

Regulatory exchange

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Conditions in terms of the Collective Investment Schemes Control Act, 2002 in which foreign collective investment schemes may solicit investments in the Republic

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The Collective Investment Schemes Control Act, 2002 (CISCA) includes new conditions in terms of which foreign collective investment schemes may solicit investments in the Republic.

Background

Board Notice 257 of 2013 (BN), as issued by the Financial Services Board (FSB) on 13 December 2013, sets out the revised conditions under section 65 (1) (c) of CISCA with which a foreign collective investment scheme must comply when it solicits investments in such a scheme from members of the public in the Republic.

Any person wishing to promote a foreign collective investment scheme for investment by members of the South African public must ensure that the scheme has been approved by the Registrar in accordance with the provisions of section 65 of the Act.

The BN comes into operation on 1 January 2014 and will be applicable to all applications for

approval of a portfolio of a scheme submitted to the Registrar after that date. An operator is defined in the BN as any person or entity that is authorised by a regulator to administer a scheme.

Conditions for approval

The following conditions are applicable to any application for approval of a scheme:

- 1) An operator applying for approval of a scheme in terms of section 65 of CISCA must be authorised and supervised by a regulator. Such a regulator must have a regulatory environment of similar standing as the regulatory environment of the Republic.
- 2) The scheme in which the operator intends to solicit investments in the Republic must be –
 - a) available for investment in its domicile of registration; and
 - b) promoted in the Republic 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.
- 3) An operator applying for approval of a scheme must –
 - a) enter into a representative agreement; or
 - b) establish and maintain a representative office.
- 4) An operator applying for approval of a scheme must satisfy the Registrar that –
 - a) the scheme is sufficiently liquid to meet investor redemptions;
 - b) the scheme does redemptions at regular intervals;
 - c) the scheme does not permit investment in an instrument that compels the acceptance of physical delivery of a commodity, and the scheme particulars or prospectus prohibits it from accepting physical delivery; and
 - d) the assets of investors are properly protected by application of the principle of segregation and identification.
- 5) The Registrar may –
 - a) require written confirmation from the applicable regulator that the operator is fit and proper and in good standing with such regulator; and
 - b) take into consideration any other information regarding the operator, derived from whatever source, including any regulatory or supervisory authority, provided such information is disclosed to the applicant and the latter is provided a reasonable opportunity to respond to the information.



Application

An application for approval in terms of section 65 of CISCA must be in writing and must, to the extent applicable, include all of the detail as set out in the BN.

Representative office or agreement

Where the operator has established a representative office, it must satisfy the Registrar that the representative office maintains paid-up share capital and reserves of no less than R2 million. Other than representing the scheme, the representative office may only conduct business relating to financial services. The capital of the representative office must be dedicated to the scheme and at all times be invested in assets that can be liquidated within seven days. The auditor of the representative office must certify annually within three months after the financial year-end of the representative office to the Registrar that the operator has complied with the capital requirement. The Registrar should be notified if, for any reason, a representative agreement is cancelled; any term of the representative agreement is amended; or the operation of the representative office is discontinued.

Guidance in respect of applications for approval

A guidance note has also been issued by the FSB with respect to making an application for approval of a foreign collective investment scheme in terms of

section 65 of CISCA. Some of the more pertinent points included in the guidance note are as follows:

- In assessing whether the regulatory environment is of similar standing, the Registrar will consider, amongst other things, the legislation governing the respective regulator and the activities that it regulates; whether the regulator is operationally independent and accountable; and whether the regulator has adequate powers, proper resources and the capacity to perform its functions and exercise its powers.
- Where the scheme is registered, applicants will need to indicate whether members of the public are able to invest in the scheme. They also need to indicate whether the target market of the scheme in its domicile of registration is the same market to be targeted in South Africa.
- Where an operator enters into a representative agreement with a local manager of a collective investment scheme, the agreement should contain at least the following information:
 - An undertaking from the operator that it will comply with the provisions of section 65 of CISCA;
 - An undertaking from the operator indemnifying the local manager against non-compliance with the provisions of section 65;
 - An undertaking by the local manager to use its reasonable endeavours to ensure compliance by the operator with the provisions of section 65; and
 - An undertaking by the local manager to compensate the investor for any loss suffered which is attributable directly to non-compliance by the operator with the provisions of section 65, provided the investor has no other recourse or legal remedy against the operator.
- Should the operator establish a representative office, it should be registered in terms of the Companies Act, 2008. It must furthermore ensure that it maintains the prescribed minimum share capital.
- The Registrar is not averse to investments in UCITS-compliant schemes, considering that these schemes are intended for investment by retail investors. The Registrar will consider more favourably UCITS-compliant schemes, provided that –
 - derivatives are not used to leverage the portfolio and are covered at all times; and
 - investment in synthetic



instruments is not permitted.

- The Registrar has made available on the FSB website a pro forma document that assists applicants by setting out the similarities and differences between the applicant scheme and a comparable collective investment in South Africa.
- Schemes will be categorised by the Registrar according to the types of collective investment schemes available in South Africa.

Conclusion

The terms of the revised regulation should be positive for new foreign schemes planning to enter South Africa. It will also be positive for existing section 65-approved schemes who also have unapproved sub-funds, which can arguably now be added to their fund offerings.

Should you wish to discuss how we can help you, please call your regular contact or, alternatively:

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