it to the FSA within three months of the end of each business year.

There are no explicit restrictions on the outsourcing by the investment manager of the foregoing fund administration business to a third-party business provider. Other than the outsourcing of application or IT businesses, however, it is not yet very common in Japan to outsource the administration business. Trade settlements are, in principle, conducted through financial institutions, namely the securities company or the trust bank, with which the customer has opened an account.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

As set out in question 1, to engage in the investment management business in Japan, in principle, it is necessary to be registered with the FSA. The applicant for registration, if it is a Japanese entity, must be a joint stock corporation incorporated under the Companies Act of Japan, with a board of directors and a corporate auditor or a committee system and a minimum capital of ¥50 million. In addition, an adequate compliance system, with sufficient staff to properly perform the business of an investment manager, must be in place. (A foreign company that has similar organisation in place is also eligible for registration, provided that it has a business office in Japan.)

The registration requirements in relation to qualified investor businesses are more relaxed. The applicant is required only to be a joint-stock corporation with a corporate auditor or a committee system and a minimum capital of ¥10 million. In addition, the compliance function can be outsourced to an affiliated company, among others.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

As a general rule, anyone who intends to perform investment management activities in Japan or provide services towards customers in Japan must register as an investment management business operator with the FSA. As an exception, however, a foreign entity licensed to conduct investment management business in its own jurisdiction may provide discretionary investment management services solely to a Japanese-registered investment manager without such registration. Similarly, a foreign entity with a licence to conduct non-discretionary investment advisory business in its own jurisdiction may provide investment advisory services solely to Japanese-registered investment management business operators. It is not permitted, however, for a foreign-licensed investment manager to provide investment management services to those who have only registered as non-discretionary investment advisers in Japan.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

A shareholder who acquires 20 per cent or more of the voting shares of an investment management business operator is required to file a notification with the FSA as a 'major shareholder'. If the shareholding ratio becomes more than 50 per cent, the major shareholder must file a further notification as a 'specified major shareholder'.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

There are no regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements except that fee-related information such as the amount, calculation method and payment timing must be specified in the disclosure documents and investment management contracts. With regard to the disclosure of the compensation of a fund manager as operator of investment trusts, more detailed information must be set forth in the investment management reports delivered to customers, such as the specific services provided as consideration for the fees and costs.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

Under the FIEA, marketing of securities including fund interests is generally permitted to the following registered financial instruments firms:

- a Type I financial instruments firm that is eligible to handle marketing, solicitation, undertaking and offering of liquid securities, such as units of investment trusts or shares of investment corporations (Category I securities); and
- a Type II financial instruments firm that is eligible to handle the marketing and solicitation of illiquid securities such as the interests of CISs (Category II securities).

There is, however, an article 63 exemption to the above requirement in relation to the marketing of fund interests as well. Those who only intend to solicit investments in CISs with at least one QII and fewer than 50 non-QIIs are not required to register as financial instruments firms, but only need to file a notification to the local finance bureau. It should be noted, however, that, because of the 2016 amendment, the scope of QIIs and non-QIIs eligible for the article 63 exemption has been narrowed (see question 36).

8 What marketing activities require authorisation?

Activities related to the solicitation of offers to acquire investment in securities (whether liquid or illiquid) require registration either as Type I or Type II financial instruments firms. Although no definition is provided under the laws, 'solicitation' is generally defined as inducing the acquisition or purchase of specific securities by enhancing the interest of an investor.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

As a general rule, any marketing activities conducted onshore or towards customers in Japan are regulated under the FIEA. Accordingly, any overseas entity that wishes to perform fund-marketing activities in Japan is required to register and obtain the same type of financial instruments business status as domestic firms. However, as an exception, if an overseas entity is licensed to conduct securities-related business in its own jurisdiction, it is permitted to make solicitation of securities to certain types of financial institutions (solely) from offshore.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

Foreign firms are eligible to apply for registration as Type I or Type II financial instruments firms. However, considering the time and effort it takes to complete the registration process, many foreign funds prefer to retain a locally registered Type I or Type II financial instruments firm to handle the offering and marketing of applicable fund interests.

Not all foreign funds can be marketed in Japan. The Japan Securities Dealers Association provides for the selection criteria for foreign funds that qualify for marketing in Japan under the Association's self-regulatory rule. Member firms (registered financial instruments firms) are prohibited from offering foreign funds in Japan that do not satisfy such selection criteria.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

There are no regulatory restrictions on the structuring of intermediaries' compensation except that fee-related information such as the amount, calculation method and payment timing must be specified in the disclosure documents delivered to customers. In practice, there are several investment trust products in which intermediaries (ie, security companies) do not charge brokerage fees. Such investment trust products are typically called 'no load investment funds'.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

The legal vehicles most commonly used to set up a retail fund are open-ended investment trusts. For such an investment trust to be formed, the operator of the trust fund will prepare a trust deed and file its content with the Japanese regulator, and prepare and enter into a trust agreement with a trustee (normally a trust bank) to set up a trust. The fund interest will be issued to the beneficiaries of the trust. Typically, these funds are publicly offered to wide-ranging retail investors through securities companies, in which case a securities registration statement must be filed with the FSA.

A closed-ended investment corporation investing in real estate-related assets (J-REITs) and foreign-domiciled unit trusts is also a popular investment structure for retail investors in Japan. However, for the purpose of this chapter, unless specifically stated otherwise, the explanation will be focused on publicly offered investment trusts, which are the most common type of retail funds offered in Japan.

13 What are the key laws and other sets of rules that govern retail funds?

The FIEA primarily governs the authorisation of investment management business and regulates the activities of investment managers, acting as fund operators, who are registered under the FIEA. It also regulates the offering, placement and marketing of Category I securities, which include interests in investment trusts. The LITIC regulates domestic and foreign investment trusts as well as investment corporations formed or offered in Japan, and governs the following:

- the structure, organisation and operation of such funds;
- information to be included in the trust deed;
- rights of the beneficiaries; and
- disclosures to investors including investment management reports.

Self-regulatory organisations such as the Investment Trusts Association of Japan (ITA) also provide detailed rules in relation to the above matters.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

As set out in question 12, the fund operator must file a trust deed with the regulator before entering into a trust agreement with the trustee. Under the LITIC, a trust agreement must be entered into between an operator who must be an investment manager registered under the FIEA and a trustee who must be a trust company authorised under the Act on Concurrent Operation, etc, of Trust Business by Financial Institutions. (In the case of a foreign investment trust established under a foreign law, a notification must be filed with the FSA before beginning solicitation of the fund interest.)

15 Who can market retail funds? To whom can they be marketed?

If a registered investment manager acting as an operator of the fund intends to market the interest of such fund directly to investors, a registration as a Type II financial instruments firm will also be required. However, in the case of publicly offered investment trusts, an operator will normally retain a third-party securities firm (or other registered financial institution) to handle the marketing of such fund interests. To market such Category I security, a Type I financial instruments firm registration is required (see question 7). There is no restriction on the people to whom such fund interests can be marketed.

16 Are there any special requirements that apply to managers or operators of retail funds?

As provided under question 14, an operator of an investment trust must be a registered investment manager (see question 3 for the eligibility requirement to register as an investment manager with the FSA). By law, an investment manager owes a duty of loyalty and the duty of care required of a prudent manager in managing the assets of the investment trust. In addition, investment managers and their officers and employees are required to perform their duties towards their customers with sincerity and fairness. They are also subject to certain rules of conduct such as that of avoiding conflicts of interest.

17 What are the investment and borrowing restrictions on retail funds?

There are certain investment and borrowing restrictions placed on a publicly offered investment trust under the FIEA, the LITIC and the self-regulatory rules of the ITA in Japan.

An investment trust may acquire no more than 50 per cent of the shares in a single issuer. Assets of the investment trust may be invested in other fund interests (but with a limitation of no more than 5 per cent of the net assets) but may not be invested in a 'fund of funds' (an investment trust that makes investments in other investment trusts or investment corporations). An investment trust may invest in derivative instruments; however, such transaction may not be conducted when a risk equivalent amount calculated by a reasonable method (ie, either of the three methods proposed by the ITA) is expected to exceed the net assets of the investment trust. From the perspective of diversification of credit risks, no more than 20 per cent in total of the assets of the investment trust may be invested in securities of a single issuer (and no more than 10 per cent each in the stocks, bonds and derivative products of such issuer).

Borrowing of money by the investment trust is limited for the purpose of the payment of redemption amounts and, in the case of investment trust where distributed amounts can be reinvested, the distribution of dividends, to the extent of the amount necessary to make such payments.

18 What is the tax treatment of retail funds? Are exemptions available?

Under the tax laws of Japan, a publicly offered investment trust is not subject to taxation with respect to the profits or income gained through the investment of trust assets. Distributions made by the investment trust to investors are subject to a withholding tax at the rate of 20.315 per cent (as of January 2017), except that distributions that are, in substance, a return of the principle are non-taxable. Profits gained upon redemption or liquidation of interests are also generally taxable at the rate of 20.315 per cent (as of January 2017). (Tax treatment of a publicly offered foreign investment trust is generally the same as that of a domestic investment trust.)

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

In the case of an investment trust formed under the LITIC, an investment manager and a trustee company will enter into a trust agreement, and accordingly, it is structurally expected that the portfolio of assets be held by a trustee company. Further, to protect the assets of the trust, a trustee is obliged to segregate its own assets and those of the fund under the Trust Law of Japan.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

A trust deed of an investment trust must be submitted to the FSA by the investment manager before the execution of the trust agreement with the trustee. When a public offering is to be made, a securities registration statement (or a short-form statement together with a securities report, under certain conditions) must be filed with the local finance bureau before the solicitation of fund interests, and a prospectus must be prepared and delivered to the investor. If an investor intends to acquire the fund interest, a document setting forth, inter alia, the contents of the trust deed must be delivered to the investor (unless the same information is covered in the prospectus).

With respect to the governance exercised by the holders of the fund interest, the consent of two-thirds of the voting interests is required to approve a material change to the provisions of the trust deed or a merger between investment trusts (except for mergers with a minimal impact on the interest of investors).

See question 2 for the general record-keeping requirements and question 21 for the reporting requirements of retail funds.

21 What are the periodic reporting requirements for retail funds?

A publicly offered investment trust is subject to ongoing disclosure requirements after its formation. The operator of the fund must file an annual securities report to the regulator containing such information as the details of the fund, status and performance of investments, financial statements and information on the operator, as well as prepare and submit a business report for each business year to the FSA. It must also prepare the investment management reports at the end of the calculation period of the fund assets and deliver a physical short-form version and an electronic comprehensive version to the investors.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

Retail funds in Japan are typically structured as open-ended investment trusts and accordingly, redemption can be requested in principle at any time to ensure liquidity of fund interests. The operator of the fund may, however, place restrictions on the redemption or purchase of interests in such retail funds, provided that such restrictions are clearly set forth in the fund prospectus. In practice, there are often funds that, inter alia, have a limited window period, restrictions on the volume of redemptions or that are subject to suspensions or cancellations of redemptions owing to the suspension of trading on the exchange.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

Among the various types of non-retail funds, an investment limited partnership (Japanese LPS) formed under the Investment Limited Partnership Act of Japan (Law No. 90 of 1998, as amended) (the LPS Act) is a legal vehicle frequently used for private equity funds. The Japanese LPS is formed upon the execution of a limited partnership agreement by and among the general partner and the limited partner in accordance with the LPS Act.

24 What are the key laws and other sets of rules that govern non-retail funds?

The LPS Act sets out rules for a Japanese LPS, covering such matters as the role and responsibility of the general partner and the limited partner, and the investment restrictions of a Japanese LPS.

Under the LPS Act, a Japanese LPS must have at least one general partner and at least one limited partner. The general partner manages the operation of the Japanese LPS and has unlimited liability for the obligations of the Japanese LPS. The general partner shall execute the business of the Japanese LPS in accordance with due care of prudent managers. By contrast, the limited partner does not have the authority to execute the business of the Japanese LPS and is liable for the obligations of the Japanese LPS only to the extent of its capital contribution.

With respect to investment restrictions, the LPS Act provides for a wide range of asset classes in which a Japanese LPS can invest; however, the acquisition of shares, warrants, equity interests and debt securities issued by foreign corporations must be less than 50 per cent of the total amount of capital contribution.

Solicitation for the acquisition of partnership interest and the management of the fund assets are regulated by the FIEA.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

The solicitation of investors for acquisition of partnership interests in a Japanese LPS is regulated under the FIEA as a Category II security. If more than half of the assets of the Japanese LPS are to be invested in securities and partnership interests are to be publicly offered (ie, the number of investors who acquire the partnership interest as a result of solicitation is expected to be 500 or more), the issuer of such interests

Update and trends

One of the most notable trends in terms of investment funds in Japan is the introduction of infrastructure funds (infra-funds). By the amendment of the LITIC and subordinate regulations thereunder that became effective in 2014, J-REITs are now able to invest in infrastructure assets such as renewable energy power generation facilities and concession rights to operate public facilities under the Japanese PFI legislation. J-REITs investing in those infrastructure facilities are now granted a tax benefit whereby the amount of dividends they pay can be deducted from taxable income subject to certain conditions under the Japanese tax code. The Tokyo Stock Exchange has established and opened a new securities market where equity interests in infra-funds can be listed and traded. As of the end of 2016, there are two infra-funds listed on the Tokyo Stock Exchange.

Another trend in relation to fund managers is the growing importance stressed by the regulator on the 'fiduciary duty' of investment managers towards their customers. Many investment management firms have issued fiduciary duty declarations announcing their pursuit of duty to act in the best interests of each customer and their efforts to achieve such duty by enhancing their investment management activities (such as increasing the engagement and dialogues with the issuers in light of Japan's Stewardship Code).

In relation to worldwide regulatory concerns, on 12 January 2017, the Financial Stability Board (FSB) released the 'Policy Recommendations to Address Structural Vulnerabilities from Asset Management Activities'. Although there has not been any significant regulatory development in Japan in response to the FSB's recommendation yet in view of new or amended guidance expected from the International Organization of Securities Commissions, investment managers are paying attention to regulatory developments in this area of law, especially the regulation of leverage within and liquidity mismatch of investment funds. (With regard to the operational risk of investment managers, there is currently a minimum capital requirement in the amount of ¥50 million in terms of registered investment managers, as mentioned in question 3.)

With regard to the 'shadow banking' issue, although Japan only represents 7 per cent of total shadow global banking assets (there has been a notable decline of the shadow banking sector in Japan since 2010) and such assets only account for a small portion relative to the national GDP of Japan, the FSA has adopted policies vis-à-vis the banking sector to use a look-through approach when calculating the banks' risk asset ratio in order to properly reflect the risks of fund components and to encourage appropriate control of exposures to shadow banking entities. Specific policies in this regard vis-à-vis the fund management sector are yet to be adopted in Japan.

High frequency trading (HFT) is another topic of global regulatory concern. HFT could cause confusion in the securities market and may deter investors from participating in the market for fear of unfair trade. There have also been reported incidents in which HFT was allegedly used as a tool for market manipulation. With this background, on 22 December 2016, a working group organised under the Financial System Council (an advisory body to the Japanese Prime Minister, in charge of research and discussion on financial regulation) has released a report proposing the implementation of a registration requirement, risk management system and record-keeping obligations to investors who engage in HFT.

must file a securities registration statement before solicitation of investors and must prepare a prospectus to be delivered to the investors, which can be quite time-consuming and cumbersome. Accordingly, in practice, limited partnership interests are often solicited by way of private placement.

In addition, if the general partner of the LPS wishes to solicit investors on its own initiative, it must register as a Type II financial instruments firm before such solicitation with the following two exceptions: the first applies if the general partner delegates all of the solicitation activities to an outside firm that is registered as an operator of a Type II financial instruments business; and the second is the article 63 exemption, where the general partner can solicit investors by means of private placement after filing a certain notification with a local finance bureau in accordance with article 63 of the FIEA. (As described in question 36, the 2016 amendment applies to the article 63 exemption.)

26 Who can market non-retail funds? To whom can they be marketed?

The solicitation of investors for the acquisition of a partnership interest must be made by either (i) the general partner who has registered itself as a Type II financial instruments firm; (ii) a third party registered as a Type II financial instruments firm and that is given the entire authority to solicit investors from the general partner; or (iii) the general partner who has submitted a notification to the local finance bureau in reliance upon the article 63 exemption.

As long as a registered Type II financial instruments firm solicits investors by means of (i) or (ii), there is no express restriction on the qualification of investors. By contrast, if the general partner solicits investors using the article 63 exemption, there must be at least one QII. Among the investors being solicited, the number of non-QIIs must be not more than 49. The general partner shall not solicit investors who are included in the list of disqualified investors under the FIEA, unless otherwise exempted thereunder. (See question 36 for the narrowing of the scope of QII and non-QII eligible for the article 63 exemption owing to the 2016 amendment.)

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

As long as a registered Type II financial instruments firm solicits investors for the acquisition of a partnership interest, there are no express restrictions on the qualification of investors. On the other hand, if the general partner solicits investors by means of private placement in reliance upon the article 63 exemption, there is a restriction on the qualification of investors as described in question 26. (See also question 36.)

28 Are there any special requirements that apply to managers or operators of non-retail funds?

The general partner must in principle be registered as an operator of an investment management business if more than 50 per cent of the assets of the Japanese LPS are invested in securities or derivatives. The general partner, however, often employs one of the following exemptions to the registration requirement:

- delegation of the entire authority to handle investment management business to an outside registered investment management firm, by entering into a discretionary investment management contract with such outside firm; or
- relying on the article 63 exemption, where the general partner can handle investment management activities after filing a notification with a local finance bureau in accordance with article 63 of the FIEA.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

Under Japanese tax law, a limited partnership is treated as a non-taxable (pass-through) entity and is not subject to corporate tax. Accordingly, income and loss arising from the investment by the partnership can be allocated to each investor without taxation at the partnership level.

Foreign investors are subject to corporate tax and income tax on their income generated in Japan. The scope of the income subject to Japanese taxation depends on whether foreign investors have a permanent establishment in Japan and the type of such establishment. A prevailing view is that if a foreign investor conducts investment in Japan through a limited partnership that has a place of business in Japan, such foreign investor is deemed to have a permanent establishment because its investments in Japan are jointly carried out with other partners through such place of business in Japan. If a foreign investor has a permanent establishment in Japan, the distribution of profit from the partnership will be subject to Japanese taxation. The tax reform of 2009, however, has created an exemption in which foreign investors in a Japanese LPS will not be deemed to have a permanent establishment in Japan under certain conditions.

In addition to the foregoing, the tax reform of 2014 has established a new tax benefit to promote venture capital investment through the Japanese LPS. This new tax incentive allows corporate investors (limited partners) in a Japanese LPS to treat up to 80 per cent of their investment amount as deductible expenses if they satisfy certain requirements under Japanese tax law.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

Under the FIEA, a Type II financial instruments firm shall not solicit investors for acquisition of partnership interest, unless the governing document of the Japanese LPS ensures the segregation of the funds contributed from the limited partners and the assets of the general partner. Financial institutions such as commercial banks and trust banks can serve as a custodian of the funds contributed from the limited partners. In addition to the foregoing, if the general partner is a registered investment manager, it must segregate the assets of the Japanese LPS from the assets of other clients and its own assets.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

With respect to the registration of a Japanese LPS, once the limited partnership agreement becomes effective, certain information (including the type of business and name of the Japanese LPS) must be registered with the local legal affairs bureau with jurisdiction over the location of the Japanese LPS within two weeks. If there are any subsequent changes to the registered information, the general partner must register those changes with the local legal affairs bureau within two weeks.

With respect to record keeping, the general partners must prepare the balance sheet, profit and loss statement and business report, along with their detailed attachments for the business year concerned, within three months of the end of each business year. These documents are maintained at the principal office of the Japanese LPS for five years for inspection by limited partners and creditors. In addition, if a registered investment manager handles the management of the assets contributed by the limited partners, it must provide a periodical management report to the client at least once every six months.

Unless solicitation of investors constitutes a public offering of securities, the general partner is not required to file the securities registration statement referred to in question 25. If the general partner wishes to make use of the article 63 exemption for either the private placement of a partnership interest or investment management activities, it must file a notification with the local finance bureau. In addition, by virtue of the 2016 amendment, the general partner who has made use of the article 63 exemption is now subject to ongoing bookkeeping and annual business reporting obligations (see question 36).

As previously mentioned, a Japanese LPS is composed of the general partner and the limited partner. The general partner manages the operation of the Japanese LPS and has unlimited liability for the obligations of the Japanese LPS.

32 What are the periodic reporting requirements for non-retail funds?

See question 31.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Separately managed accounts (SMAs) are typically structured as a discretionary investment management product whereby a wrap account or an individually customised managed account is created pursuant to a discretionary investment management contract between a customer and a registered investment manager (typically a securities company or a trust bank). In recent years, SMAs, especially fund wrap accounts, have become increasingly popular among the retail market owing to the lowering of the minimum purchase amount. Management fees for SMAs are typically based on the value of the asset under management.

34 What are the key legal issues to be determined when structuring a separately managed account?

To conduct a discretionary investment management service for SMAs, the fund manager must be a registered investment management business operator. When a registered investment manager solicits customers to open a managed account that is expected to invest in fund interests, it must provide an explanation of the details of the fund to fulfil its accountability obligation. Accordingly, in practice, a securities company with a registration as a Type I financial instruments business operator in addition to the registration as an investment management business operator would normally market as well as manage the SMA to avoid any violation of the solicitation rules for fund interests.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

As set out in question 34, although SMAs are structured as a discretionary investment management product and only an investment manager registration is technically necessary to market a discretionary investment management contract for an SMA, normally, a business operator with both a Type I financial instruments business and an investment management registration will market the SMA.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

In response to the scandals in which unsophisticated individuals suffered loss as a result of their investment in funds making use of the article 63 exemption, the FIEA was amended in 2015 in order to strengthen the governmental supervision over general partners making use of this exemption. The key elements of the amendment are as follows:

- limiting the scope of non-QII investors eligible for the article 63 exemption only to those certain sophisticated investors enumerated in the enforcement order of the FIEA;
- clarification of the situation where the article 63 exemption is not available even if there is a QII investor in the fund (eg, in the event

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that there are no QII investors except for a Japanese LPS with net assets of less than ¥5 million);
- requirement of additional information at the time of filing notifications to the regulator (such as the location of the office or the place where the general partners will conduct their business in reliance upon the article 63 exemption);
- imposing record-keeping and annual business reporting obligations on the fund operators;
- providing eligibility requirements for the article 63 exemption and disqualifying applicants that satisfy certain conditions under the FIEA;
- the introduction of a code of conduct equivalent to those applicable to registered financial instrument business operators; and
- public disclosure of certain information (such as part of the notification and the annual business report).

This amendment became effective in March 2016.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

Exchange-traded funds (ETFs) have been fully available in Japan since 2001. Domestic and foreign ETFs can be listed on the stock exchange but the types of fund that are eligible for listing are limited to those passively managed funds that attempt to track and replicate the performance of a specific index (such as a stock, bond or commodity index). It is also a requirement that there be at least two authorised participants for the listing of an ETF. Only authorised participants (typically, large broker–dealer firms) may subscribe to the primary offering of ETFs, and retail investors will only participate in the secondary market. Disclosure and reporting requirements of ETFs are similar to the unlisted publicly offered retail funds, except that the delivery of investment management reports to the investors is not required.

With respect to non-retail funds, it is not currently expected that partnership interests will be listed on securities exchanges in Japan and therefore no rules are in place.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

There is no system to redomicile an overseas fund to Japan.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

There are no specific rules from the fund management regulatory perspective.

Norway

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

Fund management is primarily regulated by the Investment Fund Act 2011 (IFA) (implementing Directive 2009/65/EC (UCITS V Directive)), the Alternative Investment Fund Management Act 2014 (AIFMA) (implementing Directive 2011/61/EU (AIFMD)) and the regulations and executive orders made under these acts. In addition, some elements in the Securities Trading Act (STA) (implementing Directive 2004/39/EC (MiFID)), such as investment advice and fund management under licence to conduct asset management, serves to supplement the regulatory environment.

The Norwegian Financial Supervisory Authority (NFSA) is the regulator responsible for the ongoing supervision of funds, fund managers and for the issuance of supplementary regulations and formal guidance to the aforementioned acts. The NFSA is responsible for ensuring that the business of fund managers is carried out in accordance with applicable laws and regulations, pursuant to the NFSA Act 1956 (NFSAA).

From a regulatory perspective, there are two broad categories of investment funds in Norway: UCITS funds and non-UCITS funds, which are defined as alternative investment funds (AIFs). The IFA applies to all collective fund structures (independent pools of assets that have arisen through capital contributions from an undefined range of persons against the issuance of units in the fund and that consist essentially of financial instruments or deposits in a credit institution). Specific regulations regarding UCITS are set out in Chapter 6 of the IFA, implementing the UCITS requirements, such as investment restrictions, borrowing restrictions and redemption rights. Specific regulations regarding AIFs in the form of mutual funds are set out in Chapter 7 of the IFA and specific regulations regarding AIF management are set out in the AIFMA. AIFs include domestic funds, special funds (such as hedge funds) and other AIFs (such as private equity funds). Domestic funds are funds established in Norway that do not qualify as UCITS and are regulated specifically in Chapter 7 of the IFA, with authorisation from the NFSA to derogate from some of the UCITS requirements regarding investment strategy and redemption rights. Special funds are a subcategory of domestic funds that derogate from an even wider spectrum of regulations, including borrowing restrictions.

2 Is fund administration regulated in your jurisdiction?

Yes, fund administration falls within the scope of the Norwegian definition of fund management and is thus regulated in the IFA, the AIFMA and the NFSAA.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

The establishment of investment funds in Norway requires authorisation by the NFSA. Authorisation to establish UCITS in Norway may be given to UCITS managers authorised by the NFSA or by managers authorised within the European Economic Area (EEA), under the 'passporting' process (see question 4). AIFs may be established by AIF managers authorised by the NFSA or with authorisation for management of similar funds within the EEA, pursuant to the passporting process.

Each fund shall be authorised separately and the application for fund authorisation shall include the following:

- the fund's articles of association as set by the board in the fund's management company;
- the depositary agreement; and
- information about outsourcing, if applicable.

The NFSA shall determine the application within two months of receiving a complete application and authorisation shall be granted if the NFSA approves the management of the particular fund and if the statutory requirements of the fund's articles of association, depositary and outsourcing are met.

Key requirements for fund managers providing services in Norway are as follows:

- organisation restricted to limited liability companies or public limited liability companies;
- authorisation by the NFSA or within the EEA (notified according to the passporting procedure where applicable); and
- compliance with organisational and business requirements, including a fit and proper assessment, adequate policies and procedures for risk management, conflict of interest management, compliance, remuneration, transparency, valuation, financial reporting, due diligence and other business functions, as set out in the IFA.

A Norwegian alternative investment fund manager (AIFM) applying for authorisation to manage an AIF other than a Norwegian special fund would essentially need to comply with the requirements stipulated above and must be a limited liability company. The formation of the AIF (apart from AIFs formed as Norwegian domestic or special funds) is, however, not contingent upon the NFSA's approval of the fund rules (or similar documentation).

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

Norwegian fund regulation applies to funds, management and other regulated fund activities carried out in Norway or marketed to investors in Norway. Initially a division has to be made between managers established inside and outside of the EEA. In the former case the manager would need an authorisation in its home country and activities may subsequently be performed in Norway, either from the overseas manager's home country or from inside Norway subject to the establishment of a Norwegian branch office. If the manager has already been granted authorisation in its home country within the EEA pursuant to either the UCITS V Directive or the AIFMD, the overseas manager may 'passport' its licence into Norway via the competent supervisory authority in its home country, and a separate authorisation from the NFSA is thus not necessary. Following such 'passporting' it is also possible for the overseas manager to manage Norwegian funds, provided that the manager's authorisation in its home country includes management of fund types comparable to the type of Norwegian fund the manager wishes to manage. However, in relation to management of a Norwegian UCITS or a Norwegian domestic or special fund, a separate authorisation must be obtained from the NFSA, which includes approval of the (revised) fund rules. The manager must also ensure that it can make disbursements to unitholders, redeem units, provide investors with required information and handle complaints in Norway. If an overseas manager wishes to manage a Norwegian AIF that is not a domestic or special fund, no separate authorisation from the NFSA is required.

A fund manager established outside the EEA may only perform management activities or provide services to Norwegian investors provided that the manager has been granted an authorisation from the NFSA in accordance with the Norwegian regulatory requirements.

Management of all investment funds in Norway thus requires that the manager is authorised either in Norway or by the authorities in the EEA home state where the passporting procedure applies. There is, however, one exception to the authorisation requirement: in accordance with article 3(2) of the AIFMD, management of AIFs below the relevant thresholds may be carried out without authorisation provided that the AIFMs are registered in an NFSA register. Note that unauthorised, registered AIF managers may only carry out marketing activities to professional investors (see question 7). The exception applies to managers that manage AIFs whose assets under management in total do not exceed either:

(i) €500 million when the portfolios consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of five years following the date of the initial investment in each AIF; or
(ii) €100 million for types of AIFs other than those mentioned in (i).

These managers are only subject to Chapter 9 of the AIFMA regarding supervision by the NFSA and the registration and reporting requirements pursuant to the AIFMD.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

Acquisition of a qualifying holding in a management company may only take place after the acquirer has notified the NFSA thereof. 'Qualifying holding' is defined as a direct or indirect holding in an investment fund management company that represents at least 10 per cent of the capital or the voting rights, or a holding that makes it possible to exercise a significant influence over the management of the manager in which that holding subsists.

Additional authorisation is required when a holding in an investment fund management company exceeds thresholds of 20, 30 and 50 per cent of the capital. The NFSA may refuse such acquisitions within three months of receiving the notification if the acquirer cannot be considered fit to ensure sound and prudent management of the company.

Changes in the qualified holding of authorised managers of funds that fall outside the scope of the IFA (see definition of 'investment fund' in question 1) require notification to the NFSA, as such changes are considered changes to the basis for authorisation.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

The IFA sets out remuneration rules that govern managers' compensation and profit-sharing agreements, and implements Directive 2014/91/EU (the UCITS V Directive) regarding fund managers. Key requirements, in force from 1 January 2017, are that management companies shall establish and practise remuneration policies and practices that promote sound and effective risk management, consistent with the investment strategy of the funds managed by the management company. The remuneration policies shall apply to employees with material impact on the risk profiles of the management company or funds subject to its management, including senior managers, employees with control tasks and employees receiving similar remuneration as senior managers. The remuneration policies shall be proportionate to the nature, extent and complexity of the business.

The AIFMA sets out similar remuneration rules for AIF mangers, in line with the objective in the UCITS V Directive of harmonising remuneration rules within the capital market and especially in UCITS and AIFs.

UCITS management companies are further subject to restrictions on remuneration from or to others than the investment fund, which is only allowed in the following circumstances:

- if the unitholders are informed about the type and value of the remuneration, or the calculation method if the value cannot be determined; or
- if the remuneration is suitable to improve the quality of the business and will not impair the manager's compliance with the fund's interests. These restrictions do not, however, apply to actual costs that ensure or are necessary in order for the company to continue its business, including costs for the depositary, the market place, the securities register and legal advisers unless the cost may raise conflicts with the management company's obligation to act in an honest and professional manner in accordance with the fund's interests.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

UCITS

Norwegian UCITS may be marketed in Norway by foreign managers, provided notification of the marketing is sent to the NFSA, pursuant to the passporting procedure. The same applies to UCITS established in another EEA state, which may be marketed in Norway by Norwegian or foreign managers after the competent authority in the fund's home state has transmitted notification of marketing to the NFSA, pursuant to the passporting procedure.

AIFs to non-professional investors

AIFs that are not domestic funds may be marketed to non-professional investors by a manager authorised by the NFSA. Managers authorised in another EEA country may apply for such authorisation by providing the following information:

- a business plan that identifies the fund and the fund's home country;
- information about the fund, which is available for investors;
- a key investor information document (KIID), which fulfils the EU packaged retail and insurance-based investment products requirements (Regulation (EU) No. 1286/2014);
- confirmation from the home state that the fund can be marketed to non-professionals; and
- a description of the planned marketing and sale, and the measurements to ensure marketing to non-professionals in accordance with good business practice.

If the AIF is established outside the EEA, the following additional criteria must be met: the manager complies with the AIFMA (except for rules regarding depositaries) and the manager's home state is not listed as a Financial Action Task Force country.

Foreign investment funds that are not considered UCITS (not covered by the EEA rules corresponding to the UCITS V Directive), may be marketed to non-professional investors in Norway subject to Norwegian authorisation from the NFSA. Such authorisation may be granted on the following conditions:

- the manager of the investment fund has transmitted such information and documentation to the supervisory authority as required by the NFSA;
- satisfactory supervisory cooperation has been established between the supervisory authority in the management company's home state and Norway;
- the investment fund and its management are subject to adequate supervision in the home state;
- the investment fund and its management meet the requirements imposed for carrying on business in the home state, and these requirements provide investors in Norway with protection at least in line with the protection provided to them when investing in domestic funds;
- the manager of the investment fund makes the arrangements necessary to make payments to the participants, redeem units and provide the information that the undertaking is required to prepare pursuant to the rules in the home state; and
- the sale in Norway of units in the investment fund takes place through one of the following:

- an authorised management company (with a Norwegian authorisation, an EEA authorisation pursuant to the passporting process or with Norwegian permission for foreign managers authorised outside the EEA);
- a credit institution entitled to carry out financing activities in Norway;
- an insurance company entitled to carry out insurance activities in Norway; or
- an investment firm entitled to provide investment services in Norway.

Norwegian special funds may be marketed to non-professionals provided the fund and the manager comply with Chapter 7 of the IFA, and the market communication makes it clear that the fund is a special fund. The NFSA may, however, restrict the fund manager of a special fund from marketing and selling the fund to non-professionals.

AIFs to professional investors
The marketing of Norwegian AIFs to professional investors may be carried out by Norwegian-authorised fund managers, but also by registered fund managers without authorisation, provided that such managers are covered by the small manager exemptions set out in the AIFMD, as described in question 4.

AIFs established in another EEA state can be marketed to Norwegian professional investors by authorised EU fund managers by notification to the NFSA via the EU marketing passporting procedure, giving the NFSA 20 days to assess whether to deny the marketing in case of non-compliance with relevant regulations.

8 What marketing activities require authorisation?

The definition of marketing varies depending on the type of investment fund. Marketing of UCITS is defined in the IFA regulation as an invitation or inducements to participate in a fund, which is targeted at or is particularly suitable to have effect in Norway. Marketing of AIFs is, however, defined in the AIFMA as to directly or indirectly offer units or shares of an AIF to, or place such units or shares with, investors, on the initiative, or on behalf of, the manager.

Notwithstanding that the above definitions are different, the analysis of what constitutes marketing and thus requires an authorisation would, in practice, be the same for a UCITS and an AIF, and marketing is considered to be all types of advertising or promotion of funds such as advertising in the mass media, cold calling, emails, oral information provided at the offices of the fund or its promoter (if the offices are located in Norway) and websites using the Norwegian language or otherwise containing information specific to the Norwegian market or Norwegian investors. All activities aimed at a potential investor, such as information given prior to an investment, are considered to constitute marketing. This means that the scope of marketing activities requiring authorisation is wide.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

The territorial scope of the fund marketing regulation is 'marketing in Norway or marketing activities from outside of Norway which is targeted towards Norway or is in any way tailored to have an effect in Norway'.

See question 7 regarding authorisation requirements for marketing.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

An overseas manager conducting marketing of a UCITS or an AIF must ensure that payments (eg, dividends), redemptions and disclosure of information relating to the fund can be made in relation to investors. These requirements may be satisfied through the appointment of a local paying agent to be responsible for the aforementioned activities (see question 7).

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

The general requirements regarding good business conduct in the IFA, AIFMA and STA will apply to such activities. See also question 6.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

'Retail funds' are commonly referred to as being funds available and generally eligible for non-professional investors. 'Non-professional investors' are defined as investors other than professional investors. 'Professional investors' are defined in accordance with the definition set out in the MiFID, implemented in Norway in the STA. The following apply to funds available to non-professional investors.

Open-ended retail funds
Investment funds are categorised as UCITS or AIF, and the latter includes domestic funds, special funds and other AIFs (see question 1). Open-ended retail funds may be structured as UCITS or domestic funds.

Norwegian 'investment funds' are classified as a special type of legal vehicle or entity. All such funds established in Norway have their own business register number and are registered in the Norwegian register of business entities as mutual funds. A Norwegian fund is, however, of a semi-contractual nature, and does not have its own board of directors, managing director or employees. Investment funds may only be established by an authorised fund manager (authorised in Norway or within the EEA where the passporting process is applicable) and funds are formed by adoption of the fund's articles of association and the NFSA's approval of the articles and the application for authorisation. The fund manager is appointed in the fund's articles of association and the manager acts on behalf of the fund. Unitholders in the fund exercise influence in the fund's management through representation in the management company's board of directors and not in the fund itself.

Collective investment structures established as legal vehicles other than the above-mentioned 'funds', such as a limited liability company (AS) or as a partnership (ANS, DA or KS) or similar foreign entities may also fall within the scope of Norwegian fund regulation, based on individual assessments. Open-ended funds will usually fall within the scope of the IFA. The AIFMA regulates managers and not funds as such, and is therefore not restricted to certain kinds of legal vehicle. If Norwegian fund regulation applies to such other legal vehicles, the requirements regarding authorisation and establishment by a manager described above apply.

Closed-ended retail funds
Investment funds subject to the IFA shall in general be open for subscription and redemption twice a month (open-ended). The NFSA may, however, grant permission for domestic funds, to some extent, and for special funds, to derogate from these requirements and thus be closed-ended funds, which may be available to non-professional investors, subject to the general investor protection rules in the MiFID and the STA. Funds subject to further restrictions than these permitted restrictions fall outside the definition of investment funds and are thus not subject to the IFA and the retail protection therein. Such closed funds are generally not considered retail funds. There are no restrictions regarding the legal vehicle used to establish closed-ended funds in Norway.

13 What are the key laws and other sets of rules that govern retail funds?

The establishment and operation of all investment funds, including open-ended retail funds, are governed by the IFA regulations and effective orders made by the NFSA. In addition, the rules of the specific fund, as well as regulations, guidelines and recommendations by the Norwegian Fund and Asset Management Association apply. AIFs are also governed by the AIFMA, the AIFM regulations and executive orders made thereunder.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

The establishment and marketing of funds available to non-professionals require authorisation, either from the NFSA or by the regulator in an EEA state where the passporting procedure applies (see questions 3, 4 and 7).

15 Who can market retail funds? To whom can they be marketed?

There are no formal restrictions governing who may market retail funds or the intended recipient of such marketing. Instead, retail funds can be marketed to any type of investor. Furthermore, the marketing entity does not need to be licensed or authorised provided that the marketing does not include the offering of funds or would otherwise require a licence pursuant to the MiFID or under the STA. See, however, questions 7 and 8.

16 Are there any special requirements that apply to managers or operators of retail funds?

The IFA generally applies to retail funds, as the Act is aimed at protecting non-professionals. Non-retail funds are, however, subject to specific regulations and exceptions in Chapter 7 of the IFA. The AIFMA provides specific regulation of AIFs marketed to non-professionals, such as the requirement for authorisation (compared with unauthorised registered managers of AIFs to professionals) and the additional requirement for Norwegian marketing authorisation for each fund.

Retail funds are characterised by extensive consumer protection rules whereby a manager of a retail fund must comply with a variety of special requirements that are not applicable in relation to other types of investment fund.

The most prominent requirement is the obligation to act exclusively in the common interest of the unitholders. Furthermore, the manager is required to, inter alia, maintain or cause to be maintained a register of all holders of units in the fund, immediately redeem a unit upon request from a holder and to maintain a suitable diversification of investments in accordance with the principle of 'risk spreading' (see question 17).

17 What are the investment and borrowing restrictions on retail funds?

Investment restrictions

The investment of retail funds shall follow the 'risk spreading' principle and be made in financial assets associated with high liquidity including transferable securities, money market instruments, derivative instruments, units in other UCITS and deposits with credit institutions. As a general rule, however, subject to exemptions, the value of the instruments issued by any single issuer may not exceed 5 per cent of the fund's value.

Borrowing restrictions

A management company may not raise loans on behalf of an investment fund, impose on the fund surety or guarantee obligations or post the investment fund's assets as security. A management company may not sell financial instruments not owned by the fund, unless specifically approved by the NFSA. This borrowing restriction does not, however, restrict the management company from, on behalf of the fund, raising short-term loans of up to 10 per cent of the fund's assets and posting the fund's assets as security for fulfilment of derivative contracts.

18 What is the tax treatment of retail funds? Are exemptions available?

Norwegian retail funds that are organised as investment funds, as described in question 12, will be covered under the Norwegian participation exemption method and be tax exempt for gains on shares in and distributions from companies resident in the EEA. An investment fund will also be tax exempt for gains on shares in companies outside the EEA, provided that the company does not reside in a low tax jurisdiction. Three per cent of dividends that are exempt under the exemption method will be subject to a taxation of 24 per cent.

Regarding taxation of interest income, a retail fund organised as an investment fund will, as a starting point, be taxable with 24 per cent on interest income received. However, if the fund has less than 20 per cent shares in its investment portfolio, the fund may deduct any profits distributed to the unitholders. If the fund has between 20 and 80 per cent shares in its portfolio, a proportional part may be deducted when the profits are distributed. The fund will not be entitled to any such deduction if the fund has more than 80 per cent shares in its portfolio. If the fund is entitled to a full deduction it will for 2017, with a corporate tax rate of 24 per cent, be subject to an effective taxation of 2.76 per cent on interest income.

On rare occasions, funds organised as limited liability companies, limited partnerships and other legal vehicles may be considered retail funds. If so, they are subject to taxation regulation applicable to the specific legal vehicle; see question 29 regarding tax treatments of legal entities other than investment funds.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The assets of all Norwegian investment funds shall be administered by and entrusted to a depositary for safekeeping. The fund manager must appoint a single independent depositary for each fund that it manages.

Only EEA credit institutions (with licences granted in an EEA home country and established in Norway through a branch) may act as depositaries. The engagement of a custodian may not be permitted for an entity whose interests may come into conflict with the management company or the unitholders.

The IFA and regulations thereunder set out certain commitments and obligations on depositaries and funds, which mirror the obligations regarding depositaries in the UCITS V Directive.

The organisational and governance requirements for UCITS also contribute to the protection of the fund's assets.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

A fund established in Norway as an investment fund is semi-contractual, based on the articles of association, and does not have its own board of directors, managing director or employees. These functions are fulfilled by the manager of the fund. Unitholders in the fund exercise influence in the fund's management through representation in the management company's board of directors and not in the fund itself. The fund itself only has a unitholders' meeting, which decides on changes to the fund's articles of association and mergers. Such decisions require consent from a qualified majority of 75 per cent. Fund managers are, however, subject to detailed regulation regarding governance requirements, etc, implementing the UCITS V Directive governance requirements, primarily including risk management, handling of potential conflicts of interest and acting in a manner that maintains the public's confidence in the fund market. More detailed guidance is provided by the NFSA.

In connection with the authorisation process (and upon revision thereof) the management company is required to submit to the NFSA a number of documents including, for example, the prospectuses, key investor information documents, an annual report and a semi-annual report. Upon authorisation being granted, the fund manager and the retail fund will be registered in the NFSA's public register. The management company must have a board of directors that consists of at least three members and a managing director and is obliged to maintain, or cause to be maintained, a register of all holders of units in the fund.

In addition, a management company must document and preserve each portfolio transaction for all UCITS it manages. The documentation must be retained for at least five years and must contain sufficient information in order to reconstruct each transaction performed.

21 What are the periodic reporting requirements for retail funds?

A management company must submit a semi-annual report containing a profit and loss account and a balance sheet for the management company itself to the NFSA. Quarterly reports must also be submitted for each retail fund managed, including information on, for example, the type of fund managed, net asset value of the fund assets, fees charged for the subscription and redemption of units in the fund and the assets and liabilities of the fund.

For each fund the manager shall publish an annual report with annual financial statements and a management report, as well as a semi-annual report.

The semi-annual report shall contain information, inter alia, on the following:

- the fund's financial instruments;
- bank deposits;
- liabilities resting on the fund;
- number of units issued;
- the value of a unit less redemption fee;
- all obligations resulting from the fund's transactions undertaken in the reporting period;
- returns in the reporting period and returns in the last five years; and
- other matters that are assumed to be of interest to the unitholders and that are necessary in order to assess the fund's development and position, and the management fee.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

A Norwegian UCITS is by statute an open-ended investment fund available to the public. As such, the fund must accept investments. In general, no restrictions may be placed on the issue, transfer and redemption of units in the funds. However, it is possible to impose rules stipulating, for example, a minimum subscription amount. Upon the request of a unitholder, a unit must be redeemed immediately and may only be postponed under extraordinary circumstances.

A Norwegian domestic or special fund may, however, subject to the NFSA's consent, incorporate restrictions on the issue of units in the fund. In addition, a special fund may limit the possibility for investors to redeem their units to once per year. Restrictions must be incorporated in the fund rules that must be approved by the NFSA in connection with the formation of the fund.

Investment funds shall be open for subscription and redemption of units in cash at least twice a month. A unitholder may request redemption of his or her units unless:

- otherwise prescribed by agreement on defined contribution pension pursuant to the Defined Contribution Pension Act or an individual pension scheme pursuant to the Individual Pension Schemes Act;
- under special agreement with major unitholders the management company limits the number of units whose redemption may be requested by the latter during specified periods;
- if called for in the interest of the unitholders or the public, the NFSA orders the management company to wholly or partially suspend the right of redemption; and
- the management company adopts a decision to liquidate the fund or the management company's authorisation has lapsed or been withdrawn, after which units of a fund must not be issued or redeemed after.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

Non-retail funds are commonly referred to as being funds solely available and eligible for professional investors.

Different types of legal vehicle may be used for the establishment of a non-retail fund and in general the fund type will govern the choice of vehicle. In this context, and from a Norwegian perspective, non-retail funds comprise AIFs.

The main legal vehicles used to set up non-retail funds in Norway are investment funds, limited liability companies and limited partnerships considered AIFs. Limited liability companies are formed through the signing of a memorandum of association, while limited partnerships are formed through the acceptance of the partnership agreement.

Norwegian private equity funds and real estate funds are primarily formed as limited partnerships but may also be formed as limited liability companies. An essential difference between a retail fund and a non-retail fund is that the latter does not have to be separate from the fund manager and merely consist of the fund assets. Consequently, a non-retail fund can be a legal person with the ability to assume rights and obligations. Furthermore, a non-retail fund could be internally or externally managed. In the former case, the fund is the manager and the entity is required to possess all functions necessary to be able to comply with applicable laws and regulations.

24 What are the key laws and other sets of rules that govern non-retail funds?

Funds that are solely marketed and sold to professional investors are regulated by the fund's rules, the IFA and the AIFMA, but are exempted from the particular statutory requirements protecting non-professional investors such as investment restrictions and redemption and subscription rights. Specific regulations regarding the marketing and sale to professional investors are set out in Chapter 6 of the AIFMA.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

With the exception of non-retail funds in the form of domestic funds or special funds, subject to the IFA, there is no requirement to obtain authorisation for the establishment of a non-retail fund (AIF). The activities requiring authorisation are, instead, the management of a non-retail fund (see the AIFMA regarding implementing the AIFMD). Marketing is subject to notification (see AIFMD and AIFMA) and licence for managers established outside the EEA.

26 Who can market non-retail funds? To whom can they be marketed?

Anyone can market a non-retail fund, provided that the marketing does not go beyond the concept of 'promotion'. The marketing entity would not need to be licensed or authorised unless the marketing activities include the offering of the funds or would otherwise require a MiFID licence or authorisation pursuant to the AIFMA.

As a main rule, non-retail funds may only be marketed to professional investors as defined in the STA (implementing the MiFID). Marketing of non-retail funds to non-professional investors is subject to a licence requirement for each fund. In addition, special requirements for sound business conduct will apply, effectively limiting the ability to market non-retail funds to non-professional investors to an extent that only leaves a small window for compliant marketing.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

No. Even though a non-retail fund may only be marketed to retail investors subject to certain prerequisites, there is no prohibition on an investment being made by a retail investor on a reverse-solicitation basis.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

Fund managers of AIFs directed at professional investors are required to establish arrangements to avoid the funds being marketed to retail investors. In general, however, there are fewer requirements imposed on managers of non-retail funds as opposed to managers of retail funds. Special regulations for domestic funds and special funds, which may be considered non-retail, are set out in Chapter 7 of the IFA, and special regulations for the marketing of AIFs that are not domestic funds are set out in Chapter 6 of the AIFMA.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

Non-retail funds organised as investment funds are subject to the same tax regulation as described in question 18.

Non-retail funds organised as a limited liability company will be covered under the participation exemption method and be tax-exempt for gains on shares in and distributions from companies resident in the EEA. Such funds will also be tax-exempt for gains on shares in and distributions from companies outside the EEA provided that the fund holds at least 10 per cent of the share capital for a period of at least two years and that the company is not resident in a low-tax jurisdiction. However, 3 per cent of dividends, which is exempt under the exemption method, will be subject to a taxation of 24 per cent. Interest income of non-retail funds that are organised as limited liability companies will be taxed at 24 per cent.

Non-retail funds that are organised as limited partnerships will be treated as transparent entities for tax purposes and taxed in the hands of the partners. Any partner of the limited partnership that is organised as a limited liability company will thus be covered under the participation exemption method to the same extent as if the investment was done directly by the partner. A partner that is organised as a limited partner will thus be taxed as described above.

Interest income of non-retail funds that are organised as limited partnerships will be taxed at 24 per cent in the hands of the partners.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

Managers of AIFs shall ensure that a single depositary is appointed for each AIF it manages. The AIFMA implements the AIFMD regulations on depositaries and funds' assets protection, including depositary qualifications and regulations regarding, inter alia, liability, control, cash management, conflict of interest, outsourcing and reporting to the NFSA. See question 19.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

The manager of non-retail funds shall comply with the governance requirements set out in the AIFMA, implementing the AIFMD. These include conducting operations in a professional manner so that the public's confidence in the fund market is maintained, as well as adequate risk and liquidity management, handling of potential conflicts of interest and establishing a remuneration policy compatible with such requirements, designation of a depositary and filings to the NFSA. Members of the board, the general manager and other executive officers in the management company must satisfy the fit and proper requirements at all times.

32 What are the periodic reporting requirements for non-retail funds?

AIFMs shall provide a report to the NFSA on a half-yearly basis.

The reporting requirements regarding non-retail funds vary depending on the fund type and the value of assets under management. In general, the manager or the fund (as the case may be) must report more frequently and in greater detail in relation to funds that are marketed to retail investors and whose asset value exceeds certain thresholds. For funds applying gearing, reporting requirements are found in the Commission Delegated Regulation (EU) No. 231/2013.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Management of separate accounts (discretionary portfolio management) is typically structured through an agreement between the investor and the manager whereby an investment strategy (portfolio allocation, etc) is determined based on the investor's investment horizon and risk profile. The manager then makes investments relating to the portfolio on a discretionary basis without having to obtain prior approval for each transaction from the investor.

34 What are the key legal issues to be determined when structuring a separately managed account?

The key legal issues to be determined include standard of care, indemnification, the parties' obligations to cooperate, fee structure, reinvestments, distributions, transparency and reporting requirements towards investors. Initially, the manager has to categorise the investor as either professional or non-professional and such categorisation thereafter governs the obligations of the manager.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

The management of separate accounts is a regulated activity falling within the scope of the STA, implementing the MiFID. The regime differs from fund management. Management of separate accounts may be provided by investment firms authorised by the NFSA, investment firms authorised within the EEA who have fulfilled the notification requirement pursuant to the MiFID passporting procedure, and by authorised managers of UCITS and AIFs with additional authorisation to provide individual portfolio management.

Marketing in the sense of 'promoting' separately managed accounts is not a regulated activity and does not require authorisation. All marketing material is, however, subject to the Norwegian Marketing Practices Act and requires the marketing to be consistent with generally accepted marketing practices.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

No.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

Exchange traded funds (ETFs) can be authorised as investment funds under the IFA. The European Securities and Markets Authority Guidelines on UCITS ETFs are implemented in Norway and the NFSA supervises the ETF's compliance with the requirements set out therein, including specific requirements regarding the prospectus, the KIID and other marketing material. Non-retail exchange traded funds are subject to the general requirements for stock exchange listing set out in the STA and the Norwegian Stock Exchange Act.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

No, it is not possible to redomicile a foreign UCITS or equivalent to a Norwegian special fund in Norway. Especially in cases where the overseas vehicle has variable capital (eg, a SICAV), Norwegian legislation would not permit the maintenance of such funds. However, Norwegian legislation would allow for the merger between a Norwegian UCITS and a foreign UCITS where the Norwegian fund is the receiving fund.

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A merger between a foreign AIF and a Norwegian AIF is not regulated by Norwegian investment fund legislation.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

No.

Portugal

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

Activity involving the management, investment and marketing of funds is mainly regulated by the following:

- the Undertakings for Collective Investment Law, enacted by Law No. 16/2015 of 24 February 2015 (the UCI Law), which partially implemented in Portugal Directive 2009/65/EC on Undertakings for Collective Investment in Transferable Securities (UCITS) (the UCITS Directive), as amended from time to time;
- Directive 2011/61/EU on alternative investment fund managers (AIFMD), which sets out most of the rules relating to investment funds;
- Portuguese Securities Exchange Commission (CMVM) Regulation No. 2/2015 on Undertakings for Collective Investment, which sets forth more specific rules regarding certain aspects of the UCI Law; and
- the Portuguese Securities Code, enacted by Decree-Law No. 486/99 of 13 November 1999, as amended when necessary, which entered into force on 1 March 2000.

The CMVM is the main regulatory body in relation to investment funds.

Furthermore, fund managers, as financial institutions, are also subject to prudential supervision under the Bank of Portugal (BoP), along with the applicable provisions of the Portuguese Banking Law, enacted by Decree-law No. 298/92 of 31 December 1992, as amended when necessary, and all complementary legal documents in connection therewith.

2 Is fund administration regulated in your jurisdiction?

Fund administration activities when not directly carried out by the fund managers are generally undertaken by a depositary and are subject to specific legal provisions, including the duty of care, outsourcing, liability of the parties involved, etc.

Furthermore, some support services, depending on their specific scope, may be deemed investment services or activities, or ancillary services, thus being subject to specific authorisation by the BoP or the CMVM, as applicable.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

The CMVM authorises the setting up of funds. When requesting such authorisation, the relevant fund manager must provide the CMVM with the fund's documentation, notably, the key investor information document and the full prospectus of the fund, which must also include the fund regulations.

In addition, the CMVM must also be given copies of the agreements to be executed between the management company and the depositary; the distributors or entities that will market the fund; and any other entities that will render services to the fund or to the fund manager.

Documents corroborating the acceptance of the services rendered by all entities involved in the fund's activities must also be delivered to the CMVM.

Authorisation is issued within 20 days (or 30 days in the case of self-managed collective investment companies) of the receipt of either the request or of any supplementary information or amendments to the documents required by the CMVM. If, at the end of this period, the applicants have not yet been notified of the success of their application, authorisation is considered to have been tacitly granted, with the exception of alterntive investment funds (AIFs) where, conversely, authorisation is deemed as tacitly refused.

The CMVM may refuse to grant authorisation if the applicant does not submit the required documentation or if the fund manager in question engages in irregular management of other investment funds.

Once authorisation is granted, a fund will be fully set up from the moment the first subscription is settled.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

No. Considering that fund managers are financial institutions carrying out intermediation activities, in order to provide their services in Portugal they will need to be incorporated in Portugal or resort to the passport regime, notably, the freedom of services or the freedom of establishment under the UCITS Directive, AIFMD or Markets in Financial Instruments Directive 2004/39/EC (MiFID).

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

Yes. The Portuguese Banking Law establishes that any entity or legal person wishing to acquire or to raise a qualifying shareholding in a fund manager, to the extent that it surpasses the 10 per cent, 20 per cent, one-third or 50 per cent share capital threshold, or if the fund manager becomes a subsidiary of the acquirer, will have to file an authorisation application with the BoP.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

Yes. Article 139 et seq of the UCI Law establishes that the fund manager is remunerated through a management fee, which may comprise a variable component. The fixed or variable components of the management fee and its calculation methods must be clearly foreseen in the fund's constitutional documents.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

Yes. The marketing or distribution of funds is defined as an activity directed towards investors with a view to promoting or proposing the subscription of units or shares, regardless of the means of communication used.

The entities that are legally permitted to market funds are as follows:

- fund managers;
- depositaries;

- financial intermediaries registered or authorised by the CMVM to perform the relevant activities, namely those of placement and the reception and transmission of orders on behalf of third parties; and
- other entities, as foreseen in CMVM Regulation No. 2/2015 and subject to its authorisation.

As regards fund marketing, such entities must observe the same rules and are subject to the same supervision as that exercised over financial intermediaries.

8 What marketing activities require authorisation?

As described in question 7, the UCI Law encompasses a very broad concept of marketing and, as such, any activity falling within this scope will require that the relevant marketing entities secure authorisation for such purpose.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

No. As best described in question 7, entities permitted to perform fund marketing activities in Portugal must be incorporated in Portugal or resort to the passport regime, notably, the freedom of services or the freedom of establishment under the UCITS Directive, AIFMD, MiFID or the Capital Requirements Directive IV.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

There is no need to have a local entity involved provided that the foreign marketing entity has a proper licence (eg, under the passport regime).

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

The conditions according to which fund marketing is rewarded should be defined in the marketing contract. It is admissible for the marketing agent to be paid through the total or partial amount of the subscription, redemption or transfer commissions, provided that this option is foreseen in the constitutional documents of the funds. Under the UCI Law, and contrary to the previous regime, the fund manager cannot receive the entirety or part of the marketing fee.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

Despite the fact that the concept of a retail fund is not entirely applicable under Portuguese law, for the purposes of this chapter the term 'retail fund' shall refer to the Portuguese legal concept of UCITS, which are aimed at investing capital obtained from the public and are subject to a risk-sharing principle and the pursuit of the relevant participants' interest.

In general terms, UCITS set aside AIFs, even if publicly distributed real estate investment funds could, to a certain degree, be assimilated to the retail fund concept. Nonetheless, considering that such AIFs are subject to a stricter framework and that their regulation is not harmonised throughout the EU, such grounds could hamper their qualification as retail funds.

A retail fund may take one of the following two forms or structures, both subject to the licensing procedures described in question 3:

- a contractual structure with no legal personality. This is the classic structure and requires that the fund be managed by a separate fund manager. The investors' or participants' interests in these funds are called units; or
- a collective investment company endowed with legal personality (SIMs). The incorporation of such entities is subject to the CMVM's authorisation. SIMs can be self-managed, in which case a minimum initial capital of €300,000 will be required, or managed by an appointed third party, which must be a duly authorised investment fund manager. Participants in these SIMs will hold shares.

13 What are the key laws and other sets of rules that govern retail funds?

See the laws set out in question 1 and the fund's documentation specified in question 3, which govern retail funds.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Yes.

15 Who can market retail funds? To whom can they be marketed?

See question 7. There are no limitations as to whom retail funds may be marketed. Both natural and legal persons can invest in the units or shares of a retail fund.

16 Are there any special requirements that apply to managers or operators of retail funds?

No.

17 What are the investment and borrowing restrictions on retail funds?

The following investment limits apply to retail funds in relation to issuing entities:

(i) no more than 10 per cent of a fund's global net value may be invested in securities and money market instruments of the same issuer;
(ii) no more than 20 per cent of a fund's global net value may be invested in deposits with the same entity;
(iii) exposure to a single counterparty in transactions involving derivatives outside a regulated market cannot exceed 5 per cent of the fund's global net value, or 10 per cent if the counterparty is a bank; and
(iv) the sum of the investments made in securities and money market instruments from the same issuer exceeding 5 per cent cannot exceed 40 per cent of a fund's global net value. This limit does not apply to deposits or transactions on derivatives performed outside a regulated market and multilateral trading facility where the fund's counterparty is an entity subject to prudential supervision.

There are a number of exceptions to these limits. For example, limit (i) rises to 35 per cent where:

- the issuer is an EU member state or one of its local or regional authorities;
- the issuer is a non-EU member state or an international organisation with at least one EU member state as a member; or
- one of these entities guarantees the securities or money market instruments.

Limits (i) and (iv) rise to 25 per cent and 80 per cent, respectively, if the investment is in covered bonds issued by a credit institution from an EU member state. However, such covered bond issuances must be backed by underlying assets that fully secure the amount due and any interest payment in the event that the issuer defaults.

No more than 20 per cent of a fund's global net value can be invested with a single entity.

A fund can invest up to 100 per cent of its global net value in securities or money market instruments issued or guaranteed by an EU member state or its local or regional authorities, or by public international entities related to a member state or a third state, provided that the investment is made across six separate issues and the value invested in each issue never exceeds 30 per cent of the global net value of the fund.

No more than 20 per cent of a fund's global net value can be invested in securities and money market instruments of issuers belonging to the same corporate group.

In addition, a retail fund cannot acquire more than:

- 10 per cent of shares without voting rights from the same issuer;
- 10 per cent of an issuer's debt titles;
- 25 per cent of the units of a UCITS or AIF; and
- 10 per cent of an issuer's monetary market instruments.

The following borrowing restrictions apply:
- management companies may obtain loans on behalf of the funds they manage. Within a one-year period, the sum of all loan periods cannot exceed 120 days, irrespective of whether they are back-to-back. Additionally, there is a borrowing limit of 10 per cent of the fund's global net value, without prejudice of the right to resort to securities loans and repo agreements;
- collective investment companies may enter into loan facilities to acquire immoveable assets indispensable to the direct exercise of their activities, in up to 20 per cent of the global net value of the fund; and
- if the incorporation documents of a collective investment company provide for the possibility of entering into loan facilities, the amounts specified cannot exceed 15 per cent of the fund's global net value.

18 What is the tax treatment of retail funds? Are exemptions available?

Retail funds are subject to corporate income tax (CIT) at the general corporate tax rate (currently set at 21 per cent). No municipal tax and state surtax will apply.

The taxable income of retail funds corresponds to the net profit assessed in accordance with their respective accounting standards. However, investment income, rents and capital gains (except when sourced in a tax haven) are disregarded for profit assessment purposes; on the other hand, expenses related to this type of income (including funding costs), as well as non-deductible expenses under the CIT code, and income and expenses relative to management fees and other commissions earned by retail funds are also disregarded for profit assessment purposes.

The tax losses of these funds shall become entitled to be carried forward for a period of 12 years. The income of retail funds is not subject to withholding tax.

Retail funds exclusively investing in money market instruments and bank deposits shall become subject to stamp duty calculated over their global net assets at the rate of 0.0025 per cent (per quarter), with the remaining retail funds being subject to a 0.0125 per cent rate (per quarter).

However, at the investor level, income tax exemptions may be applicable to non-resident investors.

In this respect, income derived from retail funds, including capital gains resulting from the redemption of unit participations or their liquidation, shall be exempt from income tax provided that:
- they are not held, directly or indirectly, in more than 25 per cent of its share capital by Portuguese residents or by individuals resident in Portugal, except when the latter is resident in an EU member state or in a European Economic Area member state that is bound to cooperate with Portugal under an administrative cooperation arrangement in tax matters similar to the exchange of information schemes in relation to tax matters existing within the EU member states or in any country with which Portugal has a double tax treaty in force;
- they have provided proof of non-residence in Portugal in due time; or
- they are not domiciled in tax haven jurisdictions listed in Ministerial Order No. 150/2004 of 13 February 2004, as amended.

Non-residents that have failed to prove their non-residence on time may request a total or partial refund of the tax withheld during a two-year period (counted from the end of the year in which the event that generated the tax liability took place).

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The assets of a retail fund must be entrusted to a single depositary, which must be a certain type of financial institution.

A depositary must have at least €7.5 million in own funds and its registered office must be located in Portugal or in another EU member state, although in the latter case it must also have a branch in Portugal. A fund must have different entities as fund manager and as depositary. A depositary can also be an investment company authorised to provide registration and deposit of financial instruments services, subject to compliance with the own funds requirements set out in article 92 of Regulation 575/2013/EU.

The depositary, like the management company, must act independently and exclusively in the interest of the fund's investors. It has three main responsibilities, as follows:
- the safekeeping of the fund's assets;
- carrying out acts related to the transfer or exercise of the rights over the assets, as instructed by the fund manager, as well as the payment to the investors of the proceeds of the redemption or liquidation of the assets; and
- monitoring and guaranteeing to investors that the investment policy, the use of proceeds and the calculation of the value of the units of the fund comply with the law, regulations and constitutive documents of the fund.

The depositary is responsible, under the general rules of civil liability, towards the fund manager and the investors for compliance with the legal duties, regulations and constitutive documents of the fund, and for the loss of the financial instruments under its safekeeping. In this respect, the UCI Law closely follows the measures and provisions established in the AIFMD.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

The retail fund must be managed by a licensed fund manager and, considering the recent changes enacted by the UCI Law, will have a board of directors comprising at least three members, one of whom must be an independent director (or non-executive director).

Moreover, pursuant to the recently enacted Law No. 148/2015 of 9 September 2015 (Auditing Supervision Framework), the fund manager shall also have an audit board comprising at least three members (the majority of whom must be considered independent) and a sole auditor.

The members of the fund manager's board of directors and audit board must be previously authorised by the BoP to take office, being subject to a thorough suitability assessment during this procedure.

Furthermore, the fund manager must have several internal policies in place aimed at addressing the following:
- the risk of its activity;
- remuneration issues;
- outsourcing;
- internal control;
- evaluation of the assets pertaining to the funds under management;
- anti-money laundering;
- record keeping; and
- selection of the members of the board of directors and audit board.

All of these are subject to the control of the CMVM and, to a certain extent, of the depository.

21 What are the periodic reporting requirements for retail funds?

The fund manager must prepare and publish annual and biannual accounts. These must be made available free of charge on request by investors.

The marketing entity must send or make available to investors a statement informing them of the the number of units held by the investor in question and their value and the aggregate value of the investment. In addition to this information, the marketing entity may provide further information regarding the investor's financial situation. For example, if the marketing entity is a bank and the investor is a client of that bank, it might provide the above information together with the investor's bank statement.

Any information published pursuant to the requirements set out below is available to investors, usually through the CMVM's information diffusion system (website).

Moreover, the fund manager must publish and send the following to the CMVM:
- the annual accounts within three months of the end of the financial year;
- the biannual accounts within two months of the end of the relevant semester; and

Update and trends

A precise analysis of the Portuguese fund market compels a distinction between open-ended and closed-ended retail funds.

A significant number of open-ended retail funds exist and are operating in Portugal. The overwhelming majority of these have been created within the financial services groups operating in Portugal as an instrument to attract clients' savings. Virtually all of Portugal's largest financial services groups hold at least one investment fund management company.

In addition, the number of foreign investment funds currently being marketed to Portuguese investors by Portuguese marketing entities (including some smaller banks) is growing. However, this is still a relatively small market compared to the amount invested in funds set up and promoted by Portuguese financial services groups. This is probably owing to the fact that the client base of these latter groups is larger than that of the entities marketing foreign investment funds. In fact, statistics show that the trends observed in previous years have remained essentially unchanged, as the management companies with the largest portfolios are the largest financial groups active in Portugal (source: Portuguese Fund Managers Association).

The most significant changes to the market result from the side effects of the financial crisis.

In this regard, the past years have been marked by a sequence of delicate events, particularly the collapse of the BES Group and the enforcement of resolution measures by the BoP in 2014, the effects of which still linger. At present, the BoP is dealing with the Novo Banco (previously Banco Espírito Santo, integrated in the BES Group) sale process. Furthermore, the Bank of Portugal enforced resolution measures against Banif (a Portuguese credit institution) at the end of 2015 and is now struggling with the recapitalisation process of the Portuguese state fully owned bank, Caixa Geral de Depósitos.

These measures and circumstances demonstrate the sense of uncertainty that still pervades the Portuguese financial markets.

It is important to note that the circumstances and effects currently shaping the Portuguese fund market are in line with the international economic scenario characterised by a profound financial crisis that has fuelled significant concern with high-frequency trading, commodity position limits, capital adequacy for investment firms and 'shadow banking'. These issues are reflected in the European standards that have generally been adequately transposed into the Portuguese jurisdiction.

- an inventory of the fund's asset portfolio, its global net value, any responsibilities not found in the balance sheet, and the number of units currently in circulation, on a monthly basis.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

There are generally no restrictions placed on the issue, transfer or redemption of interests in retail funds. However, considering that the UCI Law does not expressly forbid the establishment of such restrictions in the fund's prospectus, it is possible to set certain specific conditions in respect of the issue, transfer and redemption of the aforementioned interests.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

The vehicles available are those described in question 11.

However, in cases where collective investment companies invest in real estate, they are qualified as real estate investment companies.

In addition, it should be noted that in Portugal the AIFMD has been partially implemented by Law No. 18/2015 of 4 March 2015, relating to venture capital, social entrepreneurship and specialised investment (the Venture Capital Law).

The Venture Capital Law contains a specific regime applicable to funds investing in equity instruments for a limited period of time, as well as in other structures, which, despite having similar features to the UCI's framework, is perceived under Portuguese law as being an autonomous subject in relation to UCIs. That being said, the Venture Capital Law falls outside the relevant scope of this chapter.

24 What are the key laws and other sets of rules that govern non-retail funds?

See questions 1 and 3.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Yes.

26 Who can market non-retail funds? To whom can they be marketed?

The entities listed in question 7 can market non-retail funds. There are no limitations to whom retail funds may be marketed. Both natural and legal persons may invest in the units or shares of a retail fund.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

No. However, the constitutional documents of the non-retail fund may establish that the fund will only be placed with qualified, professional investors, or those of a certain class. In such cases, the distribution of the fund's units or shares must comply with this restriction.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

The UCI Law, which partially implemented the AIFMD in Portugal, opted out of establishing a framework similar to fund managers of retail and non-retail funds.

Therefore, the requirements applicable to the licensing and development of fund management are identical for the most part, save for a few provisions only applicable to fund managers managing certain types of funds, owing to their specific nature (eg, retail funds, non-financial assets funds or real estate funds).

29 What is the tax treatment of non-retail funds? Are any exemptions available?

The tax treatment of non-retail funds is the same as that applied to retail funds (see question 18), except as regards the following aspects.

At the investor level, income tax exemptions may be applicable to non-resident investors regarding non-retail funds that mainly invest in moveable assets, or a reduced withholding tax rate of 10 per cent may be applicable to non-resident investors regarding non-retail funds that mainly invest in real estate assets. In this respect, income derived from non-retail funds, including capital gains resulting from redemption of units or their liquidation, will benefit from income tax exemption or a reduced withholding tax rate, as the case may be, provided that:

- they are not held, directly or indirectly, in more than 25 per cent of its share capital by Portuguese residents or by individuals resident in Portugal, except when the latter is resident in an EU member state or in a European Economic Area member state that is bound to cooperate with Portugal under an administrative cooperation arrangement in tax matters similar to the exchange of information schemes in relation to tax matters existing within the EU member states or in any country with which Portugal has a double tax treaty in force;
- they have provided proof of non-residence in Portugal in due time; or
- they are not domiciled in tax haven jurisdictions listed in Ministerial Order No. 150/2004, as amended.

Non-residents that have failed to prove their non-residence status on time may request a total or partial refund of the tax withheld during a two-year period (counted from the end of the year in which the event that generated the tax liability took place).

For the purposes of this regime, income derived from non-retail funds that mainly acquire real estate assets, including capital gains from the sale or redemption of such units or from the liquidation of such funds, shall be classified as income derived from immoveable property (as a rule, under a double tax treaty the right to tax immoveable property income is attributed to the source state).

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

See question 19.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

See question 20.

32 What are the periodic reporting requirements for non-retail funds?

See question 21.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Separately managed accounts are not provided for under Portuguese law within the scope of the UCI's framework, but correspond to portfolio management financial intermediation activity.

The structure of separately managed accounts is set up in Portugal through a discretionary mandate agreement between the client and the portfolio manager (usually a portfolio management company, asset management company or another financial intermediary duly licensed to develop such activity), pursuant to which the portfolio manager is obliged, in respect of the client, to carry out all actions necessary to value the portfolio and to exercise all rights inherent to the financial instruments comprised in the portfolio.

34 What are the key legal issues to be determined when structuring a separately managed account?

Besides the general obligations arising from the Portuguese Security Code, which portfolio managers must adhere to in their capacity as financial intermediaries, Decree-Law No. 163/94 of 4 June 1994, as amended, establishes specific provisions in this respect.

The portfolio manager is subject to a strict duty of diligence when acting on behalf of the client; the former is required to act in the sole interest of the latter.

More specifically, the portfolio manager:

- must record and segregate the client's assets in different accounts or sub-accounts;
- shall refrain from practising certain transactions on its own, such as granting credit under any circumstance, providing collateral, accepting deposits, etc; and
- may not acquire, on behalf of its client, securities issued by entities pertaining to its governance bodies or any company holding more than 10 per cent of the share capital of the portfolio manager, as well as other related entities.

The portfolio management agreement must be entered into between the relevant parties and must determine the level of discretion exercised by the portfolio manager. Nonetheless, the client always has the right to issue binding orders to the portfolio manager regarding the transaction to be carried out, unless the portfolio management agreement contains a guaranteed minimum return undertaking by the portfolio manager.

Finally, this type of agreement always leaves room for the parties to regulate their contractual relationship as they see fit, provided that the principles and obligations of the financial intermediaries are not breached.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

Yes. See question 34 for more details on the operation structure.

The legal framework applicable to separately managed accounts, as described in question 33, is different from the UCI's framework because separately managed accounts are subject to the provisions of article 1 of Decree-Law No. 163/94 (ie, the fund is a mere pool of assets without legal personality per se) and are tailored and managed in accordance with an agreement (which does abide by UCI Law) entered into between the client and the portfolio manager. A UCI will be subject to the legal framework outlined in question 1 et seq.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

Given that the UCI Law was only recently enacted, no major amendments to the Law are expected in the near future. However, the possibility of one-off amendments to the UCI Law, directly attributable to changes in EU legislation in this respect, cannot be set aside, particularly concerning the implementation of additional amendments to the AIFMD and UCITS Directives.

Moreover, the new UCI tax regime, which entered into force on 1 July 2015, aligning the taxation of investment funds in Portugal with European standards, may be subject to future amendments depending on the political decisions taken by the Portuguese government.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

The listing of retail funds on a regulated market depends on the daily tradability of these funds being guaranteed in said market, and on the execution of a market-maker contract between the fund manager and the market-maker.

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The market-maker contract shall guarantee that the market price of the units and shares does not significantly diverge from the value of the units and shares or, when applicable, from their indicative value.

The fund's constitutional documents may establish that the units and shares acquired in the regulated market cannot be redeemed, but in such cases a warning must be inserted in the fund's prospectus and in all advertising material. Notwithstanding this, if the market value of the units and shares significantly diverges from the calculated and disclosed value of the units and shares, the investors have the right to redeem their units and shares acquired in the regulated market. The procedure for this redemption is set out in the fund's prospectus.

Moreover, the fund manager shall disclose to the market manager any change to the following:

- the value of the units and shares calculated in accordance with the fund's updated portfolio;
- the number of units and shares issued; and
- the assets comprised in the fund's portfolio.

Regarding non-retail funds, no specific requirements are established in the Portuguese legal framework.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

There is no specific provision on this matter in the UCI Law and, to date, the redomiciling of an overseas vehicle in Portugal has not been considered by the CMVM. However, it is possible that the CMVM may come to consider this possibility in the future.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

No.

South Africa

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

The main regulators responsible for administering applicable legislation are the Financial Services Board (FSB) and the South African Reserve Bank (SARB).

The FSB supervises and enforces compliance with the laws regulating financial institutions and the provision of financial services. Broadly speaking, subordinate legislation is made by the Minister of Finance, while the FSB is given wide powers to regulate approved financial institutions and service providers through conditions and directives.

The SARB is responsible, inter alia, for formulating and implementing monetary policy, supervising the banking sector and administering South Africa's system of exchange controls.

Another regulator, the Financial Intelligence Centre, is responsible for administering the anti-money laundering and related requirements of the Financial Intelligence Centre Act, a responsibility it shares with the FSB (in respect of non-bank financial institutions).

Within the FSB, regulation is fragmented as follows:

- the Registrar of Collective Investment Schemes administers the Collective Investment Schemes Control Act (CISCA) and regulates collective investment schemes in, respectively, securities, property and participatory bonds and collective investment schemes that are hedge funds;
- the Registrar of Financial Services Providers administers the Financial Advisory and Intermediary Services Act (the FAIS Act) and regulates the provision of financial services by, for example, investment advisers, asset managers and persons who provide financial product platforms;
- the Registrar of Long-Term Insurance administers the Long-Term Insurance Act and regulates long-term insurers (a significant portion of retail and institutional investment into funds is housed in investment policies issued by long-term insurance companies); and
- the Registrar of Securities Services administers the Financial Markets Act and regulates the Johannesburg Stock Exchange (JSE) and related service providers such as stockbrokers, depositories and clearing houses.

Exchange-traded funds and real estate investment trusts (REITs) listed on the JSE are not directly regulated by the FSB unless they are also collective investment schemes.

Special purpose acquisition vehicles listed on the JSE are regulated by the JSE. In addition, entities whose principal business is investment in securities are permitted to list on the JSE. Such an investment entity could, for example, purchase existing private equity fund portfolios and serve as a vehicle through which investors could gain long-term exposure to portfolio companies while enjoying the benefit of increased liquidity.

Private equity funds are, generally speaking, not regulated by the FSB, although service providers to such structures may fall to be regulated under the FAIS Act.

Two recent developments deserve special mention, namely the position in respect of hedge funds and the proposed introduction of a 'twin peaks' model of regulation.

The Minister of Finance exercised his powers under CISCA to declare hedge funds collective investment schemes from 1 April 2015 (Government Notice 141 of 2015). As a result of the declaration, hedge funds that invite or permit 'members of the public' (as defined in CISCA – see question 26) to invest money or other assets were required before the end of September 2015 to lodge with the Registrar of Collective Investment Schemes an application for registration as a manager to operate a hedge fund. The declaration does not apply to private arrangements and segregated portfolios using hedge fund strategies. In addition, in a companion notice (Board Notice 52 of 2015), the Registrar published certain further requirements with which hedge funds that existed on 1 April 2015 must comply within 12 months of approval as collective investment schemes. New hedge funds established after 1 April 2015 are required to register and be fully compliant from the date of their approval by the Registrar.

Two types of hedge funds may be registered: qualified investor funds and retail funds. Qualified investor funds are hedge funds that only permit investment by investors who have 'demonstrable knowledge and experience' in financial and business matters that would enable them to 'assess the merits and risks of a hedge fund investment' (or are advised by a financial services provider having such knowledge) and who initially invest at least 1 million rand. A retail fund does not have such restrictions. Generally speaking, retail funds must comply with more detailed regulatory requirements, including detailed prudential investment requirements.

It is the stated policy aim of the government to move toward a 'twin peaks' model of regulation, in terms of which supervision and monitoring of the health and soundness of financial institutions will be exercised by a newly established Prudential Authority and financial market conduct will be regulated by a newly established Financial Sector Conduct Authority. To this end, the Financial Sector Regulation Bill has been tabled before the South African parliament. The legislature intends to establish the new regulatory authorities as a first phase of implementation. In addition, it is contemplated that the FAIS Act and CISCA may be repealed and replaced with an omnibus bill addressing the conduct of financial institutions.

2 Is fund administration regulated in your jurisdiction?

Yes, as a consequence of the wide definition of 'intermediary services' in the FAIS Act, fund administrators are generally required to obtain authorisation from the Registrar of Financial Services Providers under the FAIS Act to provide non-discretionary intermediary services (a Category I licence or, where the administrators make use of aggregated or bulked investment and disinvestment orders, a Category III licence).

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

Five categories of collective investment schemes are permitted by CISCA, namely the following:

- collective investment schemes in securities;
- collective investment schemes in property;
- collective investment schemes in participation bonds;
- retail hedge funds; and
- qualified investor hedge funds.

In this section, only the position relating to obtaining authorisation under CISCA for a collective investment scheme in securities, which is the most common scheme, will be discussed.

CISCA and the relevant FSB notices made thereunder have requirements in relation to the authorisation of both the manager (who administers the scheme) and the trustee or custodian (who holds the assets and oversees compliance with applicable requirements), the formation of the collective investment scheme (being the legal structure created to house the investments) and the creation of particular portfolios (each portfolio constituting a fund in which investors can invest). Prior approval from the Registrar of Collective Investment Schemes is required to establish a collective investment scheme or to form a new portfolio.

With respect to the manager, the following should be noted:

- only companies registered under the South African Companies Act as ring-fenced companies qualify for authorisation;
- the manager's board must consist of at least four directors approved by the Registrar of whom all executive directors must be resident in South Africa and must include independent directors;
- the manager is required to maintain prescribed minimum capital (in practice consisting of seed investments in portfolios while they have low value and the maintenance of capital equal to at least 13 weeks of fixed costs of the manager); and
- the manager must satisfy the Registrar of the adequacy of its operational capacity, management systems, risk management and complaint resolution system.

The FSB has published a draft notice that seeks to amend the conditions for registration of managers of Collective Investment Schemes and the determination of fit and proper requirements for directors and management of such managers.

With respect to the trustee, public companies registered under the South African Companies Act, branches of foreign banks and South African insurers qualify to play this role, provided that they have capital of more than 10 million rand and have been registered by the Registrar of Collective Investment Schemes as a trustee or custodian. The trustee may not be a holding company or subsidiary of a manager. The Registrar may only register a trustee if it is satisfied that the general financial and commercial standing and independence of the relevant applicant is such that it is fit for performing the functions of trustee or custodian and that the company or institution is by reason of the nature of its business sufficiently experienced and equipped to perform such functions. In practice, this last requirement sets the bar quite high and only a handful of trustees (which are all affiliated with large financial institutions) have been registered.

With respect to the deed of the collective investment scheme, it should be noted that although CISCA potentially permits a variety of legal structures, in practice, collective investment schemes in securities are housed in unit trust-type schemes whose trust deeds follow model wording approved and published by the Registrar. The consideration and approval of a trust deed forms part of the approval process of the manager.

It is also possible to establish a co-named portfolio, which in effect is a joint venture between a company licensed as a manager of a collective investment scheme, which will administer the co-named portfolio and an asset manager, which will provide the asset management services to the portfolio. The portfolio will bear the name of both the manager and the asset manager.

Portfolios are created in the trust deed of the collective investment scheme or by an amendment thereto approved by the Registrar.

There are no registration requirements for private equity funds housed in partnership structures or segregated portfolios although asset managers must be appropriately licensed under the FAIS Act to provide services to such funds. REITs, exchange traded funds, exchange traded notes and special purpose acquisition vehicles seeking a listing on the JSE must comply with the JSE Listings Requirements.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

CISCA applies to the administration of a collective investment scheme within South Africa.

Administration has a broad definition in CISCA as:

> *[A]ny function performed in connection with a collective investment scheme, including the management or control of a collective investment scheme; the receipt, payment or investment of money or other assets including income accruals in respect of a collective investment scheme; the sale, repurchase, issue or cancellation of a participatory interest in a collective investment scheme and the giving of advice or disclosure of information on any of those matters to investors or potential investors; and the buying and selling of assets or the handing over thereof to a trustee or custodian for safe custody.*

Only persons registered as managers under CISCA or persons who are authorised agents of the manager may perform such administration services (section 5(1) of CISCA). Generally speaking, before a manager may delegate any function listed in the definition of 'administration' to any person, it must obtain the approval of the Registrar (section 4(5) of CISCA). Accordingly, an overseas manager may not perform management activities for South African collective investment schemes without prior authorisation (and would need to hold an appropriate licence in South Africa to authorise it to carry out any outsourced services in South Africa). It should be noted that the outsourcing of functions of administration is currently under review by the FSB.

The FAIS Act prohibits any person from providing as a regular feature of business, in relation to financial products, intermediary services for product suppliers or intermediary services or advice to clients without authorisation under the FAIS Act. In accordance with ordinary principles of statutory interpretation, the FAIS Act applies to such services rendered in South Africa. In addition, Regulation 3 of the regulations made under the FAIS Act prohibits any person from canvassing for, marketing or advertising any business related to the rendering of financial services by any person who is not an authorised financial services provider or a representative of such a provider. Accordingly, foreign service providers may not render financial services in or into South Africa without a FAIS licence and no person may canvass for, market or advertise any South African or foreign financial services business in South Africa unless such business is licensed under the FAIS Act.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

In terms of the FAIS Act, a licensed financial services provider (an asset manager in South Africa will be either a Category II or a Category IIA licensed financial services provider) is required to notify the Registrar of Financial Services Providers within 15 business days of a change in its shareholders or its board of directors. Section 8(10)(b) of the FAIS Act provides that if the Registrar is satisfied that the new director, member, trustee or partner does not comply with personal character qualities of honesty and integrity the Registrar may suspend or withdraw the licence of the financial services provider. A change in the name of a financial services provider effectively requires prior consent as a financial services provider may not carry on financial services business under its new name until the Registrar has issued it with a new licence in its new name. It should also be noted that a licence in terms of the FAIS Act is non-transferable.

Pursuant to CISCA and the regulations thereunder, the prior consent of the Registrar of Collective Investment Schemes is required for any change in shareholding of a collective investment scheme, a change of directors or a change of name. In practice, the Registrar usually also requires that this limitation be included in the constitutional documents of the manager of a collective investment scheme, as a restriction on such company's corporate powers.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

The fee arrangements of the manager of a collective investment scheme are subject to approval by the Registrar of Collective Investment Schemes as part of the general oversight exercised over collective investment schemes. Furthermore, care should be taken when setting out the agreed fee arrangement, as only the agreed and disclosed fee of the manager may be deducted from the portfolio.

In addition, consideration should be given to the tax implications of any structuring. Generally speaking, managers' compensation is often structured as a fixed percentage of the value of assets under management plus a performance fee.

A person (whether a juristic person or an individual) authorised to provide advice under the FAIS Act may not receive a sign-on bonus, save if such person is a new entrant to the market (Board Notice 146 of 2014).

There are detailed restrictions and disclosure requirements relating to fees and remuneration in the conflict of interest and other provisions of the General Code of Conduct for Authorised Financial Services Providers under the FAIS Act. These provisions impact the design of compensation and profit-sharing arrangements relating to financial services providers and must accordingly be considered when structuring the fund manager's compensation and profit-sharing arrangements.

It should also be noted that the FSB is currently engaged with a Retail Distribution Review, as part of which it is considering far-reaching reforms to the regulatory framework for distributing financial products to customers. The outcome of this review will affect the remuneration of certain financial services providers, most notably financial advisers (Category I financial services providers).

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

Yes. See question 8.

8 What marketing activities require authorisation?

A participatory interest in a collective investment scheme constitutes a 'financial product' as contemplated in the FAIS Act. The marketing of financial products may only be performed as a regular feature of business by persons having an appropriate licence under the FAIS Act (ordinarily a Category I licence is required).

In addition, section 65 of CISCA prohibits any person from 'soliciting' (defined as any act to promote investment by members of the public in a collective investment scheme) investments in a foreign collective investment scheme that is not approved by the Registrar of Collective Investments. Accordingly, a foreign collective investment scheme may only be marketed to members of the public in South Africa if it has been approved for such purpose by the FSB.

Board Notice 92 of 2014, effective from 1 May 2015, introduced comprehensive new requirements relating to the documentation used to market collective investment schemes. In terms of this notice, a manager of a South African collective investment scheme (or of a foreign collective investment scheme approved in terms of section 65 of CISCA) must lodge with the Registrar of Collective Investment Schemes copies of all advertisements and marketing material, fund fact sheets (with prescribed information) and relevant investor application forms before publication or use of the material. Furthermore, in terms of these requirements, South African collective schemes as well as foreign collective investment schemes that are approved in terms of section 65 of CISCA, are required to prepare (and update on a quarterly basis) minimum disclosure documents (similar in principal to the key investor information document required in terms of UCITS legislation).

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

The regulatory provisions set out in question 8 apply to marketing activities in South Africa.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

Foreign financial services providers qualify for licences under the FAIS Act and a substantial number of foreign entities hold Category I FAIS licences. However, it should be noted that in order for a foreign financial services provider to qualify for a Category I FAIS licence, its key individuals and representatives will be required to demonstrate their ability to comply with the South African fit-and-proper requirements published under the FAIS Act, which include, if they render financial advice, the completion of regulatory exams in respect of the relevant South African legislation. Examination sittings are held from time to time in South Africa and in London. The fit and proper requirements under FAIS are expected to be clarified and amended by the regulator in the first half of 2017.

One of the requirements relating to approval of a foreign collective investment scheme under section 65 of CISCA is that the manager or operator of the foreign scheme must, for purposes of interacting with the regulator, either open or appoint a South African office (capitalised with at least 2 million rand) or appoint a South African manager authorised under CISCA to act, for a fee, as its representative in relation to regulatory affairs. This requirement may present a stumbling block for foreign collective investment schemes that do not wish to open or appoint a local office since it may be difficult to find a South African manager willing to act as a representative.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

Intermediaries subject to the FAIS Act may earn fees expressed as a percentage of the net value of a financial product (such as an investment in a collective investment scheme) upon condition that if such fees are deducted from the investment, then the client must specifically agree thereto in writing and must have the power to stop the payment of fees. In practice, many managers of collective investment schemes or financial product platform providers stipulate maximum fee levels that they would be willing to administer by way of deduction from the client's investment. The type and level of commissions that may be earned in relation to insurance products (such as linked policies referencing investments in a collective investment scheme as the underlying asset) are subject to regulated upper limits. The ongoing Retail Distribution Review may impact such fee arrangements going forward.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

Retail funds are housed in collective investment schemes registered under CISCA. Such schemes are formed by a trust agreement entered into between an authorised manager and a registered trustee, the trust deed of which is approved by the Registrar of Collective Investments. Schemes then create portfolios, subject to approval from the Registrar, in which investors purchase participatory interests. CISCA permits other legal structures, but in practice only these unit trusts are used. See also question 3.

13 What are the key laws and other sets of rules that govern retail funds?

The key laws are CISCA and the FAIS Act. From a self-regulatory standpoint, the industry body, the Association for Savings and Investments South Africa has published various standards that are influential, such as a standard on the calculation of the net asset value of portfolios, a standard on the calculation of total expense ratio and transaction costs, a standard on the classification of funds and a standard on performance fees.

The key laws and requirements in relation to exchange-traded funds, special purpose acquisition vehicles and REITs are the relevant listings requirements of the JSE, the Companies Act and the Income Tax Act.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Yes, a South African collective investment scheme may only be marketed to members of the public if registered under CISCA. A foreign collective investment scheme may only be marketed to members of the public if approved under section 65 of CISCA.

15 Who can market retail funds? To whom can they be marketed?

South African collective investment schemes approved under CISCA may be marketed by the manager thereof and by any person having an appropriate licence under the FAIS Act. Other than in relation to qualified investor hedge funds, there are no restrictions regarding to whom the collective investment scheme may be marketed.

A qualified investor hedge fund may only permit investment by investors who have 'demonstrable knowledge and experience' in financial and business matters that would enable them to 'assess the merits and risks of a hedge fund investment' (or are advised by a financial services provider having such knowledge) and who initially invest at least 1 million rand.

A foreign collective investment scheme approved under section 65 of CISCA may be marketed by any person having an appropriate FAIS licence. The scheme may only be marketed in South Africa to the same type of investors under the same or substantially similar requirements and conditions relating to the type of investors as in its domicile of registration (Board Notice 257 of 2013).

16 Are there any special requirements that apply to managers or operators of retail funds?

The managers of hedge funds classified as retail funds will be subject to greater disclosure requirements and prudential investment limits than hedge funds classified as qualified investor funds (see question 1).

17 What are the investment and borrowing restrictions on retail funds?

Collective investment schemes in securities may not borrow any funds, save where the manager must repurchase participatory interests but insufficient liquidity exists in a portfolio or assets cannot be realised. In such circumstances the manager may borrow the necessary funds for such repurchase (and grant security over the assets of the portfolio in question), from registered financial institutions at the best commercial terms available, provided that the maximum amount so borrowed may not exceed 10 per cent of the market value of such portfolio at the time of borrowing.

Collective investment schemes in securities are subject to detailed prudential investment restrictions contained in Board Notice 90 of 2014. The restrictions distinguish between standard portfolios, money market portfolios, fund of funds portfolios and feeder fund portfolios. Notable restrictions relating to standard portfolios include the following:

- limitations on the maximum exposure of a portfolio to equity securities issued by any one entity, calculated with reference to the value of the portfolio and the weighting of the applicable security in applicable indexes;
- limitations on the maximum exposure to listed or unlisted non-equity or debt securities, based on who the issuer or guarantor is (for example, maximum exposure to the debt of an unlisted issuer is 5 per cent of the value of the portfolio);
- a requirement that at least 90 per cent of the market value of a portfolio must consist of the following:
  - securities listed on an exchange that is a full member of the World Federation of Exchanges;
  - securities acquired by the manager pursuant to the exercise of rights attaching to securities listed on an exchange; and
  - permissible unlisted non-equity securities and derivatives; and
- derivatives, such as listed futures, option contracts, warrants or index tracking certificates and unlisted swaps (relating to exchange rates, interest rates of indexes) may not be used to leverage or gear the portfolio and exposures must be covered at all times (Chapter V of Board Notice 90 of 2014).

Applicable restrictions apply to other types of retail funds.

18 What is the tax treatment of retail funds? Are exemptions available?

In general, collective investment schemes in securities are treated as conduit vehicles in relation to income amounts, and accordingly, if the income amounts are distributed within 12 months of their accrual, such amounts are taxed in the hands of the investors in accordance with their tax profile. Amounts so distributed retain their nature for tax purposes and any exemptions available in relation to particular income amounts (eg, the local dividend exemption or the individual interest exemption) are accordingly generally available to the investors in respect of such amounts. Capital gains are exempt in the hands of a collective investment scheme in securities. A disposal of participatory interests in a collective investment scheme is taxable in the hands of the investor disposing of the participatory interest as either revenue or capital depending on whether the participatory interests are acquired as part of a scheme of profit making or as capital assets. Where participatory interests were held for at least three years before their disposal, they will be deemed to be capital in nature for tax purposes.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

Yes. The portfolio of a collective investment scheme must be held by an approved trustee or custodian. In addition, the assets of the collective investment scheme are protected by the following regulatory provisions:

- section 2 of CISCA provides that the assets of a portfolio must at all times be properly protected by application of the principle of segregation and identification. For example, clause 105 of CISCA requires that the manager must within one business day of receiving cash from investors deposit such amounts in a trust account controlled by the trustee;
- section 71 of CISCA provides that any money or other assets received from an investor and assets of a portfolio are regarded as being trust property for the purposes of the Financial Institutions (Protection of Funds) Act (with the effect, for example, that the manager may not derive improper advantage from the investment activities of the portfolio and must declare relevant conflicts of interest) and a manager, its authorised agent, a trustee or custodian must deal with such money or other assets in terms of CISCA and the applicable deed and in the best interests of investors;
- section 93 of CISCA provides for a closed list of permissible deductions against the portfolio for fees, charges and so forth; and
- section 104 of CISCA provides that the assets of a portfolio are not available to satisfy third-party claims against the manager or trustee.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

See questions 3 and 21. In addition, the trustee or custodian of the collective investment scheme is required to:

- ensure that the selling or repurchase price of participatory interests is calculated in accordance with CISCA and the applicable deed;
- enquire into and prepare a report on the administration of the collective investment scheme by the manager during each annual accounting period and send the report for submission by the manager to the Registrar together with the manager's annual compliance report;
- ensure that appropriate internal control systems are maintained and that records clearly identify the nature and value of all assets under custody, the ownership of each asset and the place where documents of title pertaining to each asset are kept; and
- report any irregularity or undesirable practice concerning the collective investment scheme of which it becomes aware to the Registrar.

21 What are the periodic reporting requirements for retail funds?

Managers of all collective investment schemes must report to investors on a quarterly basis, at minimum.

Managers are required to make quarterly reports relating to all assets in the portfolios administered by them to the Registrar of Collective Investment Schemes (regulation 3 of the regulations under CISCA) and must annually submit to the Registrar their audited financial statements together with audited financial statements for each portfolio, a compliance report and prescribed information (such as the manager's income derived from all sources in the operation of the collective investment scheme and a list of all securities lent by the portfolio and the value of the collateral thereof) (regulation 2 and paragraph 10 of Government Notice 910 of 2010). Managers of retail and qualified investor hedge funds must also submit quarterly and annual reports to the Registrar (Board Notice 52 of 2015).

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

The terms of issue and repurchase contained in the deeds of South African domiciled collective investment schemes tend to be uniform, with collective investment schemes in securities permitting daily dealing. Retail hedge funds must offer at least monthly dealing and qualified investor hedge funds at least quarterly dealing. Managers from time to time enter into contracts with large institutional investors relating to the redemption of participatory interests, providing, for example, for longer periods of notice than provided for in the deed. Where a manager receives redemption notices of more than 5 per cent of the market value of the portfolio with prior notice of less than 10 business days, the manager may with the consent of the trustee suspend the repurchase of participatory interests for up to 20 business days. After the 20 days, it must tender redemption through the transfer of assets in kind (unless the investor agrees to a further extension) (Government Notice 573 of 2003).

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

Many South African private equity funds are housed in *en commandite* partnerships. *En commandite* partnerships are regulated by the common law and are formed by agreement between the partners. The main advantage of this type of partnership is that a commanditarian (or limited) partner is not liable for the debts of the partnership in an amount greater than its investment commitment to the partnership (provided applicable common law requirements are met). The managing partner (also known as the general partner) has unlimited liability for the debts of the partnership.

Another type of structure sometimes used in the private equity context is a *bewind* trust. A *bewind* trust is a type of trust vehicle registered under the Trust Property Control Act, in terms whereof the applicable assets that are subject to the trust arrangements are owned by the beneficiaries of the trust, but the trustee of the trust holds and manages such assets. In the context of a private equity vehicle structured as a *bewind* trust, the cash contributions of the investors to the trust form the initial assets of the trust. Each investor is a beneficiary of the trust, and the investors own the assets of the trust jointly in undivided shares in proportion to their respective contributions. A *bewind* trust is formed by agreement between the investors as beneficiaries and the trustee.

Lastly, long-term insurance companies may market investment exposure to portfolios owned by them to investors through the issue of linked investment policies. This type of investment policy is widely used by pension funds to obtain exposure to both listed and unlisted investments. The investment return on the policy is determined by the investment return of assets held by the insurance company and specified in the policy.

In certain instances, notably if investors are willing to receive returns on an after-tax basis, closed-ended portfolios can also be housed in companies established under the Companies Act.

24 What are the key laws and other sets of rules that govern non-retail funds?

Fund managers and other financial service providers to non-retail funds are governed by the FAIS Act. Private equity funds set up as limited or *en commandite* partnerships are governed by the common law and those set up as *bewind* trusts are governed by the common law and the Trust Property Control Act. Long-term insurance companies are governed by the Long-Term Insurance Act.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

No authorisation or licensing is required to form private equity funds housed in limited or *en commandite* partnerships or *bewind* trusts. *Bewind* trusts must be registered with the Master of the High Court and the appointment of trustees is subject to approval by the Master of the High Court before they may act as such, but these are administrative requirements that apply to the formation of all trusts. Registered insurance companies are free to write linked investment policies without prior approval.

26 Who can market non-retail funds? To whom can they be marketed?

Non-retail funds may be marketed by any person having an appropriate licence under the FAIS Act.

However, save if sold through a linked investment policy by a long-term insurer, such funds are prohibited under CISCA if marketed to members of the public. 'Members of the public' is defined in section 1 of CISCA to include:

> *[M]embers of any section of the public, whether selected as clients, members, shareholders, employees or ex-employees of the person issuing an invitation to acquire a participatory interest in a portfolio, and a financial institution regulated by any law [such as a pension fund, insurance company, stockbroker, financial services provider, or a bank], but excludes persons confined to a restricted circle of individuals with a common interest who receive the invitation in circumstances which can properly be regarded as a domestic or private business venture between those persons and the person issuing the invitation.*

In our view, 'members of the public' must be given the meaning it has in ordinary usage, save that the statutory definition serves to broaden the concept to include 'any section of the public' and (we submit, only where the circumstances of the applicable offer is such that it can properly be described as a public offer) financial institutions.

Media advertising, press releases, presentations to third parties, providing sale and promotional materials and advertising through electronic media such as television, email, the internet or a website is not permitted.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

There are no investor-protection rules other than for the requirement that the funds may not be marketed to 'members of the public', as set in question 26. A qualified investor hedge fund may only permit investment by investors who have 'demonstrable knowledge and experience' in financial and business matters that would enable them to 'assess the merits and risks of a hedge fund investment' (or are advised by a financial services provider having such knowledge) and who initially invest at least 1 million rand.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

No.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

In general, partnerships and *bewind* trusts are essentially disregarded for tax purposes (with the exception of value added tax, in which case a partnership or *bewind* trust may constitute a separate value added tax vendor), with the tax implications of the underlying investments arising in the hands of the partners or beneficiaries, respectively, as if they held the underlying investments directly. The entry or exit of partners or beneficiaries generally has tax implications.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

There are no specific custody requirements in relation to partnerships and trusts and the general partner or trustee, as the case may be, normally holds the relevant assets. Trust property does not form part of the estate of the trustee except insofar as the trustee is a beneficiary (section 12 of the Trust Property Control Act).

Where a pension fund is invested in a private equity fund, conditions relating to the pension fund require it to procure that a script count is performed by the private equity fund's auditors every six months (see question 31).

With respect to insurance companies, the Long-Term Insurance Act regulates how an insurer's assets must be kept as part of general insurance law.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

There are no fund-specific governance requirements prescribed by law. It is usual for non-retail funds to be audited on an annual basis and to be managed by a fund manager licensed under the FAIS Act.

The Registrar of Pension Funds published conditions for investment in private equity funds (the Conditions) in March 2012 that stipulate requirements in order for a private equity fund to qualify for investment by a pension fund. Although the applicable requirements do not bind private equity funds, pension funds are significant investors and private equity funds therefore have a strong incentive to comply. The most significant requirements contained in the Conditions are the following:

- fund managers must be members of the South African Venture Capital Association and are required to be authorised as discretionary financial services providers under the FAIS Act;
- the auditors of the private equity fund must verify the assets of the fund on a biannual basis and the fund must produce audited financial statements complying with international financial reporting standards within 120 days of the end of its financial year; and
- the private equity fund must have clear policies and procedures for determining the fair value of the assets of the fund in compliance with the International Private Equity Valuation Guidelines, and any valuations must be verified at least annually by a third party.

The Registrar of Pension Funds has recently published a draft notice, 'Conditions for Pension Fund Investment in Hedge Funds', for comment. If such notice is adopted in its current form it will permit South African pension funds to invest in foreign hedge funds (as defined) only if the foreign hedge fund is approved for marketing to members of the public in South Africa under section 65 of CISCA (see question 8).

32 What are the periodic reporting requirements for non-retail funds?

The reporting periods are agreed contractually. Such funds typically report on a monthly or quarterly basis.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

These are commonly referred to as segregated mandates and are typically structured as investment management agreements concluded between the investor and the asset manager. The asset manager will either hold a Category II licence under the FAIS Act or, in cases where the underlying assets are listed, could be a stockbroker authorised to act as such by the JSE.

34 What are the key legal issues to be determined when structuring a separately managed account?

Paragraph 5 of the Code of Conduct for Discretionary Financial Services Providers made under the FAIS Act sets out a checklist of matters to be dealt with in a discretionary investment mandate concluded by an asset manager with a Category II licence under the FAIS Act. In addition, the Code requires asset managers to submit their standard form investment management agreements for prior approval by the Registrar of Financial Services Providers.

From a commercial perspective, the key issues to be agreed upon are typically the following:

- duration of the appointment;
- fees;
- investment objectives and restrictions;
- termination arrangements;
- warranties;
- reporting arrangements;
- custody arrangements;
- remedial steps in the event of a mandate breach; and
- exclusion or limitation of liability of the asset manager in certain circumstances.

Update and trends

Recently, there has been an increase in interest in venture capital companies. This is partly the result of a favourable new tax incentive introduced into the Income Tax Act. Section 12J of the Income Tax Act offers tax relief to investors investing into qualifying venture capital companies. One of the requirements is that the venture capital company must be authorised as a financial services provider under the FAIS Act. The main purpose of the tax incentive is to stimulate the supply of public sector venture capital funding. In summary, section 12J permits an investor into an approved venture capital company to deduct 100 per cent of the capital invested from the investor's taxable income in the year during which the investment was made, subject to certain qualifications. Provided that the investor holds his or her shares for a minimum of five years there will be no income tax recoupment of this amount when the investment is realised. Normal principles apply to determine if the realisation proceeds are capital or revenue. There will, however, be a reduction of base cost for the purposes of capital gains tax. This tax incentive is available to companies, trusts and individuals.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

Only asset managers licensed under the FAIS Act or, in the case of listed assets, stockbrokers authorised by the JSE, may market and perform fund management services on the basis of a segregated mandate.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

Yes. The ongoing Retail Distribution Review of the Financial Services Board may have a fundamental impact on the above matters. We have not detailed in this chapter the matters on which the Review is focussing, but more information can be found at www.fsb.co.za. Also, there has been some discussion relating to the creation of a new category of licence under the FAIS Act to provide specifically for private equity managers (currently private equity managers are required to obtain the same category of licence and are required to have had the same experience as asset managers managing listed securities) and for the provision of financial services to sophisticated or professional clients. The insurance industry is also undergoing legislative change and existing governing legislation is anticipated to be repealed and replaced

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

With respect to retail funds, collective investment schemes in property are required to be listed on the JSE, as are REITS generally. To achieve REIT status under the listings requirements of the JSE, the issue must, among other things, be primarily engaged in activities in respect of immoveable freehold or leasehold property for retention as investments and distribute to holders of its listed securities on an annual basis at least 75 per cent of its total distributable profits.

The JSE recently introduced new listing requirements permitting the listing of special purpose acquisition companies. Such a company may not carry on any commercial or business operations at the time of its application for a listing, but must, within 24 months of the date of its listing, acquire assets meeting the qualifying criteria of the main board or the alternative exchange (AltX) of the JSE. In order to list on the main board of the JSE, an applicant must raise at least 500 million rand through the issue of shares. A minimum of 50 million rand must be raised for a listing on the AltX. All capital raised must be held in escrow with an escrow agent until acquisitions of qualifying assets are made. It is anticipated that this type of vehicle may, in future, be used as an alternative to the more traditional private equity fund structures discussed in question 25.

The JSE listing requirements permit exchange traded funds investing in securities to list, subject to the overarching requirements, that the persons responsible for managing the investments must have appropriate experience, there must be an adequate spread of portfolio risk and the fund must not, to a significant extent, speculate in securities.

The listings requirements also permit the listing, on the debt market, of exchange traded notes backed by assets such as gold, platinum or silver.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

Generally speaking, this would not be possible for collective investment schemes and non-retail fund structures. There are provisions in the Companies Act that permit a foreign company to redomicile in South Africa.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

Foreign investors are, in general, required to acquire any South African investments at market value. Where shares are acquired by foreign investors, the share certificates must be endorsed as 'non-resident', or an entry to this effect must be made in the records of the central securities depository participant or broker in the case of listed shares. Foreign investors may not introduce loan funding into South Africa without obtaining exchange control approval. Individual South African investors may make foreign investments utilising the following:

- their 10 million rand annual foreign investment allowance;
- their 1 million rand annual single discretionary allowance (to the extent that the same has not already been used for travel purposes); or
- authorised foreign assets in order to make foreign investments.

South African companies may only make foreign investments subject to obtaining exchange control approval for such investment. South African institutional investors (including retirement funds, long-term insurers, collective investment scheme management companies and investment managers) may make foreign investments up to certain limits.

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

Fund management is primarily regulated through Swedish legislation. There are currently, in very broad terms, two types of Swedish funds that are recognised as such under Swedish law: UCITS and alternative investment funds (AIFs) – the latter also includes Swedish special funds. Swedish UCITS are regulated by the Securities Funds Act (SFA) and AIFs are regulated by the Alternative Investment Fund Managers Act (AIFMA). The Swedish Financial Supervisory Authority (SFSA) acts as the competent regulator responsible for ongoing supervision of funds, fund managers and for the issuance of supplementary regulations and formal guidance to the aforementioned Acts. The SFSA is responsible for ensuring that the business of fund managers is carried out in accordance with applicable laws and regulations.

All marketing activities that have the purpose of furthering the sale of any product in Sweden, including funds, are subject to the Marketing Practices Act, which requires, for example, that marketing is carried out in accordance with generally accepted marketing practices. In relation to marketing of funds, the Swedish Investment Fund Association (SIFA) has issued guidance as regards, inter alia, the marketing of funds, which is considered codifying generally accepted marketing practices. The Swedish Consumer Agency, which includes the Consumer Ombudsman, is the primary authority responsible for ensuring that marketing material is in compliance with the Marketing Practices Act.

2 Is fund administration regulated in your jurisdiction?

Fund administration services are generally unregulated but there are certain administrative services, for example custodial services, which are only possible to provide under the prerequisite of a regulatory licence to conduct such business. If a Swedish custodian is delegated custody functions or where the fund administration services include trade settlement, the relevant entity must be authorised in accordance with the Securities Market Act.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

A Swedish fund is not per se subject to an authorisation or licensing process; instead it is incumbent upon the manager of the fund to obtain authorisation from the SFSA to act as a fund manager. However, where a fund manager intends to manage a UCITS or an AIF formed as a special fund, the authorisation process includes a requirement that the fund rules must be approved by the SFSA.

To obtain authorisation to act as a fund manager an application would have to be submitted to the SFSA accompanied by, inter alia, a programme of operations of the fund manager and the fund rules of the funds to be managed. Depending on the type of investment fund, slightly different rules will apply in relation to the authorisation process.

In relation to the management of UCITS and special funds, the following requirements and process apply. A Swedish investment management company must be a limited liability company and have a board of directors consisting of at least three members and a managing director. Any natural or legal person who holds or may be expected to hold a qualifying holding (as defined in question 5) in the management company has to undergo an ownership assessment by the SFSA for the purposes of determining whether the natural or legal person is suitable for ownership of an investment management company. Furthermore, a person who will serve as a member of the management body of the management company or of the management body of an entity holding a qualifying holding in the management company must undergo a management assessment by the SFSA.

The key requirement applicable to fund management companies primarily entails acting in the common interest of the unitholders. In general, a fund management company must conduct its operations in an honest, fair and professional manner so as to maintain the confidence of the public in the fund market. Furthermore, the fund management company is obliged to have and maintain a minimum capital of own funds during its operations and ensure that it has adequate risk management systems together with sound routines for the operation, accounting, internal control and management of its information systems.

A Swedish alternative investment fund manager applying for authorisation to manage an AIF other than a special fund would essentially need to comply with the requirements stipulated above and must be a legal person, but not restricted to the form of a limited liability company. The formation of the AIF (save for AIFs formed as special funds) is, however, not contingent upon the SFSA's approval of the fund rules (or similar documentation).

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

Initially a division has to be made between managers established inside the EEA and outside the EEA. In the former case the manager would need an authorisation in its home country and activities may subsequently be performed in Sweden either from the overseas manager's home country or from inside Sweden subject to the establishment of a Swedish branch office. If the manager has already been granted an authorisation in its home country within the EEA pursuant to either Directive 2014/91/EU (the UCITS V Directive) or Directive 2011/61/EU (the AIFMD), the overseas manager may 'passport' its licence into Sweden via the competent supervisory authority in its home country and separate authorisation from the SFSA is thus not necessary. Following such 'passporting' it is also possible for the overseas manager to manage Swedish funds provided the manager's authorisation in its home country includes management of fund types comparable to the type of Swedish fund the manager wishes to manage. In relation to management of a UCITS or a special fund, a separate authorisation must however be obtained from the SFSA that includes approval of the (revised) fund rules. The manager must also ensure that it can, in Sweden, make disbursements to unitholders, redeem units, provide investors with required information and handle complaints. If an overseas manager wishes to manage a Swedish AIF that is not a special fund, no separate authorisation from the SFSA is required.

A fund manager established outside the European Economic Area (EEA) may only perform management activities or provide services to Swedish investors provided the manager has been granted an authorisation from the SFSA in accordance with the Swedish national regime.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

The acquisition of a controlling stake (ie, a qualified holding) in a fund manager is subject to prior authorisation from the SFSA. The application has to be submitted to the SFSA in writing. A qualified holding is defined as a direct or indirect ownership where the holding represents 10 per cent or more of the share capital or the voting rights or otherwise makes a significant influence of the fund manager possible. The latter is the case when, for example, a shareholders' agreement allows for the appointment or dismissal of more than half of the members of the fund manager's board of directors. Authorisation is also required prior to the increase of a holding through an acquisition where the holding would exceed 20, 30 or 50 per cent of the share capital or voting rights. Should the acquisition occur through the division of joint marital property, testamentary disposition, corporate distribution or another similar measure, an application for retaining the shares has to be submitted to the SFSA within six months from the date of the acquisition.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

In general, the fund manager's compensation (ie, fees deducted from the fund assets) must be clearly disclosed to investors. Compensation may generally only be deducted in the form of fees that relate to management of the fund assets (including, for example, custody and transaction costs), subscription and redemption. Pursuant to the rules stipulated by the AIFMA and the SFA, a fund manager's compensation must follow an established remuneration policy that is consistent with, and promotes, sound and effective risk management.

There are no particular restrictions on profit-sharing arrangements. However, the SIFA has issued guidance stipulating that in the event income is derived from securities loans, the income must accrue to the fund. Any profit-sharing arrangement would have to be in compliance with the fund manager's obligation to act in the interests of the unitholders.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

Marketing of UCITS or AIFs (including special funds) requires prior registration or passporting of the relevant fund in Sweden. However, once the relevant fund has been registered or passported in Sweden, it can be marketed without any additional licence for the marketing entity provided that the marketing does not include offering (ie, promotion of registered or passported funds can be carried out without further authorisation) (see questions 15 and 26). It should, however, be noted that different types of authorisation are required in cases where AIFs are to be marketed to Swedish non-professional investors.

8 What marketing activities require authorisation?

The definition of marketing varies depending on the type of investment fund. As regards UCITS, marketing is considered as any direct or indirect offering or placement of units or shares of a UCITS at the initiative of the UCITS or on behalf of the UCITS to, or with investors domiciled, or with a registered office, in Sweden. As regards AIFs, marketing is considered to include all types of advertising or promotion such as advertising in the mass media, cold-calling, emails, oral information provided at the offices of the fund or its promoter (if the offices are located in Sweden) and websites using the Swedish language or otherwise containing information specific to the Swedish market or Swedish investors. This means that the scope of marketing activities requiring authorisation is wide.

Notwithstanding that the above definitions are different, the analysis of what constitutes marketing and thus requires an authorisation would, in practice, be the same for a UCITS and an AIF.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

The applicable Swedish legislation should be interpreted to include any marketing or promotional activities carried out in Sweden or directed towards Swedish investors. In determining whether an activity is directed to Swedish investors, a number of factors need to be taken into account including, for example, whether the communication is in Swedish, whether a Swedish contact address is provided and whether payment can be made in Swedish kronor.

In the absence of authorisation in respect of the relevant fund, an overseas entity may not direct marketing activities towards Sweden. A fund may however be marketed under the concept of 'pre-marketing', which is in principle (however not categorically), before the fund has been established. The scope of this exemption is however unclear and cannot be used to circumvent the obligation to obtain authorisation. A fund may also be marketed on a reverse solicitation basis, meaning that the investor initiates the contact with the manager. Such marketing can only be carried out on a product-by-product basis and only allows the entity to provide the investor with information specifically requested.

Once the relevant fund has been authorised in Sweden for marketing purposes, the overseas entity may carry out marketing on a cross-border basis into Sweden. It should be noted that cross-border marketing is not intended to include regular activities being carried out in Sweden, but rather being conducted from outside Sweden.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

An overseas manager that is conducting marketing of a UCITS or an AIF that is a special fund to Swedish investors must ensure that payments (eg, dividends), redemptions and disclosure of information relating to the fund can be made in relation to investors. These requirements may be satisfied through the appointment of a local paying agent to be responsible for the aforementioned activities.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

Fund managers must take all reasonable steps to identify potential conflicts of interest that may arise between the intermediary and the client as a result of commission payments. Commission payments to intermediaries are only allowed if such are made for purposes of enhancing the quality of the relevant service and provided that the manager is not impeded from acting in the interest of the unit- or shareholders. Intermediaries (being entities authorised by the SFSA) distributing or selling funds are separately required to comply with similar rules and are only permitted to receive commission payments under, in principle, the same circumstances as fund managers.

It should be noted that the rules governing commission payment to intermediaries will change following the implementation of Directive 2014/65/EU (MiFID II) (see question 36 and 'Update and trends').

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

Swedish retail funds include UCITS and AIFs in the form of special funds. These funds are construed as pools of assets without any legal capacity and thus cannot acquire rights or assume liabilities. In addition, such funds may not be sued in, or be brought before, courts of law or any other public authority. Consequently, these funds merely consist of the fund assets. The fund manager represents the unitholders in respect of all issues concerning such a fund and it is also required by law that the assets of the fund are kept with a custodian that is independent of the fund management company. The fund is formed via capital contributions from investors and through the SFSA's approval of the fund rules.

Accordingly, the establishment of a Swedish retail fund requires a three-party relationship that is governed by contractual and statutory obligations.

13 What are the key laws and other sets of rules that govern retail funds?

The sets of rules governing retail funds are the SFA and the SFSA's Regulations FFFS 2013:9 regarding securities funds, which govern UCITS, and the AIFMA and the SFSA's Regulations FFFS 2013:10 regarding alternative investment fund managers, which govern special funds.

The laws and regulations presented above are supplemented by guidelines issued by the SIFA that are considered as codifying good marketing practices.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Yes. In connection with the authorisation process for retail funds, the fund rules of the funds that the applicant fund manager intends to manage must be submitted to the SFSA for approval. The fund may not be marketed prior to such approval except under the circumstances described in question 9.

15 Who can market retail funds? To whom can they be marketed?

There are no formal restrictions governing who may market retail funds or the intended recipient of such marketing. Instead, retail funds can be marketed to any type of investors. Furthermore, the marketing entity does not need to be licensed or authorised provided that the marketing does not include offering of the funds or otherwise would require a licence pursuant to Directive 2004/39/EC (MiFID) and the Securities Markets Act.

16 Are there any special requirements that apply to managers or operators of retail funds?

Retail funds are characterised by extensive consumer protection rules whereby a manager of a retail fund must comply with a variety of special requirements that are not applicable in relation to other types of investment funds.

The most prominent requirement is the obligation to act exclusively in the common interest of the unitholders. Furthermore, the manager is required to, inter alia, maintain or cause to be maintained a register of all holders of units in the fund, immediately redeem a unit upon the request from a holder and to maintain a suitable diversification of investments in accordance with the principle of 'risk spreading' (see question 17).

17 What are the investment and borrowing restrictions on retail funds?

Investment restrictions

The investment of retail funds shall follow the risk spreading principle and be made in financial assets associated with high liquidity including transferable securities, money market instruments, derivative instruments, units in other UCITS and deposits with credit institutions. As a general rule, however, subject to exemptions, the value of the instruments issued by any single issuer may not exceed 5 per cent of the fund's value.

Borrowing restrictions

Besides the possibility of raising short-term loans in an amount not exceeding 10 per cent of the fund's value, a management company may not raise or grant cash loans or act as guarantor within the fund operations.

18 What is the tax treatment of retail funds? Are exemptions available?

Dispositions of units in retail funds are subject to tax treatment in accordance with the Income Taxation Act. A fund unit is assigned to the income class of capital. Any capital gain upon the disposal of fund units is generally subject to taxation and any capital loss may be utilised so as to reduce the taxable income. No exemptions are available.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The portfolio of assets of a retail fund must be held by a separate custodian, which does not need to be a local entity. A Swedish custodian must be a bank or a credit institution and have its registered office in Sweden or, where the custodian is a branch established in Sweden, in another country within the EEA. The engagement of a custodian may not be given to an entity whose interests may come into conflict with the management company or the unitholders.

The custody of financial instruments (including, for example, fund units) may only be conducted by an entity that has been granted an authorisation by the SFSA (or by the competent authority in another state within the EEA).

A Swedish custodian may be required to assume the management of a retail fund where the management company has entered into insolvency proceedings, liquidation or if the SFSA has revoked the management company's authorisation to conduct fund operations.

In the event the custodian becomes subject to insolvency proceedings, the unitholders would be protected as the ownership of the fund units is reserved for the unitholders who may easily be distinguished. However, any cash held by the custodian would most likely be unprotected.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

Governance requirements primarily include risk management, handling of potential conflicts of interest and acting in a manner that maintains the public's confidence in the fund market. More detailed guidance is provided in guidelines issued by the SIFA.

In connection with the authorisation process (and upon revision) the management company is required to submit a number of documents including, for example, the prospectuses, key investor information documents, an annual report and a semi-annual report to the SFSA. Upon authorisation being granted, the fund manager and the retail fund will be registered in the SFSA's public register. The management company must have a board of directors that consists of at least three members and a managing director and is obliged to maintain or cause to be maintained a register of all holders of units in the fund.

In addition, a management company must document and preserve each portfolio transaction for all UCITS it manages. The documentation must be retained for at least five years and must contain sufficient information in order to reconstruct each transaction performed.

21 What are the periodic reporting requirements for retail funds?

A management company must submit a quarterly report containing a profit and loss account and a balance sheet for the management company itself to the SFSA. Quarterly reports must also be submitted for each retail fund managed, including information on, for example, the type of fund managed, net asset value of the fund assets, fees charged for the subscription and redemption of units in the fund and the assets and liabilities of the fund.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

A UCITS is by statute an open-ended investment fund available to the public. As such, the fund must accept investments. In general, no restrictions may be placed on the issue, transfer and redemption of units in the funds. However, it is possible to impose rules stipulating, for example, a minimum subscription amount. Upon the request of a unitholder, a unit must be redeemed immediately and may only be postponed under extraordinary circumstances.

A special fund may, however, subject to the SFSA's consent, incorporate restrictions on the issue of units in the fund. In addition, a special fund may limit the possibility for investors to redeem their units to once per year. Restrictions must be incorporated in the fund rules that must be approved by the SFSA in connection with the formation of the fund.

Update and trends

In Sweden it is currently only possible to establish a UCITS or a special fund on a contractual basis (ie, it is not possible to set up such funds on the basis of company law as a nationally regulated form of investment fund). As described in question 36, a governmental inquiry has proposed that Sweden should introduce the possibility to establish UCITS or special funds with a variable capital (similar to a SICAV, for example) for purposes of enhancing Sweden's competitiveness on the international fund market.

MiFID II is expected to be implemented into Swedish legislation on 3 January 2018, which will have profound effects on the distribution and selling of funds to Swedish investors. A government bill, which is expected to be published in late spring 2017, will detail how Sweden will implement new rules regarding, inter alia, commission payments.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

Different types of legal vehicles may be used for the establishment of a non-retail fund and in general the fund type will govern the choice of vehicle. In this context and from a Swedish perspective, non-retail funds comprise AIFs.

Owing to the investment restrictions described in question 17, a Swedish hedge fund may only be formed as a special fund intended for the public (ie, retail investors), and therefore of an open-ended nature.

Swedish private equity funds and real estate funds are primarily formed as limited partnerships but may also be formed as limited liability companies. An essential difference between a retail fund and a non-retail fund is that the latter does not have to be separate from the fund manager and merely consist of the fund assets. Consequently, a non-retail fund can be a legal person with the ability to assume rights and obligations. Furthermore, a non-retail fund could be internally or externally managed. In the former case, the fund is the manager and the entity is required to possess all functions necessary to be able to comply with applicable laws and regulations. It should be noted, however, that Swedish legislation does not allow for a limited liability company to have variable capital, which impedes the establishment of non-retail funds as limited liability companies and of any other nature than open-ended.

24 What are the key laws and other sets of rules that govern non-retail funds?

The sets of rules governing non-retail funds are the AIFMA and the SFSA's Regulations FFFS 2013:10 regarding alternative investment fund managers.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

There is no requirement to obtain authorisation for the establishment of a non-retail fund. The activities requiring authorisation are instead management and marketing of a non-retail fund. However, where the fund is internally managed, the establishment would, in practice, require authorisation. A private equity fund would, for instance, need to apply for authorisation with the SFSA upon its establishment, which may in some cases correspond to its 'first closing'. A non-retail fund may be marketed without authorisation under the circumstances set out in question 9.

26 Who can market non-retail funds? To whom can they be marketed?

Anyone can market a non-retail fund that has been authorised for marketing in Sweden, provided that the marketing does not go beyond the concept of 'promotion'. The marketing entity would not need to be licensed or authorised unless the marketing activities include offering of the funds or otherwise would require a MiFID licence or authorisation pursuant to the Securities Markets Act.

As a main rule, non-retail funds may only be marketed to professional investors as defined in the Securities Market Act. However, it is possible to market certain non-retail funds that have been formed as AIFs to retail investors.

In order to market a non-retail AIF to retail investors, the units or shares of the AIF have to be admitted to trading on a regulated market (ie, an exchange or a multilateral trading facility) and there has to be a key investor information document available for the fund.

Furthermore, it is possible to market AIFs formed as private equity funds to a particular category of Swedish non-professional investors. This is permitted under the prerequisites that units in the fund may not be redeemed within five years of the first investment and that the fund generally invests in issuers or non-listed companies for the purpose of acquiring control. In addition, the investor must commit to invest an amount of at least €100,000 and confirm knowledge of the risks associated with the investment in writing.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

No. Even though a non-retail fund may only be marketed to retail investors subject to certain prerequisites, there is no prohibition on an investment being made by a retail investor on a reverse-solicitation basis.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

Fund managers of AIFs directed at professional investors are required to establish arrangements to avoid the funds being marketed to retail investors. In general, however, there are fewer requirements imposed on managers of non-retail funds as opposed to managers of retail funds.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

The tax treatment for investors in non-retail funds is the same as described for retail funds.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

For each AIF the assets must be held by a separate custodian. The custodian does not have to be established locally but must have its registered office within the EEA. The obligation to appoint a custodian is intended to provide satisfactory protection of a fund's assets in case of insolvency proceedings involving the manager. Similar to UCITS, the management of an AIF formed as a special fund may be assumed by the custodian.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

The most prominent governance requirements include conducting operations in a professional manner so that the public's confidence in the fund market is maintained, as well as adequate risk and liquidity management, handling of potential conflicts of interest and establishing a remuneration policy compatible with such requirements.

The authorisation process involves submission of various documents and upon authorisation being granted, the non-retail fund and the manager (as the case may be) must be registered with the SFSA. The management company of a non-retail fund must have a board of directors consisting of at least three members.

32 What are the periodic reporting requirements for non-retail funds?

The reporting requirements regarding non-retail funds vary depending on the fund type and the value of assets under management. In general, the manager or the fund (as the case may be) must report more frequently and in greater detail in relation to funds that are marketed to retail investors and whose asset value exceeds certain thresholds. The frequency of such reporting varies between quarterly, semi-annually and annually.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Management of separate accounts (ie, discretionary portfolio management) is typically structured through an agreement between the investor and the manager whereby an investment strategy (portfolio allocation, etc) is determined based on the investor's investment horizon and risk profile. The manager then makes investments relating to the portfolio on a discretionary basis without having to obtain prior approval for each transaction from the investor.

34 What are the key legal issues to be determined when structuring a separately managed account?

Within a managed account, the manager receives funds from the investor subject to a reporting obligation. Initially, the manager has to categorise the investor as either professional or non-professional and such categorisation thereafter governs the obligations of the manager. The manager is required to safeguard the client's interests and ensure best execution in terms of price, fees, etc and to disclose information to the investor as required by law.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

Management of separate accounts is a regulated activity under Swedish law and the entity providing the service must be regulated by, and obtain authorisation from, the SFSA. Management must be carried out by either a credit institution or a securities business, authorised under the Securities Markets Act. A fund management company that has obtained authorisation to manage a UCITS or an AIF may, however, also be granted separate authorisation from the SFSA to conduct discretionary portfolio management.

Marketing in the sense of 'promotion' of separately managed accounts is not a regulated activity and does not require authorisation. All marketing material is, however, subject to the Marketing Practices Act requires the marketing to be consistent with generally accepted marketing practices.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

The EU has adopted MiFID II and it was intended that MiFID II be implemented into Swedish legislation by 3 January 2017. However, its implementation has been postponed and is expected to enter into force on 3 January 2018. Furthermore, a governmental inquiry has proposed that Swedish law should introduce the possibility to establish Swedish funds with variable capital (see also 'Update and trends').

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

In order to list a retail fund on Sweden's largest stock exchange, NASDAQ Stockholm, the fund manager must prepare an information brochure or prospectus and have the units registered on central securities depositary registers at Euroclear Sweden or, subject to NASDAQ's consent, with another Swedish or foreign central security custodian or the equivalent. Furthermore, listing of foreign retail funds on NASDAQ Stockholm requires prior registration or passporting with the SFSA of the relevant fund.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

Owing to the contractual basis on which UCITS and special funds are formed, it is not possible to redomicile a foreign UCITS or equivalent to a special fund in Sweden. Especially in cases where the overseas vehicle has variable capital (eg, a SICAV), Swedish legislation would not permit the maintenance of such funds. However, Swedish legislation would allow for the merger between a Swedish UCITS and a foreign UCITS where the Swedish fund is the receiving fund. A merger between a foreign AIF and a Swedish AIF is not regulated by Swedish investment fund legislation.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

In relation to funds and investors domiciled within the EEA, the freedom of movement of capital provides that no restrictions may be placed on investments within the EEA. As regards funds and investors domiciled outside the EEA, Sweden has adopted a regime that imposes no general restrictions on foreign investments.

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

The primary legal basis for the investment fund business in Switzerland is the Federal Act on Collective Investment Schemes of 23 June 2006 (the Collective Investment Schemes Act (CISA)), which came into force on 1 January 2007 and underwent a major revision in 2013. The Swiss Financial Market Supervisory Authority (FINMA) authorises or approves, as the case may be, and supervises funds, fund management companies and persons involved in marketing funds.

CISA focuses on providing the basic principles and regulations pertaining to investment fund business. Its implementing ordinances – the Ordinance of the Swiss Federal Council on Collective Investment Schemes (CISO) as well as the Ordinance of the Swiss Financial Market Supervisory Authority (CISO-FINMA) – provide more detailed regulations. FINMA has issued various circulars setting out in more detail the duties of the licensees under the CISA.

In terms of self-regulation, the Swiss Funds and Asset Management Association (SFAMA) has issued a code of conduct for the Swiss fund business as well as various model documents and guidelines, some of which have been recognised by FINMA as a minimum standard that must be respected by all supervised entities.

The purpose of CISA and its implementing ordinances is to protect investors and to ensure transparency and the proper functioning of the market for collective investment schemes in Switzerland. All of these regulations regulate both open-ended and closed-ended, retail and non-retail as well as local and foreign investment funds. However, while Swiss investment funds are always subject to an authorisation or approval requirement, foreign investment funds only require approval if they are distributed to retail investors in or from Switzerland.

Generally, the following Swiss investment fund-related entities are required to obtain a licence from FINMA:

- fund management companies;
- investment companies with variable capital (SICAVs);
- limited partnerships for collective investment schemes;
- investment companies with fixed capital (SICAFs);
- custodian banks of Swiss collective investment schemes;
- asset managers of collective investment schemes;
- distributors; and
- representatives of foreign collective investment schemes.

Certain asset managers of collective investment schemes, distributors and representatives who already hold another FINMA licence may be exempt from obtaining such a further licence.

2 Is fund administration regulated in your jurisdiction?

Fund administration as such, as opposed to fund management and asset management, is not subject to a licence requirement in Switzerland. However, it is regulated and supervised either as part of the oversight over fund management, within a fund management company (for contractual investment funds), a self-managed SICAV, limited partnership for collective investment schemes or a SICAF. Similarly, the delegation of fund administration functions to a fund administrator or other providers is regulated. In particular, the fund management company may only delegate fund administration tasks, if it is in the interest of efficient management. Further, the fund management company may only appoint persons who are properly qualified to carry out the relevant tasks. The fund management company must ensure the proper instruction, monitoring and control required for the implementation of the assigned tasks.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

The approval process for investment funds depends on whether the investment fund is organised under Swiss law or a foreign law. Furthermore, the applicable regulations also differ depending on how the fund is organised.

Swiss investment funds

Open-ended funds

Pursuant to CISA, there are two different investment vehicles available to structure an open-ended collective investment scheme (see also question 12), namely, a contractual investment fund (contractual fund) or a SICAV. In the case of contractual funds, the fund management company and the custodian bank must be authorised as such by FINMA (see question 1). Further, the fund management company must submit the fund contract, with the consent of the custodian bank, to FINMA for approval.

In the case of a SICAV, it must have obtained authorisation from FINMA (see question 1). As part of this process, its articles of association and investment regulations are subject to FINMA approval. The SICAV must also appoint a custodian bank. FINMA may, however, grant exemption from this duty in certain cases.

Closed-ended funds

Pursuant to CISA, closed-ended collective investment schemes can either be structured as a limited partnership for collective investment schemes or a SICAF (see questions 12 and 23).

Both the limited partnership for collective investment schemes and the SICAF must have obtained the relevant licence from FINMA (see question 1). In particular, the limited partnership agreement of the limited partnership for collective investment schemes and the articles of association and investment regulations of the SICAF are submitted to FINMA for approval.

In Switzerland an applicant requiring a licence from FINMA under CISA (see question 1), such as a fund management company or fund, must comply with the following requirements:

- the persons responsible for its management and business operations must have a good reputation, guarantee proper management and possess the requisite specialist qualifications;
- the significant equity holders must have a good reputation and their influence must not be used to the detriment of cautious and sound business practice;
- compliance with the duties under CISA is ensured by internal regulations and an appropriate organisational structure;
- sufficient financial guarantees are available; and
- the additional authorisation requirements listed in the relevant provisions of CISA pertaining to the relevant licensee are met.

Foreign investment funds
See question 39.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

The territorial scope of Swiss fund regulation is basically limited to the following:
- all collective investment schemes established or distributed in Switzerland;
- all persons responsible for the (general) fund management or asset management of (Swiss or foreign) collective investment schemes who are based in Switzerland;
- all Swiss banks that hold the assets of collective investment schemes in safe custody; and
- all persons who distribute collective investment schemes in or from Switzerland.

A foreign fund management company cannot, as such, act as a fund management company of a Swiss collective investment scheme. A Swiss fund management company may, however, delegate certain fund administration activities to third parties. They may also delegate asset management to foreign asset managers who are subject to recognised supervision under certain circumstances. In particular, where foreign law requires an agreement on cooperation and the exchange of information with foreign supervisory authorities, it may only delegate investment decisions to asset managers abroad where such an agreement exists between FINMA and the relevant foreign supervisory authorities for the investment decisions concerned.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

Significant changes regarding the fund management company, such as a change in its significant equity holders need to be approved by FINMA in order for the fund management company to maintain its licence.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

Generally, only the following may be charged from the assets of a Swiss collective investment scheme:
- a management fee for remunerating the activities of the fund management company;
- custody fees and other costs for remuneration of the custodian bank's activity, including the costs for the safekeeping of the fund's assets by third-party custodians or collective securities depositories;
- a portfolio management fee and any performance fees for the remuneration of the portfolio manager of collective investment schemes;
- a distribution fee to remunerate the activity of distributors;
- certain incidental costs; and
- commissions and fees incurred in connection with the issue and redemption of units.

In addition to this, fund management companies must disclose the intended use of the management fee. This means that investors should be given a detailed picture of the use made of the management fees paid out of the assets of the fund before they purchase units. This disclosure duty also applies to profit-sharing arrangements, if any exist.

The SFAMA Guidelines on Duties regarding the Charging and Use of Fees and Costs set out the relevant requirements in more detail.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

Whoever markets, or more generally, distributes, investment funds in or from Switzerland requires an authorisation either in Switzerland or in their home country. Furthermore, depending on the category of the targeted investors, an approval requirement of the investment fund itself by FINMA may also be triggered. 'Distribution' covers all forms of marketing and advertising, subject to certain specific exemptions (see question 8).

Any individual or company marketing (ie, distributing) Swiss investment funds to non-qualified investors (as opposed to qualified investors as defined in question 27) must obtain a distributor's licence from FINMA. Furthermore, distributors of foreign investment funds in Switzerland must also hold a FINMA distributor's licence, whether the foreign investment fund is distributed to non-qualified investors or to qualified investors (as defined in question 27). Individuals and legal entities as well as partnerships can apply for a FINMA distributor's licence. However, branch offices of foreign entities cannot obtain a licence as a distributor.

Any party licensed by FINMA as a bank, securities trader, insurance or fund management company, asset manager of investment funds or Swiss representative of foreign investment funds pursuant to the CISA, is exempted from the obligation to also obtain a FINMA distributor's licence. Certain agents of insurance companies are also excluded from the scope of the licence obligation for distributors of collective investment schemes.

8 What marketing activities require authorisation?

Generally, any form of offering or advertising pertaining to investment funds (including the mere mention of a particular investment fund), which is intended to interest investors in acquiring the relevant investment fund, is, in principle, deemed to be 'distribution', unless such advertising is exclusively addressed to regulated financial intermediaries (such as banks, securities dealers, fund management companies and asset managers of investment funds), central banks or regulated insurance companies.

Offering and advertising of investment funds exclusively to regulated financial intermediaries as described above must not be accessible to any other category of investor (qualified or non-qualified investors as defined in question 27).

The following activities are not deemed to be distribution and therefore do not require a distributor's licence or, as the case may be, an approval of the investment fund by FINMA:
- the provision of information and the subscription of investment funds at the instigation of (reverse solicitation), or at the own initiative of, investors (eg, in the context of certain defined types of investment advisory agreements or for execution-only transactions);
- the provision of information and the subscription of investment funds based on a written discretionary management agreement with regulated financial intermediaries (such as banks, securities dealers, fund management companies and asset managers of investment funds) and central banks;
- the provision of information and the subscription of investment funds based on a written discretionary management agreement with an independent asset manager complying with minimal standards with respect to (Swiss) anti-money laundering regulations, conduct rules and the form and content of the agreement;
- the publication of prices, net asset values and tax data by regulated financial intermediaries, unless contact information is provided; and
- the offering of stock option schemes in the form of collective investment schemes to employees.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

The territorial scope of the rules on distribution of investment funds includes the distribution in and from Switzerland as well as distribution into Switzerland from abroad. Regarding the relevant authorisations for Swiss distributors, see question 7.

In addition, a foreign financial intermediary may distribute foreign investment schemes (exclusively to qualified investors in Switzerland) without obtaining a distributor's licence from FINMA provided it holds a licence in its home jurisdiction allowing the distribution of investment funds in its country of domicile and has entered into a written distribution agreement with a Swiss representative in Switzerland subject to Swiss law.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

Before distributing foreign collective investment schemes in or from Switzerland, the fund management company or the fund must contractually appoint a Swiss representative and a Swiss paying agent.

The Swiss representative must then appoint the entity wishing to market the investment fund as a distributor by way of a written distribution agreement to which Swiss law is applicable. Such distribution agreement must commit the distributor to exclusively use fund documents that indicate the names of the Swiss representative and paying agent as well as the place of jurisdiction.

For the marketing of Swiss funds, no distribution licence is required except for marketing to retail investors.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

As a matter of principle, Swiss law does not restrict intermediaries involved in marketing funds in or from Switzerland from earning commission payments. Institutions paying such distribution fees must ensure that the remuneration system promotes proper client advice and the fostering of long-term relationships. Furthermore, distributors and other intermediaries involved in marketing activities are required to disclose the nature and scale of all fees and other pecuniary benefits through which the activities of the distributor are to be compensated. Finally, the Swiss Supreme Court held in two leading cases that, as a matter of principle, a portfolio manager who receives distribution fees is required to pass them over to the client, unless all of the following requirements are met:

- the client waives its right to receive the distribution fee and other benefits (ie, the client agreed that the distributor will retain the benefits it receives from third parties in the course of the contractual course of business on behalf of the client);
- the client is in a position to estimate the overall amount of the distribution fee in question, which is possible only if the distributor disclosed to the client the amount of the fee actually paid or, at least, the range of the fees and how they were calculated; and
- the distributor discloses the risk of conflicts of interest and the measures taken to avoid any adverse consequence for the client.

Under pension fund laws and regulations, an occupational pension institution is not allowed to agree to such a waiver, thus effectively banning the use of distribution fees when directly dealing with Swiss pension institutions.

The subject of distribution fees was revisited in connection with the law review process related to the Financial Services Act (FinSA) (which is pending in Parliament and expected to enter into force mid-2018). Although previously there were discussions on partially banning the payment of commissions for marketing activities or prohibiting financial service providers from calling themselves 'independent' if they received fees, the version currently pending in Parliament does not provide for a ban on distribution fees and allows financial service providers to accept and keep fees provided the above-mentioned requirements are met, thus codifying the precedents of the Swiss Supreme Court.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

Retail funds can either be structured as open-ended or closed-ended investment funds. Open-ended retail funds can take the form of a contractual fund or a SICAV. Contractual funds are based on a tripartite collective investment agreement (fund contract) between the investor, the fund management company and the custodian bank. The majority of open-ended retail funds in Switzerland are set up as contractual funds. SICAVs are investment companies with variable capital that are, to a large extent, subject to the provisions of the Code of Obligations on companies limited by shares with the following characteristics:

- the share capital and number of shares vary;
- the share capital is divided into company and investor shares;
- for whose liabilities only the company's assets are liable; and
- the sole purpose is collective capital investment.

Unless the law and the articles of association of the SICAV provide otherwise, a SICAV may, at any time, issue new shares and must, at all times, if requested, redeem shares at the net asset value.

Both company and investor shares, in principle, have the same rights and obligations and each share, regardless of its category, carries one vote. Nevertheless, only the holders of the company shares may decide on the SICAV's dissolution.

Closed-ended retail funds can take the form of a SICAF of a listed Swiss company limited by shares.

A SICAF is an investment company with fixed capital that is set up as a company limited by shares pursuant to the Code of Obligations with the following characteristics:

- the sole purpose of the company is the investment of collective capital;
- the shareholders are not required to be qualified shareholders in terms of the CISA (see question 27); and
- the company is not listed on a Swiss stock exchange.

To date, no SICAFs have yet been approved by FINMA. In practice, the promoters will prefer to list the company (or exclude its accessibility to retail investors), because investment companies limited by shares are out of the scope of the CISA and can therefore remain unregulated.

13 What are the key laws and other sets of rules that govern retail funds?

See question 1.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Swiss investment funds

Swiss investment funds are subject to authorisation or approval requirements to be established and marketed. This is true whether the investment fund is open or closed-ended or whether it is a retail or a non-retail fund (see question 1).

Open-ended retail funds

In the case of a contractual fund, the fund management company must be authorised by FINMA and the fund contract must be approved by FINMA.

SICAVs must also be authorised by FINMA who must also approve their articles of association and investment regulations.

A simplified approval procedure may be adopted for open-ended investment funds to the extent that the fund regulations:

- comply with a format that FINMA has recognised as a minimum standard, such as model regulations and prospectus of a specific industry body; or
- comply with a set of standards that FINMA has recognised as binding in relation to the relevant licensee.

Closed-ended retail funds

Like the SICAV, the SICAF itself must be authorised by FINMA who must also approve the articles of association and investment regulations.

Foreign investment funds

Prior to distributing foreign investment funds in or from Switzerland to non-qualified investors, FINMA must have approved the binding documents such as the prospectus, articles of association and fund contract. Furthermore, the foreign fund needs to appoint a representative and a paying agent in Switzerland, irrespective of whether it targets non-qualified or qualified investors.

15 Who can market retail funds? To whom can they be marketed?

As regards the question of who can market retail funds, see question 7. There are no restrictions on the type of investor to whom retail funds can be marketed.

16 Are there any special requirements that apply to managers or operators of retail funds?

There are no special requirements that apply to managers or operators of Swiss retail funds. See question 3 regarding the general requirements that apply to managers and operators of investment funds.

17 What are the investment and borrowing restrictions on retail funds?

There are no generally applicable restrictions on investment and borrowing for Swiss retail funds. However, different investment and borrowing restrictions apply pursuant to the CISA and its implementing ordinances, depending on whether the investment fund qualifies as a securities fund, a real estate fund, another fund for traditional investments or another fund for alternative investments. Further restrictions may apply based on the fund contract or the articles of association.

Securities funds

Securities funds are generally allowed to invest in transferable securities issued on a large scale and in non-securitised rights having the same function (uncertified securities) that are traded on a stock exchange or another regulated marked that is open to the public and other liquid financial assets. Apart from investing in such assets, securities funds may also, subject to applicable restrictions:

- engage in securities lending;
- enter into repurchase agreements and reverse repurchase agreements;
- borrow, on a temporary basis, up to 10 per cent of the fund's net assets;
- pledge or transfer as collateral up to 25 per cent of the fund's net assets; and
- use derivatives.

Real estate funds

Real estate funds may, in particular, invest in the following:

- real estate;
- real estate companies;
- units in real estate funds; and
- foreign real estate assets.

Furthermore, real estate funds are, under certain circumstances, allowed to enter into derivative transactions.

Other funds for traditional investments

Other funds for traditional investments are, in particular, permitted to invest in the following:

- securities;
- units in collective investment schemes;
- precious metals; and
- various derivatives instruments.

In addition, they may use the following investment techniques:

- borrow amounts of up to 25 per cent of the fund's net assets;
- pledge, or transfer as collateral, up to 60 per cent of the fund's net assets;
- commit to an overall exposure of up to 225 per cent of the fund's net assets; and
- engage in short-selling.

Other funds for alternative investments

While the permitted investments are basically the same as for other funds for traditional investments, less restrictive regulations apply regarding investment techniques. Other funds for alternative investments are permitted to:

- borrow amounts of up to 50 per cent of the fund's net assets;
- pledge, or transfer as collateral, up to 100 per cent of the fund's net assets;
- commit to an overall exposure of up to 600 per cent of the fund's net assets; and
- engage in short-selling.

FINMA may in individual cases grant other funds for traditional and alternative investments an exemption from the rules pertaining to the following:

- the permitted investments;
- the investment techniques;
- the restrictions; and
- the risk diversification.

18 What is the tax treatment of retail funds? Are exemptions available?

In principle, Swiss tax laws do not discriminate between retail and non-retail investment funds. The taxation of Swiss investment funds depends on the way the funds are legally structured under the CISA.

Swiss contractual funds, SICAVs and limited partnerships for collective investments are treated as transparent for the purpose of income or profit taxation as long as they do not directly own real estate. As a result, the investors, as opposed to the funds, are directly and exclusively subject to taxation, typically in the country of their tax residence. Nevertheless, such fund structures are subject to Swiss withholding tax on net profits, excluding capital gains, if they are accumulating funds and on the effective distributions in the case of distributing funds. The 35 per cent withholding tax that is levied on distributions of profits or on the accumulated profits, or both, can be reclaimed by Swiss residents and foreign investors in accordance with the applicable double taxation treaty between Switzerland and the country of the foreign investor's residence.

SICAFs are not transparent from a tax perspective. The SICAF is treated as a separate taxpayer in Switzerland and is subject to ordinary corporate income tax. Dividend payments from the SICAF to its shareholders are subject to Swiss withholding tax at the rate of 35 per cent.

For Swiss individual and corporate income tax purposes, the legislation does not distinguish between investments in Swiss or foreign investment funds. In both cases, distributed and reinvested fund income received is subject to income tax for Swiss investors while capital gains are tax-free for investors holding their assets for private investment purposes. The taxable income and the tax value of foreign funds for net wealth tax purposes are published every calendar year on the website of the Swiss Federal Tax Authorities.

However, only Swiss funds are subject to Swiss withholding taxes (anticipatory taxes) at a rate of 35 per cent on the net profits with respect to the effective distributions. A foreign fund may be recharacterised as a Swiss fund for Swiss withholding tax purposes if the members of the board are mainly Swiss residents and the board meetings are held in Switzerland or the supervisory functions of the custodian bank are carried out by a Swiss person.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

Assets of a Swiss open-ended fund (whether in the form of a contractual fund or a SICAV) must be held with a custodian bank, regardless of whether the respective investment fund targets retail or non-retail investors.

The custodian bank must hold a banking licence from FINMA in accordance with the Federal Act on Banking and Savings Institutions of 8 November 1934, which must also be licensed as a custodian bank by FINMA. The custodian bank is responsible for the safekeeping of the assets of the investment fund and issuing and redeeming units, as well as making payments on behalf of the investment fund. Furthermore, the custodian bank must ensure that the fund management company or the SICAV complies with applicable investment fund regulations. Accordingly, the custodian bank is, in particular, responsible for verifying the calculation of the net asset value and the issue and redemption prices of the units and ensuring that investment decisions comply with the applicable investment regulations. It must also assess whether profits are allocated in accordance with the fund regulations.

In the event of bankruptcy of the custodian bank, the assets of the investment funds are not included in the estate, but are segregated in favour of the investors, subject to any claims the custodian bank may have against the investors. As regards contractual funds, the fund management company acts as a fiduciary with regard to the investors' assets. Therefore, in the case of bankruptcy of the fund management company, the proceedings are similar to those in the case of bankruptcy of the custodian bank. The assets are segregated from the assets of the bankrupt estate. As regards closed-ended funds, SICAFs are also required to hold their assets with a custodian bank. By contrast, no such obligation exists for limited partnerships for collective investment.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

With regard to the entities connected to any form of investment fund, including retail funds, FINMA only grants the relevant licence if, in particular, the following is true:

- the persons responsible for the management and business operations have a good reputation, guarantee proper management and possess the requisite specialist qualifications;
- the significant equity holders have a good reputation and do not exert their influence to the detriment of prudent and sound business practice;
- compliance with the duties resulting from CISA is ensured by internal regulations and an appropriate organisational structure; and
- sufficient financial guarantees are available.

Such requirements must be fulfilled at all times following the granting of the licence (see also question 3). Should a change in the circumstances underlying FINMA's licence approval arise, FINMA's authorisation must be sought prior to the continuation of activity.

Further, licensees (see question 1) and their agents generally need to fulfil the following requirements:

- duty of loyalty: they must act independently and exclusively in the interest of the investors;
- due diligence: they must implement the organisational measures that are necessary for ensuring proper management; and
- duty to provide information, as follows:
  - they must ensure the provision of transparent financial statements and provide appropriate information pertaining to the investment funds they manage and distribute as well as to the assets they hold in safekeeping;
  - they are required to disclose all charges and fees incurred directly or indirectly by the investors and their appropriation; and
  - they are required to notify investors of compensation, brokerage fees and other soft commissions in a full, truthful and comprehensible manner.

CISA also provides for a record-keeping duty, pursuant to which the licensees (see question 1) are responsible for ensuring that all of their distribution and solicitation activities, as well as those of their agents, are recorded in written form.

21 What are the periodic reporting requirements for retail funds?

Swiss investment funds

Within four months of the close of the financial year, open-ended collective investment schemes need to publish an annual report, regardless of whether they target non-qualified or qualified investors. Furthermore, a semi-annual report has to be issued within two months of the end of the first half of the financial year.

The issue and redemption price must be published in the print media or electronic platforms set out in the prospectus (see below) each time units are issued and redeemed.

Further, FINMA must be notified of any changes regarding the following:

- persons responsible for management and business operations;
- significant equity holders;
- executive persons entrusted with the performance of the custodian bank's duties;
- financial guarantees, especially if the fund no longer complies with the minimum requirements; and
- the prospectus or the key investor information document, articles of association and the fund contract.

Should these changes result in a change of the relevant circumstances with regard to obtaining an authorisation as a collective investment scheme in the first place, FINMA has to authorise said changes and a simple notification is not sufficient (see question 20).

Further, a notification to FINMA is necessary regarding facts that might have a negative impact on the good reputation of significant equity holders or the proper management and sound business practice by persons in charge within the funds, and, in particular, any criminal proceedings against them.

Foreign investment funds

The Swiss representative of a foreign investment fund for retail investors also has certain notification duties to FINMA regarding the following:

- any measures taken by a foreign supervisory authority against the foreign fund, in particular a withdrawal of its authorisation;
- any amendments to the relevant documents of the foreign fund (such as prospectus, key investor information document) and the articles of association, the fund contract or similar documents required in accordance with the applicable domestic law; and
- the (proposed) termination of representative agreements.

All notifications to the investors of both Swiss and foreign investment funds in Switzerland are carried out by way of publication in a Swiss official language in the Swiss Official Gazette of Commerce, in a print media as defined in the prospectus, or on a publicly accessible electronic platform approved by FINMA.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

Restrictions on the issue and transfer

Investment funds may only be available to investors that fulfil certain defined objective criteria provided for in the fund documents.

As regards contractual funds, transfer restrictions can be specified in the fund contract. There are, however, no statutory provisions restricting the transfer of shares. Shares in SICAVs are generally freely transferable.

The transferability of shares in a SICAF is governed by the provisions of the Code of Obligations and the SICAF's articles of association can set out certain transfer restrictions. If there are no such restrictions, the shares are freely transferable and the SICAF's board of directors generally needs to approve the transfer, unless the SICAF offers the seller of the shares to take over its shares at the real value at the time of the request for its own account, the account of other shareholders or third parties, and the acquirer does not expressly declare that it has acquired the shares in its own name and for its own account.

Redemption restrictions

In the case of open-ended funds, a redemption can generally be requested at any time by the investor. However, the rules of a specific fund can provide that a redemption is only possible on specific dates, if the following criteria are fulfilled:

- the investments are difficult to value or are of limited marketability;
- redemptions can be requested at least four times per year; and
- the restricted right of redemption is explicitly disclosed in the regulations and prospectus.

Furthermore, FINMA can, upon request, authorise further restrictions, especially if the investment fund invests in the following:

- assets that are neither listed nor traded on a regulated market open to the public;
- mortgage investments; and
- private equity investments.

Generally, redemption right restrictions must be disclosed in the relevant investment fund regulations and the prospectus. The redemption right cannot be suspended for more than five years.

In the following exceptional circumstances, redemptions can be restricted if the investment fund's regulations contain relevant provisions:

- a market that serves as the basis for the valuation of a significant proportion of the investment fund's assets is closed, or trading on the market is restricted or suspended;
- in the event of emergencies (political, economic, military or monetary);
- owing to exchange controls or restrictions on other asset transfers, the collective investment scheme can no longer transact its business; and
- large withdrawals of units or shares may significantly endanger the interests of other investors.

If redemptions are deferred because of these exceptional circumstances, the investment fund immediately has to inform the auditor, FINMA, as well as its investors.

In the case of closed-ended funds, the redemption of shares cannot be requested.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

Open-ended non-retail funds

Open-ended non-retail funds can be structured as contractual funds and SICAVs, which are both limited to qualified investors (as regards their particularities, see question 12).

Closed-ended non-retail funds

Closed-ended non-retail funds can be structured as a limited partnership for collective investment schemes or a SICAF (as regards the particularities of a SICAF, see question 12).

A limited partnership for collective investment schemes is a limited partnership with the sole object of collective investment. At least one member bears unlimited liability (the general partner), while the other members (limited partners) are liable only up to a specified amount (the limited partner's contribution).

Further, general partners must be companies limited by shares with their registered office in Switzerland. Limited partners must be qualified investors under CISA (see question 27).

Limited partnerships for collective investment schemes are specifically used for investment in risk capital (venture capital), real estate projects and other alternative investments.

24 What are the key laws and other sets of rules that govern non-retail funds?

See question 1.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

See questions 1 and 14. As regards limited partnerships for collective investment schemes, FINMA must have authorised the partnership and approved such with regard to the partnership agreement.

26 Who can market non-retail funds? To whom can they be marketed?

Marketing a foreign fund in Switzerland, including non-retail funds to qualified investors, requires a FINMA distributor licence (see questions 7 and 9 – the latter also covers foreign distributors into Switzerland).

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

Non-retail funds may only be distributed to qualified investors. The following are deemed to be 'qualified investors' pursuant to CISA:

- regulated financial intermediaries, such as banks, securities dealers, fund management companies and asset managers of collective investment schemes, central banks and regulated insurance companies;
- public entities and pension funds with professional treasurers;
- enterprises with professional treasurers;
- investors who have entered into a discretionary asset management agreement with a regulated financial intermediary (as described above) or with an independent asset manager complying with certain minimal standards, unless they have declared in writing that they do not want to be considered as qualified (opt-out); and
- high net worth individuals to the extent that they fulfil certain criteria (thresholds of assets or knowledge in the field of investments) and have requested in writing to be treated as qualified investors (opt-in).

Pursuant to the FINMA Circular 2013/09 on the distribution of collective investment schemes, independent asset managers complying with certain minimal standards as set out above may also be treated as if they were qualified investors.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

There are no specific requirements that apply to managers or operators of non-retail funds, compared with retail funds (see question 16).

29 What is the tax treatment of non-retail funds? Are any exemptions available?

The tax treatment of non-retail funds is the same as the tax treatment of retail funds (see question 18).

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The same rules and regulations apply as to retail funds (see question 19).

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

See question 20.

32 What are the periodic reporting requirements for non-retail funds?

With regard to Swiss non-retail funds, the same rules and regulations apply as to retail funds (see question 21).

As regards foreign non-retail funds, there are no requirements for reporting to FINMA.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Separately managed accounts are generally offered to institutional clients and wealthy private clients. In such a set-up, the asset manager (bank or independent asset manager) manages the assets of the client, which are deposited in an account in the name of the client, in accordance with the terms set out in a written discretionary management agreement.

Separately managed accounts are not, as such, subject to the provisions on collective investment schemes. Rather, general contract law, in particular the provisions of article 394 et seq of the Code of Obligations regarding agency contracts, are applicable between the client and the asset manager.

34 What are the key legal issues to be determined when structuring a separately managed account?

According to the provisions of the Code of Obligations regarding agency contracts, which also apply to separately managed accounts, the agent is obliged to return to the client anything received for whatever reason as result of its agency activities (article 400 of the Code of Obligations). This also applies to retrocession payments, provided that the asset manager receives a commission from the issuer of a product for placing it with the client, a client waiver is generally necessary in order for the agent to legitimately hold back such commission and to not be obliged to pass it on to the client.

Further, the Swiss Bankers Association and the Swiss Fund and Asset Management Association, as well as other professional associations, have issued guidelines regarding asset management. Such guidelines are considered by the courts and FINMA to be a generally accepted standard of conduct as regards asset management contracts. They clarify the scope of the general duty of care of the asset manager and oblige managers to manage the client's assets in good faith, diligently and in accordance with the agreed investment goals and guidelines of the client. Beyond this, the asset manager has to take the personal circumstances of the client into account and act in accordance with the initial instructions from the client, as the owner of the assets.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

To date, the management or marketing of separately managed accounts in Switzerland is not regulated in Switzerland. The activity is, however, often carried out by a bank that requires a FINMA licence in that capacity. Nevertheless, independent asset managers are not currently obliged to obtain a licence or an authorisation from FINMA.

Independent asset managers do, however, qualify as financial intermediaries and are therefore subject to the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector. Consequently, independent asset managers (as a matter of law, banks are subject to anti-money laundering rules) must become a member of a recognised self-regulatory organisation with respect to anti-money laundering supervision or request a relevant anti-money laundering licence from FINMA to carry out their business.

As far as managed fund accounts are concerned, the rules on distribution of collective investment schemes apply indirectly (see question 7 et seq).

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

Switzerland is currently undertaking a far-reaching reform of its financial markets regulations.

The main goal of this reform is to consolidate the Swiss financial markets regulation into the following three main acts:

- the Financial Market Infrastructure Act, which was adopted by Parliament in June 2015 and entered into force on 1 January 2016 together with its implementing Financial Market Infrastructure Ordinance;
- FinSA: in November 2015, the Swiss Federal Council adopted the dispatch on FinSA, including a draft of FinSA. The draft is now being debated in Parliament and it is expected that it may enter into force as early as mid-2018; and
- the Financial Institutions Act (FinIA): the status and the timeline for enacting FinIA is the same as for FinSA.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

The listing rules of the main Swiss stock market, the SIX Swiss Exchange (the Listing Rules) contain special requirements with regard to the listing of 'ordinary' collective investment schemes. In particular, collective investment schemes must comply with special requirements concerning minimum capitalisation (ie, assets of at least 100 million Swiss francs at the time of listing) and free float of units. These requirements are waived, to the extent that a SIX Swiss Exchange participant undertakes to act as market maker for the securities in question (article 108, paragraph 2 of the Listing Rules). Furthermore, these requirements do not apply to exchange-traded funds.

In any event, the listing of units in collective investment schemes is conditional on an authorisation from FINMA for domestic collective investment schemes and an approval for distribution in or from Switzerland for foreign collective investment schemes (article 109 of the Listing Rules). Both domestic and foreign investment schemes are obliged to publish a listing prospectus, which in essence corresponds to the latest version of the prospectus authorised by FINMA, including additional listing information (article 110 of the Listing Rules). With regard to real estate funds and exchange-traded funds, the SIX Swiss Exchange has issued specific implementing trading provisions (article 106 of the Listing Rules).

Pursuant to CISA, investment companies in the form of Swiss companies limited by shares are not governed by CISA, provided that they are listed on a Swiss exchange, or provided that only qualified investors (see question 27) are entitled to hold interests in them and that their shares are registered (article 2, paragraph 3 of CISA). Swiss investment companies and real estate companies organised as a company limited by shares can therefore be listed on the SIX Swiss Exchange without being licensed or approved by FINMA. However, in such a case, they must comply with the specific disclosure requirements applicable to investment companies.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

Theoretically, it is possible to redomicile an overseas collective investment scheme in Switzerland. However, in doing so, the overseas collective investment scheme will need to be transformed into a Swiss collective investment scheme. Therefore, it would need to be restructured either as a contractual fund or a SICAV (in the case of an open-ended collective investment scheme), a SICAF or a limited partnership for collective capital investments (in the case of a closed-ended collective investment scheme) complying with all applicable Swiss laws and regulations.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

There are no general legal limitations on the admissibility of foreign investors to invest in domestically established or managed funds. However, foreign investors must meet the specific requirements set out in CISA pertaining to qualified investors (see question 27), to be able to invest in Swiss investment funds for qualified investors.

There are no Swiss rules that would generally prevent a Swiss investor from investing in foreign-established or managed funds. Regarding the admissibility to distribute foreign funds in or from Switzerland, see question 14.

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

Fund management is regulated in the UK by the Financial and Services Markets Act 2000 (FSMA), various statutory instruments made under the FSMA and the Financial Conduct Authority's (FCA) rules. EU directives are typically implemented in the UK by statutory instruments under the FSMA and changes and additions to the FCA's rules. The FCA is responsible for regulating funds, fund managers and those marketing funds.

Following the UK's referendum on membership of the EU in June 2016, there has been no change to English law that has implemented EU directives, or ongoing implementation in the UK of EU directives. However, the UK government has announced plans to introduce a 'Great Repeal Bill' to repeal the European Communities Act 1972 and incorporate EU law into domestic law, 'wherever practical'. The government has indicated that these legal changes within the Bill will take effect on the day the UK officially leaves the EU. The government has also stated that the Great Repeal Bill will contain delegated powers to enable the government to adapt any laws on the statute book that originates from the EU so as to fit the UK's new relationship with the EU. See 'Update and trends' in relation to the referendum.

2 Is fund administration regulated in your jurisdiction?

Fund administration will usually amount to the regulated activity of 'establishing, operating or winding up a collective investment scheme', which requires authorisation from the FCA. In addition, any administrator that performs custody must be authorised by the FCA to perform this service.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

The authorisation or licensing process for funds is outlined in questions 20 (in the case of retail funds) and 31 (in the case of non-retail funds).

Depending on the type of activity undertaken, a manager or operator of an investment fund must be authorised by the FCA to perform any of the following regulated activities in the UK:

- managing an alternative investment fund (AIF);
- managing an undertaking for collective investment in transferable securities (UCITS) fund;
- managing investments (in the case of a manager that does not directly manage a fund, but manages a fund as a delegated investment manager appointed by the fund manager, or a manager that manages assets of a single investor (a segregated account));
- advising on investments (in the case of a manager that only gives advice without having the power to invest the assets);
- establishing, operating or winding up a collective investment scheme (in the case of an entity that operates a collective investment scheme but does not manage the scheme). Operating generally means administering the scheme (for instance, determining investor entitlements and overseeing the calculation of net asset value and fund accounts); and
- arranging deals in investments (this is required for many intermediation activities, including distribution activities such as handling investor orders and subscription amounts).

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

The FSMA prohibits a legal or natural person from carrying on a regulated activity (examples of which are listed in question 3) in the UK without authorisation. A person will carry on a regulated activity if it does so by way of business (which is itself determined by the scale of the activity and whether the activity is carried on a commercial basis). There is an exemption for 'overseas persons', which are persons who carry on a regulated activity in the UK, other than from a permanent place of business maintained by them in the UK. Various conditions must be satisfied to rely on this exemption, in particular that the person relying on the exemption has either not solicited contact with the client or has solicited contact in compliance with the UK rules on financial promotion (see question 8).

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

Any legal or natural person which wants to acquire 'control' over an FCA-authorised firm must obtain the FCA's consent before making the acquisition. 'Control' for this purpose is holding 10 per cent or more of the shares or voting power in the firm (or its parent undertaking) or holding shares or voting power as a result of which the holder is able to exercise significant influence over the management of the firm (20 per cent for 'non-Directive' firms, which are firms regulated by the FCA but not subject to EU Directives). Any person that wants subsequently to hold 20, 33 or 50 per cent of the shares or voting power must obtain the FCA's prior consent. These rules implement the EU Acquisitions Directive.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

There are two sets of remuneration rules that apply to fund managers. These will govern the structuring of the manager's compensation and profit-sharing arrangements and implement the remuneration rules in the Banking Consolidation Directive (as amended by Capital Requirements Directive III (CRD III) and Capital Requirements Directive IV (CRD IV)) and in the Alternative Investment Fund Managers Directive (AIFMD).

An investment manager that is a 'BIPRU investment firm' (broadly, a firm other than an alternative investment fund manager (AIFM) that is regulated to carry out, among other services, discretionary portfolio management) is governed by the FCA's BIPRU Remuneration Code (which implements the remuneration requirements of the EU Banking Consolidation Directive (as amended by CRD III but not CRD IV)). An AIFM is governed by the FCA's AIFMD Remuneration Code (which implements the remuneration requirements of the AIFMD). A UCITS manager is governed by the FCA's UCITS Remuneration Code (which implements the remuneration requirements of UCITS) and is very similar to the rules for AIFMs. Any manager that is subject to the remuneration rules will apply the rules in a way appropriate to its size, internal organisation and scope and complexity of its activities (the proportionality principle). The requirements of each code are similar but not identical. In particular, rules in the BIPRU Remuneration Code that require payment of part of the remuneration in equity of the fund or the manager and rules relating to deferral (ie, delayed payment) and clawback (ie, return of remuneration following a 'bad act' by the individual) of remuneration are automatically disapplied in the case of most investment managers that are BIPRU investment firms, while the equivalent rules in the AIFMD Remuneration Code may be disapplied only on the basis of the size and risk profile of the AIFM.

Some investment managers are 'IFPRU investment firms' (broadly, a firm with permission to hold client money or assets, with permission to deal on own account or with permission to underwrite or place financial instruments) and are governed by the FCA's IFPRU Remuneration Code (which implements the remuneration requirements of CRD IV). In particular, CRD IV contains the bonus cap, which is that the ratio of fixed and variable remuneration cannot exceed 1:1 (or 1:2 with shareholder approval) and requires that all variable remuneration is subject to clawback arrangements (in the light of subsequent poor performance).

CRD IV may also apply where an AIFM or UCITS manager is part of a group that is subject to CRD IV. According to CRD IV, group-wide remuneration policies should apply to all staff at group, parent and subsidiary levels, and the remuneration rules (including the bonus cap) should apply at least to those staff members whose professional activities have a material impact on the group's risk profile. It is therefore necessary to consider which staff (if any) within the manager conduct professional activities that have a material impact on the group's risk profile.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

UK investment funds will either be classified as a UCITS fund under the UCITS Directive or an AIF under the AIFMD, unless a 'fund of one' (fund vehicles established for a single investor and exempt from the AIFMD). In broad terms, the marketing of a UCITS fund in the UK requires authorisation from the FCA, while the marketing of an AIF in the UK either requires notification to the FCA or authorisation from the FCA, depending on whether the fund is marketed under the UK's private placement regime or under a marketing 'passport' provided by the relevant EU directive. Segregated accounts (accounts structured as funds for a single investor) and joint ventures are outside the scope of the AIFMD and will generally be governed by terms negotiated by the relevant parties and by rules in the EU Markets in Financial Instruments Directive (MiFID). The marketing of segregated accounts and joint ventures is governed by the UK financial promotion regime (see question 9).

8 What marketing activities require authorisation?

Fund marketing activities in the UK are either governed by the UK financial promotion regime (see question 9) or the UK marketing regime governing AIFs. A financial promotion is an 'invitation or inducement to participate' in a fund and broadly covers marketing, distribution and promotional activity (regardless of whether the promotion was solicited by the investor). The concept of financial promotion is relevant to marketing, distribution and promotional activities for both UCITS funds and AIFs and any other investment product or service. The concept of marketing (as defined in the AIFMD) only applies to the marketing of AIFs and was introduced on implementation of the AIFMD. Marketing is a 'direct or indirect offering or placement at the initiative of an AIFM or on behalf of an AIFM'. It is a narrower concept than financial promotion and is generally interpreted as the final offer stage of the marketing process.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

The territorial scope of the financial promotion regime covers communications made within the UK and promotions made from outside the UK to anywhere (inside or outside the UK) if they are 'capable of having an effect in the UK'. A promotion that is communicated to a person in the UK or a website accessible in the UK will be capable of having effect in the UK. There is an exemption for communications only 'directed at' persons outside the UK. It is possible to rely on this exemption by including appropriate disclaimers in marketing material and having controls in place on the making of such communications.

The territorial scope of the marketing regime covers marketing in the UK to investors domiciled or with a registered office in a European Economic Area (EEA) state. The FCA has commented that this only applies to 'marketing that takes place in the UK'. In practice, this includes communications to a person in the UK and websites accessible in the UK.

The promotion of UCITS funds is exempt from the financial promotion restriction. There are exemptions under the financial promotion regime and the marketing regime to allow financial promotion or marketing of AIFs to categories of investors. The main categories of exemptions are 'professional investors' and other types of qualified investor, such as investment professionals and high net worth companies, trusts or associations. See question 26 for more details.

The authorisation or notifications required for financial promotion of UCITS funds and marketing of AIFs are outlined in questions 20 (in the case of UCITS funds) and 31 (in the case of AIFs). No authorisation or notification is required for the financial promotion of AIFs, although notification is required for the marketing of AIFs (ie, the latter stage of the offer process).

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

There is no requirement to involve a local entity in the fund marketing process. In practice, however, involving a locally authorised entity in the fund marketing process will facilitate marketing an AIF to various types of investors (in particular, individual investors). An FCA-authorised firm can market an AIF to, for instance, an opted-up professional investor, a certified high net worth investor, a certified sophisticated investor and a self-certified sophisticated investor. Such investors will usually be clients of the authorised firm to whom the authorised firm owes a responsibility to ensure that the investment recommended is suitable.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

The FCA introduced restrictions on intermediaries earning commission payments as part of its 'retail distribution review' in 2012. A UK-authorised firm (such as an independent financial adviser) that makes a personal recommendation to a retail client in relation to a retail investment product (other than to a retail client outside the UK) can only be remunerated by adviser charges, which are fees agreed between the adviser and its client. Payments made from the product provider to the adviser are prohibited. In addition, where a retail investment product is executed for a retail client by a 'platform service provider' and no personal recommendation is made, the firm may not offer or pay commissions. There will be further restrictions on payment of commissions when MiFID II applies (see question 36).

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

A retail fund will most likely be established as an open-ended vehicle qualifying as a UCITS fund. An exchange-traded fund will typically be structured as a UCITS fund, which is listed on a stock exchange. Alternatively, a manager may wish to establish a closed-ended vehicle, typically to invest in assets (such as real estate) in which a UCITS fund is not permitted to invest, or to adopt the investment trust model (see below). A closed-ended vehicle will typically be listed on a stock exchange, to allow investors to realise their interests and (in some cases) to allow a retail offering of the vehicle.

Open-ended funds

Open-ended retail funds are established in the UK either as UCITS funds or as a non-UCITS retail scheme (NURS). A NURS is a type of non-UCITS fund that the FCA will authorise for distribution to retail investors, and has wider investment and borrowing powers than a UCITS scheme – in particular, a NURS can invest in real estate. In either case, such a fund will be established as an open-ended investment company (OEIC), an authorised unit trust (AUT) or an authorised contractual scheme (ACS).

An OEIC is a type of company (the term 'investment company with variable capital' is synonymous with OEIC). It is formed with an instrument of incorporation, a single director (which may be a corporate director) (or directors) and shareholders. An AUT is a trust without separate corporate identity. It is established on the basis of a trust deed between the trustee and the manager. The trustee holds the assets on trust for the beneficiaries, which are known as the unitholders (as their beneficial interest is represented by 'units'). Unlike OEICs and AUTs, an ACS is a tax-transparent vehicle that can be established either as a co-ownership scheme or as a limited partnership. A co-ownership scheme is established on the basis of an agreement between the fund manager and depositary under which the investors hold beneficial title to the scheme's property as tenants in common.

Any of these vehicles (excluding an ACS established as a limited partnership) can be established with underlying sub-funds (an umbrella fund). The property of a sub-fund of an umbrella fund may only be used to discharge the liabilities of that sub-fund, allowing ring-fenced liability between sub-funds.

Closed-ended funds

Closed-ended retail funds will generally take the form of companies listed on the London Stock Exchange's (LSE) Main Market (traditionally called 'investment trusts' although they are now in corporate form). The LSE's Main Market is the most liquid market and offers the widest investor base. As the LSE's Main Market is a 'regulated market' that is governed by EU directives on listing and securities offerings, funds that are listed on the LSE's Main Market can be marketed to retail investors and will qualify for inclusion in institutional investors' mandates where such mandates limit investment to funds listed on a 'regulated market'. Investment trusts must comply with requirements relating to, for instance, diversification to qualify for special tax treatment (see question 18).

Some investment companies are listed on the LSE's Alternative Investment Market (AIM) or the LSE's Specialist Fund Market. The AIM is an exchange-regulated market and is not an EU-regulated market. As such, it is generally easier and quicker to list a fund on the AIM as opposed to the LSE's Main Market (and to conduct follow-on offerings) if the offering is limited to institutional investors only, because compliance with the EU Prospectus Directive is not required. The Specialist Fund Market is designed for specialist investment funds that only target professional or institutional investors. These closed-ended retail funds can be formed under special regimes for venture capital trusts and real estate investment trusts.

Following the UK's implementation of the AIFMD, most investment trusts and other listed investment companies are now classified as AIFs (note that some real estate investment trusts are not classified as AIFs because they have a commercial, as opposed to an investment, purpose).

13 What are the key laws and other sets of rules that govern retail funds?

The establishment and operation of open-ended retail funds is governed by the FSMA, various statutory instruments made under the FSMA and the FCA's rules (in particular, the FCA's collective investment scheme (COLL) rules). Closed-ended retail funds are generally not collective investment schemes in UK terms, and therefore substantially fall outside FSMA and FCA regulation. However, any closed-ended retail fund that is listed on the LSE's Main Market is governed by the FCA's Listing Rules, and any fund listed on the AIM and the Specialist Fund Market will be governed by the rules of those markets.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Open-ended funds

Open-ended retail funds must be either authorised by the FCA (if a UK-domiciled fund) or recognised by the FCA (if established in another jurisdiction) to be marketed in the UK. In addition, establishment of an open-ended retail fund in the UK must be authorised by the FCA. Funds that are recognised by the FCA mostly comprise UCITS funds established in other EEA jurisdictions. The authorisation process is outlined in question 20.

Closed-ended funds

Closed-ended retail funds that are listed on the LSE's Main Market or Specialist Fund Market are not authorised as funds by the FCA, although the listing itself requires approval by the FCA in its capacity as the UK listing authority. Funds listed on the AIM do not require the approval of the FCA, but are subject to regulation by the AIM. Any fund that lists on the AIM must appoint an independent adviser to act as a nominated adviser that will confirm compliance with the AIM rules to the LSE on the fund's behalf.

15 Who can market retail funds? To whom can they be marketed?

Open-ended retail funds that are authorised or recognised by the FCA, and closed-ended retail funds listed on the LSE's Main Market or Specialist Fund Market can be marketed to any type of person (although, in practice, a fund listed on the Specialist Fund Market will not make a retail offering because the LSE's guidance indicates that it will only admit funds to the Specialist Fund Market that are targeted at professional or institutional investors). A fund that is listed on the AIM is likewise, in practice, not usually offered to retail investors (any such retail offering would require compliance with the EU Prospectus Directive, which funds listing on the AIM generally seek to avoid). However, retail investors can and do acquire shares in funds listed on the AIM in secondary trading.

A person that markets a retail fund must be an FCA-authorised person to the extent that: (i) that person performs a regulated activity (such as investment advice or 'arranging deals in investments') in the course of marketing the fund; and (ii) that person carries on the activity in the UK (subject to the overseas person exemption described in the response to question 4). A professional UK fund distributor is normally an FCA-authorised person either because it gives investment advice in the course of its distribution or because its distribution activities (such as handling investor orders and subscription amounts) comprise the regulated activity of 'arranging deals in investments'.

16 Are there any special requirements that apply to managers or operators of retail funds?

The manager of a UK UCITS fund that is established as an AUT must be independent from the trustee of the AUT and must be a body corporate established in the UK or another EEA state. The manager of a UK UCITS fund that is established as an OEIC will usually be the authorised corporate director of the OEIC and must be established in the UK or another EEA state.

The manager of a UK UCITS fund must be authorised by the FCA to perform the regulated activity of 'managing a UCITS', or may be a firm established in another EEA state operating under the UCITS management passport. The manager of a NURS (see question 12) must be authorised to perform the regulated activity of 'managing an AIF'. The manager of a closed-ended retail fund must be authorised by the FCA, typically to perform the regulated activity of 'managing an AIF'. Alternatively, the fund itself can be authorised as a self-managed AIF.

17 What are the investment and borrowing restrictions on retail funds?

Open-ended retail funds

The investment and borrowing powers for UCITS funds are in the FCA's COLL Rules (which implement the UCITS Directive). A UCITS fund can invest its portfolio in the following asset classes:

- transferable securities or money market instruments traded on an EU regulated market. Transferable securities comprise shares, debt securities and other traded securities, such as depositary receipts. An EU-regulated market is an EU stock exchange that is classified as a regulated market under EU directives;
- cash and near cash (eg, bank deposits and treasury bills);
- units of other UCITS and other non-EEA collective investment schemes, subject to conditions; and
- derivatives and forward transactions.

A UCITS fund is subject to spread and concentration requirements, including:

- up to 5 per cent of the fund's assets can be invested in transferable securities or money market instruments issued by a single body. The 5 per cent limit can be raised to 10 per cent for 40 per cent of the portfolio;
- up to 20 per cent of the fund's assets can be invested in deposits with a single body;
- exposure to a derivatives or broker counterparty cannot exceed 5 per cent except where the counterparty is an approved bank where the exposure can be up to 10 per cent;
- no more than 20 per cent of the fund's assets can be invested in transferable securities and money market instruments issued by the same group;
- no more than 20 per cent of the fund's assets can be invested in units of any one collective investment scheme; and
- no more than 35 per cent of the fund's assets can be invested in government or public securities, subject to conditions, including:
  - only 30 per cent can be invested in a single issue;
  - the securities must come from six different issuers; and
  - the names of the issuers must be set out in the prospectus.

A UCITS fund can borrow up to 10 per cent of the fund's assets on a temporary basis. In practice, a UCITS cannot borrow for investment purposes, but can borrow on a temporary basis to cover fund redemptions.

A NURS has broader investment powers. It can invest in those investments permitted for UCITS schemes. It can also hold:

- 100 per cent of its assets in real property;
- 10 per cent of its assets in transferable securities issued by a single issuer;
- 10 per cent in gold;
- 20 per cent in unlisted securities; or
- 35 per cent in other collective investment schemes (including other non-UK schemes whose investment and borrowing powers are equivalent to, or more restricted than, those of NURSs, and alternative investment funds, provided that the combined value of unapproved securities and unregulated schemes does not exceed 20 per cent of the NURS's value).

In addition, a NURS that is authorised as a 'fund of alternative investment funds' can invest in a range of AIFs. A NURS can borrow up to 10 per cent on a permanent basis, and is subject to a number of concentration restrictions that are similar to but less stringent than a UCITS fund.

Closed-ended retail funds

Listed closed-ended retail funds are not subject to restrictions on investment or borrowing, although they will need to have a published investment policy covering asset allocation, risk diversification and gearing as a condition to listing. In practice, a fund will be required to draw up its own set of investment restrictions and will need shareholder approval to amend them.

A UK closed-ended retail fund that is listed on the LSE's Main Market must satisfy certain conditions, including an investment condition in order to qualify for special tax treatment, namely that the business of the company consists of investing its funds in shares, land or other assets with the aim of spreading investment risk and giving members of the company the benefit of the results of the management of its funds.

18 What is the tax treatment of retail funds? Are exemptions available?

Open-ended retail funds

The UK tax regime for AUTs and OEICs has been criticised for its complexity. Subject to special rules that apply for tax-elected funds, AUTs and OEICs are generally exempt from UK tax on gains on the disposal of investments but subject to corporation tax at 20 per cent (19 per cent from April 2017) on income, although dividend income is exempt, subject to conditions, and there are deductions for amounts distributed by funds that are primarily invested in debt securities (bond funds).

UK-resident individual investors will be subject to tax on dividend distributions (distributions are deemed to be made if the fund accumulates its income) subject to a £2,000 annual dividend allowance. Such distributions are generally tax exempt for UK corporation taxpayers.

UK-resident individual investors in bond funds will receive their distributions (or deemed distributions), which are generally treated as interest, after withholding at 20 per cent, which is creditable against income tax (the withholding will cease to apply with effect from April 2017). UK corporation taxpayers will not be subject to withholding tax but will be subject to corporation tax broadly in accordance with their accounting treatment.

UK-resident investors are subject to capital gains tax on gains realised on disposal of an interest in an AUT or an OEIC.

UK non-resident investors are generally not directly subject to UK tax (including by withholding).

Funds that are structured as ACSs are not taxable entities for UK purposes. For tax purposes, investors will be treated broadly as if they had invested directly in the underlying assets in the case of an ACS structured as a partnership, whereas an ACS structured as a co-ownership scheme is transparent for income tax purposes but opaque for capital gains

Closed-ended retail funds

UK investment trusts are exempt from tax on chargeable gains but are otherwise generally subject to UK corporation tax. Investors are taxed in the same way as shareholders in other UK companies. However, the rules have recently been modernised, including the introduction of an election for investment trusts to be treated in broadly the same way as AUTs and OEICs, which are bond funds as described above to the extent that they receive interest income.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

Open-ended retail funds must appoint an independent entity to hold their assets. This will be a trustee (for an authorised unit trust) or a depositary (for an open-ended investment company). A trustee must be independent from the manager and established in the UK (or, if established in another EEA state, have a place of business in the UK). A depositary must likewise be established in the UK (or, if established in another EEA state, have a place of business in the UK). Trustees and depositaries must be authorised by the FCA to perform this activity. They will be subject to the FCA's client asset (CASS) rules on custody of assets, which ensure that custodians observe professional standards of care and diligence, including when they appoint sub-custodians. Depositaries to UCITS funds (or trustees, in the case of an authorised unit trust) are subject to strict liability for loss of assets held in custody, similar to depositaries for AIFs (see question 30).

As most closed-ended retail funds are classified as AIFs, they must, under the AIFMD, appoint a depositary, to the extent the fund is established and managed in the EEA (see question 20). Closed-ended retail funds that are not required under the AIFMD to appoint a single depositary (where the fund is established outside the EEA) (and funds managed by sub-threshold AIFMs – see question 25) will, in practice, appoint a custodian where they hold assets (such as listed securities), which require a custodian for settlement purposes.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

The registration and governance requirements for UCITS funds established as AUTs, OEICs and ACSs are largely the same. Funds established in the UK must be authorised by the FCA. Application is made to the FCA with:

- a draft prospectus;
- a draft instrument of incorporation (in the case of an OEIC);
- a trust deed (in the case of an AUT) or limited partnership agreement or co-ownership deed (in the case of an ACS);
- an application form; and
- a solicitors' certificate to confirm that the constitutional documents comply with the regulations.

The FCA has two months to consider a UCITS application.

UCITS funds that are established elsewhere in the EU can be recognised for sale by the FCA under the 'passporting' process. Under this process, the manager provides a notification letter and the fund documentation to its home state regulator, which then approves the application and provides the documents to the FCA with an attestation of compliance.

Certain schemes that are considered to be comparable to UK authorised schemes can also be recognised for sale by the FCA. In practice, it is rare for such funds to be recognised for sale from any jurisdiction other than the Isle of Man, Guernsey and Jersey.

As previously noted, most types of closed-ended retail funds are outside FCA regulation – although their manager will be subject to FCA regulation (see question 16). A listed closed-ended retail fund is subject to the governance requirements of the rules of the exchange on which it is listed. In particular, the UK Listing Rules require that a majority of the fund's board are independent from the investment manager.

21 What are the periodic reporting requirements for retail funds?

For open-ended retail funds, reports and accounts must be provided to investors biannually. The following must be prepared for each annual accounting period and half-yearly:

- short reports, which are sent to all holders and include various prescribed information about the fund's investment activity and performance; and
- long reports, which are available to investors on request. Long reports must include certain prescribed information including the accounts and a report from the auditor and both the manager and trustee or depositary.

Closed-ended retail funds that are listed on the LSE's Main Market, Specialist Fund Market or AIM must report twice a year to shareholders, with a long report every 12 months. A closed-ended retail fund that is listed on the LSE's Main Market also needs to obtain approval from the UK tax authority (HMRC) to obtain its special tax treatment (see question 18) and make ongoing notifications to HMRC in relation to this approval.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

Open-ended retail funds must offer issue and redemption of shares or units on each dealing day. There must be at least two dealing days in each month (on at least a fortnightly basis). Retail funds can limit the number of shares or units in issue or the number of shares or units issued for a particular month. It is also possible for retail funds that have a daily dealing day to defer redemptions of shares or units to the next valuation point, if redemption requests for a particular valuation point exceed 10 per cent, subject to certain conditions. Dealing in open-ended retail funds can be suspended in exceptional circumstances and where justified in the interests of unitholders, and must be notified to the FCA. Temporary limits on redemptions (gates) should also be notified to the FCA. A NURS can impose limited redemption arrangements (to limit redemptions up to every six months) where the NURS is a property fund, offers some form of capital protection or is a fund of alternative investment funds.

Listed closed-ended retail funds are traded on the exchange on which they are listed. It will usually be a condition to listing a fund and admitting the fund's interests to a settlement system that there are no restrictions on transfer, although limited restrictions (such as restrictions on transfer to US holders) can be accommodated. The fund can operate repurchases of its shares, which is a method used to reduce any discount of the trading price below underlying net asset value.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

Non-retail funds (other than funds in the form of limited partnerships) are usually established outside the UK, because there are no UK non-retail tax exempt fund vehicles (other than unauthorised unit trusts that are only offered to UK tax exempt investors).

In practice, closed-ended funds (such as private equity funds) are typically established as English or offshore limited partnerships and open-ended funds (such as hedge funds) are typically established as offshore companies or trusts. Scottish limited partnerships (which, unlike English limited partnerships, have separate legal personality) are occasionally used as fund vehicles and often used as vehicles for private equity 'carried interest' schemes. Popular offshore jurisdictions for limited partnerships are the Cayman Islands, Guernsey and Jersey. Popular offshore jurisdictions for companies are the Cayman Islands and Ireland.

Listed closed-ended vehicles that are only offered to institutional investors are typically formed in Guernsey or Jersey.

24 What are the key laws and other sets of rules that govern non-retail funds?

Non-retail funds are subject to the governing law of their jurisdiction. Most offshore jurisdictions impose relatively lighter requirements on the establishment and operation of these vehicles, subject to limiting their distribution to professional investors.

UK-based managers of non-retail funds are subject to UK law implementing the AIFMD, because they perform the regulated activity of 'managing an AIF'. A number of requirements under the AIFMD apply indirectly to the fund (such as the requirement to appoint a depositary). In addition, certain types of non-retail funds may qualify as European venture capital funds (EuVECA) and European social entrepreneurship funds (EuSEF) under the EU regulations governing those entities. The designation of a fund as a EuVECA and EuSEF fund is available to UK AIFMs. In particular, sub-threshold AIFMs (see question 25) may obtain such a designation to allow marketing of the fund to professional investors in the EU on the basis of an EU 'passport'.

It is possible to establish an AUT, OEIC or ACS as a qualified investor scheme (QIS), which is a type of scheme authorised by the FCA that can be promoted to certain types of qualified investor. In practice, few QISs have been established. As a QIS will constitute an AIF under AIFMD, it is uncertain whether a QIS will be an attractive vehicle in the future.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

This depends on the status of the manager. The UK manager of a non-retail fund will be required to be authorised as an AIFM. 'Sub-threshold' AIFMs are managers whose aggregate AIF assets under management do not exceed €100 million or, where the funds are unleveraged and closed-ended, €500 million. Sub-threshold AIFMs are not subject to the AIFMD (other than a limited registration regime), but are subject to FCA rules similar to those rules that apply to discretionary investment managers that are not fund managers.

The AIFMD distinguishes between the management and marketing of:

- EU funds managed by an EU AIFM (which can only be established and marketed following FCA approval) and which are marketed on the basis of the AIFMD 'passport');
- non-EU funds managed by an EU AIFM (which can only be marketed following notification to the FCA); and
- EU and non-EU funds managed by a non-EU AIFM (which can only be marketed following notification to the FCA).

26 Who can market non-retail funds? To whom can they be marketed?

Following implementation of the AIFMD, non-retail funds can only be marketed in the UK to 'professional investors' (investors that are professional clients within the meaning of the MiFID, including individuals that satisfy the conditions to be treated as professional investors). In addition, the UK allows non-retail funds to be marketed to a number of other types of institutional and private investors that may not qualify as professional investors. In particular, UK-authorised firms can market non-retail funds to various classes of individual investor (such as certified high net worth investors), subject to conditions (see question 10).

As noted above, a person that markets a non-retail fund must be an FCA-authorised person to the extent (i) that person performs a regulated activity (such as investment advice) in the course of marketing the fund and (ii) that person carries on the activity in the UK (subject to the overseas person exemption referred to in question 4). UK intermediaries such as placement agents (which advise managers on marketing strategy and locate prospective investors) are normally FCA-authorised persons.

Update and trends

Following the UK's referendum on membership of the EU in June 2016, the UK will take steps to leave the EU. There is no single impact of exit from the EU on the UK financial services industry, but a patchwork of consequences, issues and considerations. There is no indication of those parts of EU-derived UK law that might be repealed – there is certainly a political argument that anything less than the existing regulatory framework would not be acceptable. The key impact of exit is that firms providing financial services in the UK would lose passporting rights, which allow UK firms to: conduct 'cross-border' business in the EU (including providing services to customers in the EU); establish branches in the EU; sell UCITS and AIFs in the EU; and access EU-regulated markets, central counterparties and clearing systems. There are a number of options on how, post-exit, the UK might structure its relations with the EU and it is likely that a bespoke arrangement between the UK and the EU will seek to preserve some or all passporting rights.

Following the referendum decision, the FCA stated that regulation derived from EU legislation will remain applicable until any changes are made, which is a matter for the government, and that firms should continue to abide by their obligations under UK law, including those derived from EU law and continue with implementation plans for legislation that is still to come into effect.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

There are no investor protection rules in the UK that restrict ownership in non-retail funds (including listed funds) to certain classes of investor. There are rules that limit the marketing or promotion of non-retail funds to certain classes of investor (see question 26), and certain types of investor (such as pension funds or charities) are subject to rules governing the types of investment they can make from a prudential or risk perspective. In addition, FCA-authorised persons must ensure that any investment recommended to a client is suitable. There are also rules that apply to firms that sell complex financial products (including non-retail funds) on an execution-only basis to retail clients (ie, without giving advice) to ensure that any product sold meets an 'appropriateness' test.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

Following the implementation of the AIFMD, managers of non-retail funds are subject to special requirements. The FCA's rules (in particular, the FCA's FUND rules) contain rules on (among other things) capital, risk and liquidity management, valuation, delegation, the appointment of a depositary for the fund, regulatory reporting, investor disclosure and anti-'asset stripping' for managers of private equity funds. These rules represent international best standards of practice for managers, in particular for hedge fund managers. The manager of a non-retail fund must also have regard to the rules of the domicile in which the fund is established. For example, Ireland imposes rules on governance and reporting required for funds established in Ireland.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

Funds that are structured as partnerships are typically exempt from UK direct taxes. Broadly, investors are taxed as if they had invested directly into the underlying assets.

Funds that are structured as offshore companies are typically not subject to UK direct taxes, provided that, where their activities would otherwise constitute trading for UK tax purposes, the manager qualifies for the UK's investment management exemption.

Under the offshore funds rules, UK-resident investors are generally subject to income tax on gains realised on the disposal of holdings of offshore companies, unless, very broadly, the fund either distributes or reports (and is certified by HMRC as a reporting fund) its income annually to UK investors. In this case, UK-resident investors pay capital gains tax on gains but will be subject to income tax (where applicable) on any income on a current basis. Special rules can treat distributions from bond funds (defined in question 18) broadly as if they were interest for tax purposes.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The AIFMD requires an EU manager of an EU fund to appoint a depositary to hold the fund's assets and perform other oversight duties, such as monitoring the fund's cash accounts and net asset value calculation. The AIFMD introduced new rules to govern the circumstances in which a depositary is liable for loss of the fund's assets. In particular, a depositary is liable for loss by a sub-custodian of the fund's assets, unless if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary. Where the depositary is in the UK, the depositary will be subject to the FCA's CASS rules on custody of assets, which ensure that custodians observe professional standards of care and diligence, including where they appoint sub-custodians.

An EU manager of a non-EU fund that is not marketed in the EU need not appoint a depositary. An EU manager of a non-EU fund that is marketed in the EU must appoint one or more entities to perform the depositary functions (known as 'depositary-lite'), without application of the new depositary liability regime.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

The UK manager of a non-retail fund must be authorised as an AIFM. An AIFM must notify the FCA of an intention to market an EU AIF in the UK and provide details of the AIF and a copy of the fund's prospectus to the FCA. The FCA has 20 working days to grant permission to the AIFM to market the AIF.

An AIFM must notify the FCA prior to marketing a non-EU AIF. It must provide details of the AIF. It may market the non-EU AIF following the notification (although in practice the manager will wait for acknowledgement of the notification from the FCA, which takes a day or so).

A non-retail fund is not subject to rules on record-keeping and officers, although its manager is subject to such rules (see question 28). The manager of an AIF must disclose information regarding the AIF to investors on a periodic basis (see question 32).

32 What are the periodic reporting requirements for non-retail funds?

Following implementation of the AIFMD, the manager of an AIF must:

- prepare an annual report in respect of each EU AIF it manages and each AIF it markets in the EU. The annual report contains the fund's financial statements and a disclosure of various aggregate amounts of remuneration paid to various groups of staff at the manager;
- disclose information regarding the AIF (such as changes in liquidity or leverage) to investors on a periodic basis; and
- regularly report to the FCA on, among other things, its principal exposures, risk profile and categories of assets (Annex IV reporting).

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

A managed account is usually structured by arranging for the client to appoint a custodian to hold the client's assets in an account and give an investment manager discretionary investment management authority to acquire and dispose of assets in the account. Managed accounts are increasingly structured as funds of one (see question 7).

34 What are the key legal issues to be determined when structuring a separately managed account?

The terms for a separately managed account may be negotiated in an investment management agreement between the investor and manager. Depending on the type of investor, this is typically a considerably negotiated agreement. An investor will particularly seek to negotiate terms relating to the standard of care that it requires of the manager; any waiver or limitation of liability of the manager; any indemnification required to be granted by the client in favour of the manager; and the term and termination.

As a manager will be subject to MiFID for a managed account mandate, MiFID rules relating to, inter alia, best execution, aggregation and allocation of client orders, outsourcing and conflicts of interest will apply.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

Management of a managed account will fall under the regulated activity of 'managing investments' and will require authorisation from the FCA.

A managed account will not generally comprise either a collective investment scheme or an AIF. A fund of one will not be treated as an AIF either, subject to a condition that its constitution restricts the admission of more than one investor. Marketing of a managed account is restricted under the UK financial promotion regime. Marketing of a managed account by a non-FCA authorised person is restricted to certain classes of investors (with some exemptions for individual investors). An FCA-authorised person can market a managed account to any investor, subject to complying with rules relating to the form and content of the communications.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

The EU's next iteration of MiFID (MiFID II) will take effect in January 2018. MiFID II contains significant new rules on the distribution of funds that will apply to any EU entity that either manufactures or distributes funds. MiFID II also contains new requirements on (inter alia) transaction reporting, best execution, 'soft' commission, algorithmic and high-frequency trading and commodities trading that will apply to firms regulated by MiFID. The FCA is likely to apply some of the requirements under MiFID II (such as the requirements relating to best execution and soft commission) to AIFMs and UCITS managers.

Separately, the European Commission started the process to grant the AIFMD a marketing passport to allow non-EU AIFMs from specified third countries to market their funds in the EU, subject to full compliance with the AIFMD. The European Securities Markets Authority (ESMA) issued its final advice to the European Commission in July 2016 on the extension of the third-country passport, confirming that there were no significant obstacles to the grant of the passport to managers and funds established in Canada, Guernsey, Jersey, Japan and Switzerland, and giving qualified advice in relation to the United States, Australia, Hong Kong, Singapore, Cayman Islands, Bermuda and the Isle of Man (pointing to aspects of those regimes that should change as a condition to the grant of the passport). Since receiving this advice, the Commission has not made any further steps on the grant of the passport to third-country managers. The timing and availability of the third-country passport is uncertain. As a further step after grant of the third-country passport, the AIFMD envisages ESMA issuing advice to the European Commission on the functioning of the passport and termination of national private placement regimes. Any decision to terminate national private placement regimes is some years away and currently uncertain.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

See questions 12 to 22 regarding the stock-exchange listing of funds. Most funds that are listed will be classified as AIFs following the implementation of the AIFMD, although their listed status may allow the funds to be distributed to retail investors.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

It is not possible to redomicile an overseas fund into the UK. It is possible to put in place a scheme of arrangement whereby an overseas fund is liquidated and investors receive interests in a UK fund.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

Other than the marketing restrictions referred to in question 7, there are no special rules in this regard.

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Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

Fund managers

In the US, fund managers (investment advisers) are regulated principally by the Investment Advisers Act of 1940 (the Advisers Act). The US Securities and Exchange Commission (SEC) oversees the regulation of funds and their investment advisers. Under the Advisers Act, an investment adviser not qualifying for an exemption must register with the SEC and disclose a significant amount of information about themselves and their qualifications in order to register. This information regarding a registered investment adviser (RIA) must be made available to prospective clients.

Retail and private funds

If a fund is a 'retail' fund – a fund offered to investors by means of a registered public offering and sold to investors of all types or sophistications – then the fund is subject to the Investment Company Act of 1940 (the 1940 Act). The SEC oversees the regulation of retail funds under the 1940 Act, which requires retail funds to register with the SEC (thus becoming a registered investment company (RIC)). A discussion of RICs begins at question 12 (under Retail funds). In addition, RICs are required to register their publicly offered shares with the SEC under the Securities Act of 1933 (the Securities Act). The registration statement (which includes the prospectus) and any advertisements used in the public offering must conform to the requirements of the Securities Act.

Non-retail funds (private funds) can be exempt from SEC registration under the provisions of the 1940 Act. The securities of private funds, when sold to investors, typically qualify for an exemption from SEC registration under provisions of the Securities Act.

The Securities Act focuses principally on disclosure by issuers, while the Advisers Act and the 1940 Act focus mainly on substantive regulation of the activities of RIAs and RICs, respectively.

Under the Commodity Exchange Act, the operator of a 'commodity pool' (ie, a fund that invests in commodities, including many types of derivatives) must register as a commodity pool operator (absent an exemption from registration), and its adviser may need to register as a commodity trading adviser.

Marketing

The marketing of RICs and private funds falls within the jurisdiction of the SEC and, at times, is also subject to oversight by the Financial Industry Regulatory Authority, a self-regulatory organisation. The marketing of private funds is discussed in question 7, and the marketing of RICs is discussed in question 15.

2 Is fund administration regulated in your jurisdiction?

In the US, most fund administration activities generally are not subject to regulation.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

Private funds are not subject to authorisation or licensing. The key requirements applicable to RIAs exist under the Advisers Act and state securities laws, which deem an RIA to be a fiduciary with respect to its clients. As a fiduciary, an RIA is held to strict standards of fairness to clients in all matters. Under the Advisers Act, an RIA's activities are subject to detailed regulatory requirements. In particular, the Advisers Act and related SEC rules regulate, among other things, the terms of an advisory agreement, performance fees, client-solicitation arrangements, political contributions, trading practices, advertising, record keeping, proxy voting, personal securities reporting and custody of client assets. The Advisers Act also imposes broad anti-fraud prohibitions, which extend to dealings with clients, prospective clients, and investors and prospective investors in private funds that are advised by the adviser.

An RIA must have written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act, which must be administered by a chief compliance officer. In addition, the SEC will periodically examine RIAs for compliance with the Advisers Act, and has the power to bring enforcement actions for non-compliance with the Advisers Act and to impose fines, suspensions and other penalties for violations.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

Generally, an investment adviser, whether located within the US or abroad, must be an RIA to perform investment management activities for US clients. However, investment advisers solely to venture capital funds are exempt from SEC registration. Family offices, which provide investment advice to 'family clients', are exempt from SEC registration. Finally, investment advisers solely to private funds that have less than US$150 million in assets in the aggregate are exempt from SEC registration. In addition, the following exemptions are available with respect to overseas investment advisers.

Overseas affiliates

There is an exemption available to an overseas affiliate (a 'participating affiliate') of an RIA. The exemption has multiple requirements, including:

- any advice given to US clients by the participating affiliate must be given through the RIA or through employees of the participating affiliate participating in the RIA's US advisory business;
- the RIA must subject to its supervision each employee of the participating affiliate whose duties relate to the determinations and recommendations that the RIA makes to its US clients; and
- the participating affiliate must submit to the jurisdiction of US courts with respect to any action under US securities laws that involves the services provided by the participating affiliate's employees to the RIA's US clients.

Overseas private fund investment adviser

There is an exemption available to an overseas investment adviser with its principal office and place of business outside of the US, provided the investment adviser has no US clients, except for one or more private funds, and all assets under management by the investment adviser at a place of business in the US are solely attributable to private fund assets, the total value of which is less than US$150 million. There is no limit on the amount of assets that can be advised through the private fund if the investment adviser does not have a place of business in the US. To rely on the exemption, the investment adviser must periodically file certain information with the SEC, which is then publicly available.

Overseas private investment adviser

Finally, there is an exemption available to an overseas investment adviser with fewer than 15 US clients and US investors in private funds advised by the investment adviser. The exemption is available only if the adviser has no place of business in the US and has aggregate assets under management attributable to US clients and US investors in private funds advised by the adviser of less than US$25 million.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

Generally, there is no pre-authorisation requirement with respect to the acquisition of a non-controlling stake in an RIA. Control is generally defined to be the acquisition of 25 per cent or more of the RIA's (or parent company's) voting stock. The acquisition of control of an RIA may be deemed to constitute an assignment of the RIA's advisory contracts with its clients, and an assignment of an advisory contract may not be made without the consent of the client (where the client is a RIC, consent means voted approval by the RIC's shareholders). Therefore, in practical terms, a transaction involving the acquisition of control of an RIA is usually conditioned on the consent of the RIA's clients.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

In general, for private funds, in which all of the investors are high net worth investors (both natural persons and institutional investors), there are no regulatory restrictions on the structure of the RIA's compensation (other than pre-disclosure to the investors). For RICs, RIAs are generally prohibited from charging the RIC a performance fee, subject to the following exception: an RIA may charge a RIC a fee that provides for compensation based on the investment company's net assets, averaged over a specified period, and increasing and decreasing proportionately with the investment performance of the company over the specified period in relation to the investment record of a relevant securities index.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

Marketing activities may subject the person or entities performing the marketing activities to registration with the SEC. Specifically, any person engaged in the business of marketing funds to prospective investors may be required to register with the SEC as a 'broker-dealer' under the Securities Exchange Act of 1934 (the Exchange Act) and to register with the Financial Industry Regulatory Authority (FINRA), the industry self-regulatory organisation. There may be an exemption from these registration requirements that applies to employees of the sponsor of a private fund who do not receive transaction-based compensation, are not employed by a registered broker-dealer and perform substantial duties for the private fund (other than soliciting investors).

Sponsors of funds frequently use registered broker-dealer firms as 'placement agents' to market their funds. A placement agent introduces the sponsor to potential investors.

8 What marketing activities require authorisation?

As noted in question 7, fund marketing activities may subject the person or entities performing the marketing activities to registration with the SEC as a broker-dealer.

In general, performance of any one of the following activities may trigger an obligation to register with the SEC:

- participating in important parts of a securities transaction, including solicitation, negotiation or execution of the transaction;
- earning compensation for participation in a securities transaction that depends upon, or is related to, the outcome or size of the transaction or deal;
- engaging in the business of effecting or facilitating securities transactions; or
- handling the securities or funds of others in connection with securities transactions.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

The territorial scope of US regulation of fund marketing activities is broad. Generally speaking, activities that occur in the US, even if initiated outside the US, will be regulated.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

There is no requirement for a local entity to be involved in the fund marketing process.

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

As noted in question 7, fund marketing activities may subject the person or entities performing the marketing activities to register with the SEC as a 'broker-dealer' and with FINRA. Broker-dealers are the principal distribution channels for shares of RICs (other than ETFs).

With respect to sales of shares issued by a RIC, FINRA Rule 2830 imposes a cap on a broker-dealer's one-time sales commission ('sales charge') that varies, based on whether the broker-dealer also receives an annual asset-based service payment ('service payment') (which may not exceed 0.25 per cent) or an annual asset-based sales charge ('trail payment') (which may not exceed 0.75 per cent, or both), as follows:

- a sales charge of no more than 8.5 per cent of the shares' offering price, provided the broker-dealer is not paid a service payment or trail payment;
- a sales charge of no more than 7.25 per cent of the shares' offering price, if the broker-dealer is paid a service payment but is not paid a trail payment; or
- a sales charge of no more than 6.25 per cent of the shares' offering price, if the broker-dealer is paid a service payment and a trail payment.

These are maximum figures. Sales charges, service fees and trail payments vary significantly, based on a variety of factors.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

The 1940 Act requires that retail funds (RICs) must adopt a corporate form of governance with a board of directors or trustees (the directors). The 1940 Act does not require an investment company (other than a unit investment trust, which is not discussed here) to be organised in any particular corporate form. Thus, corporations, business trusts and limited partnerships would all be permitted legal vehicles.

13 What are the key laws and other sets of rules that govern retail funds?

The key law is the 1940 Act and rules promulgated under the 1940 Act by the SEC. The SEC has also issued a substantial number of guidance and interpretive publications with respect to the 1940 Act and rules thereunder. In addition, the offer and sale of shares of a RIC are governed by the Securities Act. Finally, the provisions of the Advisers Act and rules promulgated under the Advisers Act by the SEC are also relevant to RICs' RIAs.

Closed-ended RICs, if they are listed and traded on a stock exchange, also are subject to the listing and trading rules of the relevant exchange. The same is true with respect to exchange-traded funds (ETFs), described immediately below.

A significant and growing segment of the US retail RIC market belongs to the ETF sector. Most ETFs are organised as open-ended funds and, as their name suggests, trade on a stock exchange. Most ETFs are passively managed to seek to track the performance of a designated index. ETFs sell shares directly only to 'authorised participants' (APs) in large blocks (eg, 50,000 shares) known as 'creation units'. Each AP is required to enter into an agreement with the ETF, which governs the AP's activities with respect to the ETF and its creation units. Through the arbitrage activities of APs, the ETF share's market price generally tracks the ETF share's net asset value.

Investors (ie, not APs) may buy ETF shares only in secondary market transactions on an exchange. Except where otherwise indicated, any response herein concerning open-ended RICs includes ETFs.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

RICs must be registered with the SEC under the 1940 Act. To offer their shares to the public, RICs must register their shares with the SEC under the Securities Act.

15 Who can market retail funds? To whom can they be marketed?

Broker-dealers are the principal distribution channels for shares of RICs (other than ETFs). Banks and insurance companies also are permitted to distribute shares of RICs (other than ETFs).

Shares of an open-ended RIC can be offered and sold to any person (except for ETF shares, which are offered and sold only to APs, but are then subsequently available for purchase on a stock exchange).

Closed-ended RICs, which have their shares listed on a stock exchange, are generally offered to investors through broker-dealers that function as underwriters of the shares offered to investors in a public offering.

16 Are there any special requirements that apply to managers or operators of retail funds?

The principal special requirement is that an investment adviser to a RIC must be an RIA. Therefore, in addition to any provisions of the 1940 Act that affect the RIA to a RIC, the RIA is subject to the requirements of the Advisers Act and rules promulgated under the Advisers Act by the SEC.

17 What are the investment and borrowing restrictions on retail funds?

Investment limitations

The 1940 Act requires a RIC to disclose its policies with respect to certain investments. These policies may be either fundamental or non-fundamental. In general, fundamental policies can be changed only by vote of a majority of the RIC's shareholders. A RIC's registration statement must disclose its proposed fundamental policies with respect to each of the following:

- diversification (whether it will be diversified with respect to the number of issuers in which the RIC invests);
- borrowing money and issuing any form of debt;
- underwriting the securities of other issuers;
- concentrating its investments in a particular industry;
- investing in real estate and commodities;
- lending; and
- any other policy that the RIC deems fundamental or that cannot be changed without a shareholder vote.

The SEC requires that no more than 15 per cent of an open-ended RIC's assets (10 per cent in the case of a money market RIC) may be invested in illiquid securities (this restriction does not apply to a closed-ended RIC). The 1940 Act and rules thereunder also regulate a RIC's investments in issuers that are in a securities-related business (eg, broker-dealers and RIAs), issuers that are insurance companies and issuers that are RICs. Finally, the 'name-test' rule under the 1940 Act applies to a RIC with a name that suggests a focus on a particular type of investment (such as an industry, country or region). Under the name-test rule, a RIC is required to invest at least 80 per cent of its assets in the type of investment that is suggested by its name.

In October 2016, the SEC adopted Rule 22e-4 under the 1940 Act. Rule 22e-4 retains the 15 per cent limit described above and, in addition, requires RICs (including certain ETFs but not money market RICs) to establish written liquidity risk management programmes. 'Liquidity risk' is defined as 'the risk that a fund could not meet requests to redeem shares issued by the fund without significant dilution of remaining investors' interests in the fund'. A RIC's liquidity risk management programme is required to include the classification of the liquidity of each of the RIC's assets; the assessment and periodic review of the RIC's liquidity risk; and management of the RIC's liquidity risk, including maintaining a minimum percentage of the RIC's net assets in holdings that could be converted to cash within three business days.

For most families of RICs (with combined assets of at least US$1 billion), the compliance date for Rule 22e-4 is 1 December 2018. RICs and their RIAs will be required to devote significant resources to develop liquidity risk management programmes that satisfy the applicable requirements.

Borrowing

Closed-ended RICs are permitted to borrow from banks and private sources and are permitted to issue debt, subject to a 300 per cent asset coverage requirement (ie, the ratio of assets to debt, including the amount borrowed, must be at least 300 per cent), which applies at all times that the borrowing is outstanding. Closed-ended RICs also may issue preferred shares but, in doing so, become subject to a 200 per cent asset coverage requirement.

An open-ended RIC, because its shares are redeemable securities, has less freedom to employ leverage. Specifically, an open-ended RIC may borrow only from banks, and the RIC must retain 300 per cent asset coverage with respect to all such borrowings. Unlike closed-ended RICs, open-ended RICs may not issue preferred shares. However, certain limited exemptions from the rules on borrowing exist.

18 What is the tax treatment of retail funds? Are exemptions available?

The Internal Revenue Code (IRC) governs the tax treatment of RICs. A RIC that satisfies the IRC requirements to qualify as a 'regulated investment company' is a 'pass-through' entity for US federal income tax purposes. This means that the RIC is not subject to federal corporate income tax. Instead, the RIC's income and capital gains are passed through to the RIC's investors.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The assets of a RIC must be maintained by a qualified custodian, usually a bank. As a custodian, the bank performs only limited duties as agent of the RIC and has no discretion with respect to the assets of a RIC.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

The principal governance requirement applicable to RICs is that, under the 1940 Act and rules thereunder, a majority of a RIC's directors generally must be 'independent' from the RIC (other than serving as a director) and the RIC's RIA, sponsor and principal underwriter. The 1940 Act and its rules mandate that directors, including a majority of the independent directors, have the following specific duties:

- to review and approve investment advisory agreements at least annually;
- to review and approve underwriting agreements;
- to review and approve distribution plans and related agreements; and
- to select the RIC's independent auditors.

More generally, under the 1940 Act, independent directors are critical in policing the potential conflicts of interest between a RIC and its RIA. The Supreme Court of the United States has referred to the role of the independent directors under the 1940 Act as that of a 'watchdog' protecting RIC investors.

Independent directors are rarely involved in the day-to-day operation of a RIC. Rules promulgated by the SEC mandate that RICs adopt and implement written policies and procedures reasonably designed to prevent violation of the federal securities laws (including the 1940 Act) by the RIC and its principal service providers, including the RIC's RIA. The RIC's policies and procedures must be approved by the RIC's board, including a majority of independent directors. The SEC rules also require the board to designate a chief compliance officer (CCO) responsible for administering the policies and procedures. The CCO is required to review annually with the RIC's board the adequacy of the policies and procedures, including any material violation of those policies and procedures.

21 What are the periodic reporting requirements for retail funds?

Semi-annual and annual reports

Under the 1940 Act, a RIC must transmit semi-annually a report to each shareholder of record no later than 60 days after the close of the relevant period. The annual report, covering the RIC's entire fiscal year, must be audited by the RIC's independent auditors.

Form N-CSR

No later than 60 days after the close of each semi-annual and annual period, a RIC must file with the SEC (using Form N-CSR) its report to shareholders for that period, various certifications regarding the controls and procedures in place to assure that the reports to shareholders are accurate, and other information with respect to the RIC's code of ethics, audit committee, internal controls and procedures, and a schedule of the RIC's portfolio holdings.

Portfolio holdings

For the first and third quarter of its fiscal year, a RIC must file Form N-Q with the SEC, containing a complete list of its portfolio holdings. Form N-Q must be filed within 60 days after the end of the quarter covered. A complete listing of portfolio holdings for the second and fourth fiscal quarters must be contained in the RIC's Form N-CSR. Thus, a RIC's Form N-Q disclosure, combined with the RIC's Form N-CSR disclosure, disclose the RIC's portfolio holdings for each fiscal quarter no more than 60 days after the close of the quarter.

Form N-SAR

Form N-SAR, which must be filed with the SEC semi-annually, is used by the SEC to obtain data from RICs.

Proxy voting

A RIC must disclose how it voted portfolio securities using a prescribed form that must be filed each year by 31 August and cover the 12-month period ending 30 June.

Form N-1A

An open-ended RIC must update its registration statement annually using one form, Form N-1A, under the 1940 Act and the Securities Act.

Rule changes

In an October 2016 release, the SEC finalised new and amended rules and forms that significantly broaden the type and scope of information reported by RICs. For most families of RICs (with combined assets of at least US$1 billion), the compliance date for these changes is 1 June 2018. The following is a summary of the principal changes effected by the October 2016 release:

Form N-PORT

Form N-Q is rescinded and replaced by a new portfolio holdings reporting form, Form N-PORT, to be filed monthly by all RICs (except money market RICs) and unit investment trusts that operate as ETFs. A RIC's Form N-PORT must be filed with the SEC no later than 30 days after the end of each month. With some exceptions, the information in a RIC's quarter-end Form N-PORT will be made publicly available by the SEC 60 days after the end of the RIC's most recent fiscal quarter.

Form N-PORT requires RICs to report detailed information about their monthly portfolio holdings and risk metrics to the SEC using a prescribed XML data format. Detailed information (not currently required by Forms N-Q and N-CSR) is required with respect to each RIC investment (eg, type of investment, value, payoff profile, asset and issuer type, country of investment and issuer, fair value level and whether the investment is a restricted security or an illiquid asset).

Form N-PORT expands significantly the reportable information about a RIC's investment in derivatives, including the characteristics and terms and conditions of each derivative contract that are important for understanding the payoff profile of a RIC's investment in such contracts, as well as the exposures created or hedged in the RIC.

Form N-PORT also requires certain quantitative measurements of risk that measure a RIC's sensitivity to changing market conditions, such as changes in asset prices, interest rates or credit spreads.

Form N-CEN

Form N-SAR is rescinded and replaced by Form N-CEN, which requires RICs to report detailed census-type information on an annual basis, instead of semi-annually. Form N-CEN streamlines and updates information currently reported to the SEC on Form N-SAR to reflect current SEC staff information needs and developments in the industry, including detailed information about ETFs, closed-ended RICs and securities lending activities. Form N-CEN must be filed with the SEC using a structured XML data format within 75 days of the close of each fiscal year.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

A RIC may set minimum investment requirements (minimum investments of US$500 or more are not uncommon). Certain RIC classes of shares are intended for institutional investors and, therefore, may have higher minimum investment requirements (for these, minimum investments of US$1 million are not uncommon). As noted, ETFs sell and redeem their shares only with APs.

A RIC's board may adopt a policy whereunder the RIC will not sell its shares to persons whose ownership of the RIC's shares is likely to be disruptive to the RIC (eg, market-timers). Usually, such persons become known to the RIC owing to prior disruptive trading practices with the RIC or with other RICs managed by the same RIA.

In general, with respect to any shareholder, a RIC may delay delivery of redemption proceeds for up to seven days to avoid disruption of the RIC's operations. Moreover, a RIC may pay redemption proceeds in kind (ie, in specie).

The foregoing discussion applies only to open-ended RICs that are not ETFs. ETF shares are not redeemable by ordinary investors (only APs share that privilege) and are sold only to APs. A closed-ended RIC's shares are not redeemable, and the closed-ended RIC's sales of its shares are usually limited to a public offering through underwriters and certain dividend reinvestment programmes.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

Private funds are organised in a variety of structures and jurisdictions. A private fund's investment strategy, type of target investor and tax considerations are normally paramount in determining the structure and jurisdiction of the private fund.

For those private funds organised within the US, the most common structure is a limited partnership, with Delaware most frequently the state of organisation. A limited partnership has a general partner, which is often organised as a limited liability company or in some other form. The general partner is responsible for management of the private fund and the limited partners are passive investors. In most instances, one entity serves as the general partner and an RIA manages the private fund's portfolio pursuant to an investment management agreement.

Taking Delaware as an example, limited partnerships are formed under the Delaware Revised Uniform Limited Partnership Act by filing of a certificate in the Office of the Delaware Secretary of State. The certificate must be signed by the general partner and must provide the general partner's name and address. The limited partnership agreement is not publicly filed, and the names of the limited partners do not have to be stated in the certificate filed with the Secretary of State. A Delaware limited partnership must maintain a registered agent and a registered office in Delaware. There are service providers that will fulfil these roles.

24 What are the key laws and other sets of rules that govern non-retail funds?

The limited partnership agreement controls the structure and operation of the limited partnership, including management fees and performance allocations, payment of costs and expenses, and transfer and assignment of limited partnership interests. The limited partnership agreement normally sets forth each limited partner's capital contribution and explains the manner in which net profits and losses will be allocated to the partners' capital accounts and the manner in which distributions of net profits will be made. Normally, the agreement provides the general partner with broad authority to enter into transactions, contracts and arrangements on behalf of the limited partnership.

Private funds rely on exemptions under the Securities Act to avoid registering the interests to be sold to investors under the Securities Act with the SEC. Similarly, private funds rely on exemptions from the 1940 Act to avoid the registration and substantive provisions of the 1940 Act.

An RIA typically manages the private fund's portfolio pursuant to an investment management agreement. All of the provisions of the Advisers Act described above apply with respect to the RIA's relationship to the private fund, which is a client of the RIA. See questions 1 and 3.

Private funds are sold to investors by means of an offering document (frequently called a 'private-placement memorandum'). Anti-fraud provisions under the US securities laws and state laws would apply in the case of any material misstatements in, or material omissions from, the offering document.

Finally, the SEC recently adopted Form PF, which requires detailed information about private funds managed by an RIA. The form is filed periodically with the SEC on a confidential basis, and RIAs must include various information regarding each fund, such as the fund's use of leverage, derivative holdings and investors.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Private funds are not subject to authorisation or licensing. Instead, the most important legal requirements are those that are applicable to RIAs under the Advisers Act and the RIA's fiduciary obligations (under the Advisers Act and state laws). See questions 1 and 3.

26 Who can market non-retail funds? To whom can they be marketed?

As described in questions 7 and 8, marketing activities may subject the person or entities performing the marketing activities to registration with the SEC. Absent an exemption, any person engaged in the business of marketing private funds to prospective investors would be required to register with the SEC as a broker-dealer under the Exchange Act. See question 7 for a description of the exemption from these registration requirements that may be available to employees of the sponsor of a private fund.

A private fund or a broker-dealer acting on behalf of the private fund may engage in general public solicitation and general public advertising activities (if desired), provided certain conditions are met, including selling interests only to high net worth natural persons and institutional investors (sophisticated investors), who are assumed to be able to fend for themselves in making a decision to invest in a private fund.

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

Investment protection rules underlie the exemptions from the Securities Act and 1940 Act alluded to in the second paragraph of question 26. As a consequence, investors who are not sophisticated investors are effectively precluded from investing in private funds.

As noted in question 26, a private fund generally may engage in general public solicitation and general public advertising activities, provided interests in the private funds are sold only to sophisticated investors. More specifically, such sales may be made only to 'accredited investors'. Under the 1940 Act, private funds that limit sales only to accredited investors generally are limited to no more than 100 investors to avoid registration with the SEC. Other private funds limit sales only to accredited investors that are also 'qualified purchasers' (generally, institutions with US$25 million in investments and individuals or family companies with US$5 million in investments). The 1940 Act does not limit the number of investors in these funds.

28 Are there any special requirements that apply to managers or operators of non-retail funds?

Absent an exemption, the manager or operator of a private fund is required to be an RIA. The obligations and responsibilities of an RIA are set forth in questions 1 and 3. In addition, as described in question 24, periodic disclosures must be made to the SEC on Form PF.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

Private funds, which are usually organised as limited partnerships, are generally 'pass-through' entities for US federal income tax purposes. This means that a private fund is not subject to federal corporate income tax. Instead the private fund's income and capital gains are passed through to the private fund's investors.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

A private fund's RIA is generally required to maintain custody of the private fund's portfolio securities with a qualified custodian, often a bank. The RIA may be able to rely on an exemption from this custody requirement.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

The governance requirements of a limited partnership are set forth in the applicable limited partnership agreement. The agreement provides the general partner with broad authority to enter into transactions, contracts and arrangements on behalf of the limited partnership. In addition, under state law, the general partner is a fiduciary to each limited partner. In some cases, the limited partnership agreement may limit the general partner's fiduciary duties.

32 What are the periodic reporting requirements for non-retail funds?

As described in question 24, periodic disclosures must be made to the SEC on Form PF. The limited partnership agreement of a private fund typically sets forth the reports that limited partners are entitled to see or receive, including financial statements of the limited partnership and its annual tax reports. The limited partnership agreement also may provide for more frequent reporting on the private fund's performance.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Separately managed accounts are created by an investment management agreement between an investor and an RIA. The assets are held by a custodian, typically hired by the investor. Rather than owning interests in the account, the investor owns the account, which owns securities and other assets directly. Thus, no securities are deemed issued by the account. Instead of an offering document, the account is managed in accordance with the terms of the investment management agreement.

34 What are the key legal issues to be determined when structuring a separately managed account?

From the perspective of an investor, indemnification and standard of care are often among the most important terms. Other important terms include investment limitations, notice requirements and termination provisions.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

The management of separately managed accounts by an RIA is subject to the requirements of the Advisers Act and rules promulgated under the Advisers Act by the SEC. In addition, state law fiduciary obligations may apply. See questions 1 and 3.

In the case of a separately managed account, the RIA is not marketing any security – the investor does not own an interest in the account but, rather, the investor owns the account. Therefore, the marketing in question is the RIA's marketing of its services. Under the Advisers Act, an RIA's advertising or marketing of its services is regulated. Specifically, any advertisement by the RIA and addressed to more than one person (or any notice or other announcement in any publication or by radio or television) that offers, among other things, any 'investment advisory service with regard to securities' is regulated. There are specific limitations on the RIA's use of any testimonials from other clients and any references by the RIA to past investment recommendations. More generally, the RIA is prohibited from making any advertisement

Update and trends

Systemic and operational risks
In 2014, the SEC promulgated amendments to the rules governing money market RICs to address redemption or 'run' risks, which some deemed to present 'systemic' risks. Beginning in October 2016, money market RICs were required to comply with the 2014 rule amendments. In early 2017, the SEC announced that examining money market RICs for compliance with the amended rules is among the SEC's priorities.

In December 2014, the then-Chair of the SEC announced four initiatives to address prudentially risks arising within the asset management industry. These initiatives resulted in the expanded RIC reporting requirements described in question 21 and the liquidity management requirements described in question 17.

The initiatives also resulted in the proposed (but not final) rules described in question 36. The SEC's proposal regarding RICs' use of derivatives was intended to limit the aggregate amount of leverage a RIC can obtain through derivatives transactions. The SEC's proposal regarding business continuity and transition plans for RIAs was intended to minimise service disruptions to clients after a significant business disruption or upon an RIA's business being wound down. As noted in question 36, whether the SEC finalises these two proposals in one form or another is an open question.

High-frequency and disruptive trading
In March 2015, the SEC proposed rule amendments to enhance the supervision of large proprietary trading firms, including those engaged in high frequency trading, which would require that broker-dealers trading in off-exchange venues become members of FINRA and, therefore, subject to FINRA supervision. In September 2016, the then-Chair of the SEC announced that the SEC was working on a recommendation for an anti-disruptive trading rule (including against disruptions caused by failing or malfunctioning systems that drive algorithmic trading, and also by high-speed trading leading to sudden gaps between liquidity demand and supply, that can cause extreme price volatility).

Commodity position limits
The Commodity Futures Trading Commission (CFTC) and most US futures exchanges have set limits on the number of futures contracts and options thereon that a person may directly or indirectly own or control. Certain futures and options positions must be aggregated in determining compliance with position limits. The CFTC and certain futures exchanges recently amended their aggregation rules to modify existing exemptions from aggregation, create new exemptions, impose new restrictions on market participants and impose a filing requirement on those who rely on certain aggregation exemptions. The CFTC has also proposed to broaden the scope of products subject to position limits to include 25 core physical commodity futures contracts and their economically equivalent futures, options and swaps.

that contains a false or misleading statement of a material fact or that is otherwise misleading.

With these limitations in mind, an RIA is permitted to advertise its past performance, subject to various disclaimers and disclosure requirements.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

In December 2015, the SEC issued a long-anticipated release regarding the use of derivatives and certain related instruments by RICs. A proposed rule would supplant a significant volume of SEC guidance on derivatives use by RICs, and would introduce a range of specific, technical restrictions. In particular, each RIC that utilises derivatives transactions would have to comply with one of two alternative portfolio limitations designed to limit the aggregate amount of leverage the RIC may obtain through derivatives transactions, 'financial commitment transactions' (a newly defined term consisting of reverse repurchase agreements, short sale borrowings, firm or standby commitments, and similar agreements) and other senior securities transactions (such as permitted borrowings). In addition, the proposed rule would require each RIC to maintain a specified value of 'qualifying coverage assets' identified on its books and records to manage the risks associated with its derivatives transactions and financial commitment transactions. Finally, depending on the extent and complexity of its derivatives usage, a RIC may be required to adopt and implement a written derivatives risk management programme reasonably designed to assess and manage the risks associated with the RIC's derivatives transactions. The programme would include, among other things, an assessment of specified risks, the designation of an individual as derivatives risk manager and oversight by the RIC's board.

The comment period on the proposed rule closed on 28 March 2016. The SEC had not adopted a final version when the SEC Chair stepped down from her post in January 2017. Whether the SEC finalises the proposal in one form or another remains an open question.

In June 2016, the SEC proposed a new rule that would require every RIA to adopt and implement a written business continuity and transition plan reasonably designed to address operational risks related to a significant disruption in the RIA's business. The business continuity portion of the required plan would be required to consist of policies and procedures reasonably designed to minimise material service disruptions after a significant business disruption. The transition portion of the required plan would be required to consist of policies and procedures reasonably designed to minimise material service disruptions if the RIA's business is wound down or transitioned to others. The SEC had not adopted a final version of the business continuity and transition plan proposal when the SEC Chair stepped down in January 2017. Whether the SEC finalises the proposal in one form or another remains an open question.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

Private funds are not listed on US stock exchanges. Only open-ended RICs that are ETFs trade on a stock exchange.

Exchange-listed closed-ended RICs and ETFs are subject to the applicable listing requirements of the exchange on which they are listed. The exchange will impose a number of requirements. Some of the more typical requirements of the New York Stock Exchange (NYSE) are a requirement to have an audit committee, which must consist exclusively of independent directors; the audit committee must establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting matters by employees of the RIA and key service providers to the closed-ended RIC. Further, an NYSE-listed closed-ended RIC must hold a shareholder meeting each year and the NYSE requires the chief executive officer of a closed-ended RIC to certify annually that the CEO is unaware of any violation by the RIC of NYSE listing standards.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

Yes, although the process to do so would vary, depending upon the state selected to form or incorporate the vehicle.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

Foreign investors may invest in US private funds and RICs. Such investors may be subject to US tax and tax-filing obligations as a result of such investments. Very generally, certain items of capital gain and ('portfolio') interest income earned through a private fund are exempt from US taxation, as are distributions from a RIC of net capital gains (the excess of net long-term capital gain over net short-term capital loss) and, under recent Internal Revenue Code amendments, net short-term capital gains and 'interest-related' dividends. Foreign investors are generally subject to US tax on other RIC dividends as well as on dividends from US sources earned through a private fund. Additional complex rules apply in the case of investments in the US operating pass-through entities (typically partnerships).

US investors may invest in foreign private funds or the other country's RIC equivalent. Such investors may be subject to foreign tax withholding as a result of such investments. US taxable investors may be subject to adverse US tax consequences when investing in certain foreign private funds and RIC-equivalents that are not treated as pass-through entities for US tax purposes.

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Law Business Research

Fund Management
ISSN 2058-6744

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

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