

Fund Regulation in the UAE

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The New Fund Regulations have been long-awaited and have replaced both the Board of Directors Resolution No. 37 of 2012 (Concerning the Regulation of Mutual Funds) (“2012 Fund Regulations”) and the Board of Directors Resolution No. 13 of 2013 (on Amending the Regulation of Investment Funds) (the “Private Placement Exceptions” and together with the 2012 Fund Regulations, the “Former Regulations”). The New Fund Regulations were published in the UAE Federal Gazette dated 31 July 2016 and are currently in force. We note that SCA has also recently circulated certain draft regulations for review and comment which will also be of relevance to fund regulation in the UAE. Accordingly, we note that the New Fund Regulations will need to be read in conjunction with any applicable resolution, regulation, directive or circular issued by SCA from time to time, including those in relation to the arranging and promoting of financial products and securities.

Similar to the 2012 Fund Regulations, the New Fund Regulations include provisions on licensing, management, offer document requirements, subscription, and issuance and listing of fund units. However, the New Fund Regulations also feature some changes to the Former Regulations, including the introduction of provisions for specialized categories of funds, such as umbrella and feeder funds. While the majority of these changes will largely affect UAE domiciled funds, there are new provisions that will also affect foreign funds. This article covers some of the key aspects of the New Fund Regulations.

Foreign Funds

The New Fund Regulations greatly simplify the requirements for the promotion of foreign funds in the UAE. The seven articles (containing twenty-two clauses) under the 2012 Fund Regulation have been pared down to just one article (of five clauses), perhaps reflecting that most foreign funds are currently promoted on a cross-border basis or under the private placement exceptions. Both the 2012 Fund Regulations and the New Fund Regulations only relate to the promotion of a foreign fund in the UAE through a local distributor who has a duty to register the fund with the SCA and comply with certain requirements. The New Fund Regulations essentially pare the requirements down to requiring registration of a foreign fund and annual renewal of registration where a local distributor is used.

That said, promoters of foreign funds should note that the private placement exceptions under the New Fund Regulations have been narrowed in scope. Under the Former Regulations, the 2012 Fund Regulations did not apply in respect of the private promotion of foreign funds targeting:

- federal or local government financial portfolios;
- companies, institutions or entities trading on their own account whose main purpose, or one of their main purposes, is to invest in securities; and
- investment managers who have a discretionary investment mandate.

This position has changed as the exception to promotion of foreign funds is now limited only to federal or local government authorities. It is also important to note that where the Former Regulations are silent on reverse solicitation, the New Fund Regulations explicitly provide that the New Fund Regulations shall not apply to reverse solicitations. While the New Fund Regulations do not grant express permission for short marketing visits to the UAE in relation to such reverse solicitations, the current understanding is that such visits will be tolerated. However, care should still be taken over activities while physically in the UAE so as to avoid being deemed to be “conducting business” in the UAE, which would itself require licensing.

Legal Form

The New Fund Regulations have eliminated the ambiguity and uncertainty that has been associated with the legal form of a fund. Under the 2012 Fund Regulations, there are certain provisions which imply that the governance of the fund will be subject to similar rules as a corporate entity (i.e. meetings of unit holders, liquidation etc.). The New Fund Regulations go further and clarify that investment funds are to be treated as corporate persons and this also includes provisions setting out the terms of expiry of such corporate personality. This is further supported by UAE Federal Law No 2 of 2015 (governing commercial companies in the UAE) which, unlike its predecessor, specifically provides for the establishment of investment funds under the rules and regulations of SCA and recognises such funds as a separate legal entity.

The New Fund Regulations also contain express provisions in relation to the assets of investment funds. In particular, the New Fund Regulations provides that the assets of investment funds will guarantee the rights of the unit owners and that such assets cannot be mortgaged, lent, attached or disposed of for the fulfilment of any obligations to a third party. This coupled with the clarification on the legal form should provide some comfort for investors in such funds as it supports the notion that the assets of such investment funds are separate from the assets of its fund managers. Accordingly, the assets of an investment fund, and the associated rights of unit owners, should not be jeopardised by the insolvency of its fund manager.

Regulatory Oversight

The UAE financial regulatory landscape has undergone some changes since 2010 when the UAE Central Bank (“Central Bank”) and SCA entered into an arrangement to determine the responsibilities of each regulator relating to particular financial activities. The changing dynamics between the Central Bank and SCA were made apparent in the 2012 Fund Regulations which delineated the roles of each regulator and a handover of funds regulation in the UAE from the Central Bank to SCA. However, under the 2012 Fund Regulations the Central Bank continues to play a regulatory role in the oversight and inspection of local funds in relation to their financial position which has not been adopted in the New Fund Regulations. In this regard, the New Fund Regulations appears to reflect the culmination of the changing relationship between the Central Bank and SCA as full responsibility for the control and inspection of funds now rests with SCA.

Other Highlights

The New Fund Regulations introduce the concepts of feeder funds and umbrella funds. Under the New Fund Regulations, a feeder fund is a public investment fund or part of a group of funds for an umbrella fund which invests at least 85% of its assets in the units of a public master fund or foreign public fund and is excluded from investing in negotiable securities and certain other investments determined by SCA. An umbrella fund is also a public investment fund but one whose investment policy is represented in establishing affiliate sub-funds.

SCA has also released Chairman Resolution No. 10 R.M. of 2016 (Concerning the Fees of Mutual Fund Regulation) (“Fees Resolution”) which is also now in force. The Fees Resolution sets out the fees payable for both registration and licensing of investment funds and for the annual renewal of such registration and licensing.

Conclusion

The New Fund Regulations will certainly have an impact on both the establishment of local investment funds and the marketing and promotion of foreign funds in the UAE. Such institutions will need to re-evaluate their current practices in order to ensure compliance with the New Fund Regulations, noting that the penalties for non-compliance include suspension or cancellation of the relevant license, registration or approval.