

OFR – FCA publishes its consultation paper on the implementation of the Overseas Fund Regime December 2023

We are finally seeing movement from the FCA on the Overseas Funds Regime (OFR), taking EEA UCITS management companies one step closer to understanding what will be involved in marketing their EEA UCITS in the UK following the closure of the UK's temporary marketing permission regime (TMPR).

On 4 December 2023, the FCA published its Consultation Paper [CP 23/26](#) (CP) setting out details of how the OFR will be operationalised. The FCA have requested feedback on the CP by [Monday 12 February 2024](#).

Simmons & Simmons stands ready to help taking EEA UCITS management companies digest the CP and support you on your OFR journey.

Background

Following the withdrawal of the UK from the EU, the TMPR was established to allow EEA UCITS, which had been marketed in the UK under the UCITS passport, to continue to market to UK investors for a limited period.

In March 2020 the UK Government [consulted on changes](#) on ways in which overseas funds could be recognised for sale to the retail public in the UK following the end of the TMPR. A new fund access gateway (the OFR) was established under the [UK's Financial Services Act 2021](#), setting out the legislative framework for a streamlined regime allowing for the recognition of designated funds which are authorised in approved countries to be marketed in the UK.

The FCA's consultation paper is a step towards making the OFR operational for firms, but it is far from being the final piece of the puzzle. While the publication of the CP is a welcome development, many questions remain. We discuss below what the CP tells us, but also set out areas of continued uncertainty for firms.

Scope of the OFR

EEA UCITS management companies

At least initially, the OFR will only be available for **EEA UCITS management companies**.

While the principles for the recognition of overseas schemes are wide-reaching and have the capacity to be used more widely than EEA UCITS, in practice, the UK government is currently only looking to designate EEA UCITS as equivalent for the purposes of access to the OFR.

Target Investors – UK retail clients

The OFR will be a route through which EEA UCITS can gain permission to be marketed to **UK retail investors**.

If an EEA UCITS is only targeting professional UK end investors, it could look to explore an alternative route to market in the UK via the UK's National Private Placement Regime.

Areas covered by CP 23/26

While the CP is an important publication for the industry, in practice firms are waiting for the confirmation of equivalence from the UK government to learn the extent of any additional obligations they may be subject to by accessing the OFR.

That said, it is important for firms to understand the key points set out in the CP and we have listed these below -

1) Process to apply for recognition via the OFR

The FCA have made it clear that the OFR will be an “application” regime, meaning that it will be necessary to apply to the FCA for recognition of an EU UCITS. The FCA will have the power to refuse any application for recognition if it considers it desirable in order to protect the interests of investors and potential investors in the UK.

Information to be supplied as part of the application: The FCA has listed the information it is planning to require in respect of schemes applying for recognition in detail in Annex 4 of the CP. The information is bucketed into a number of categories:

- Category 1 – Information identifying the scheme
- Category 2 – Information on the scheme’s profile
- Category 3 – Fees and charges at scheme and share class level
- Category 4 – Characteristics of unit/share class
- Category 5 – Parties connected to the scheme
- Category 6 – Information about marketing and distribution

Fees to be paid: Applications for OFR schemes will be charged a fee of £2,500 for a standalone scheme and £5,000 for an umbrella scheme. Ongoing fees will also be levied.

Approval timeframe: Subject to an equivalence decision from the UK Government, EEA UCITS management companies will be given landing slots during which time they will be required to submit an OFR application to the FCA. As of the date of this publication, the timing in respect of this equivalence decision remains unclear, meaning that timing for the start of landing slots is unknown. We do know, however, that the FCA will have a 2 month review period for each application for recognition, which will begin on the day on which the FCA receives a complete application. In the CP, the FCA has indicated that it may be able to process applications relating to lower-risk schemes more quickly.

2) On-going notification obligations when within the OFR

Once recognised under the OFR, EEA UCITS management companies will be subject to ongoing notification requirements to allow the FCA monitor changes throughout the fund lifecycle, assess any potential consumer harm and ensure such schemes and their management companies continue to meet the OFR recognition conditions.

This is important, as the FCA makes clear it intends to assess OFR schemes on an ongoing basis and that it will invoke its powers to suspend or revoke OFR recognition orders if schemes

- fail to continue to meet the conditions for recognition,
- act in contravention of other applicable rules under COLL or FSMA, or
- the FCA considers it desirable to do so to protect the interests of investors or potential investors in the UK.

In practice, the proposal creates **four categories** of on-going notification requirements:

Notification category	Timing	In-scope change events <i>(note that these lists are non-exhaustive and, where relevant, further details will be provided on the FCA website)</i>
Pre-event notification	30 days prior to the change taking effect in the UK	<ul style="list-style-type: none"> • Changes to a scheme’s name or legal structure • Termination of a scheme in its home jurisdiction, or a request to de-recognise the scheme from marketing in the UK • Notification of supervisory sanctions • Suspension of dealings • Fundamental change to a scheme’s investment objective, policy or strategy • Matters that would likely cause significant negative effect on UK investors (such as a material increase in fees or change in redemption terms) • Additional changes such as changes to a scheme’s target investors, change in the scheme’s minimum investment amount, changes to unique identifiers (including LEI), changes to a benchmark
Immediate notifications	Immediately	<ul style="list-style-type: none"> • When the EEA UCITS management company becomes aware that the scheme is or will be terminated or wound up • Once the EEA UCITS management company decides to cease marketing the scheme in the United Kingdom and applies for withdrawal of recognition as an OFR scheme
Section 271I notification	As soon as reasonably practicable	<ul style="list-style-type: none"> • Change of the EEA UCITS management company, trustee / depositary, or representative of the operator in the UK • Change of name or address details for any of the above entities • Change of address of the place in the UK for service of notices, or other documents, required or authorised to be served on the EEA UCITS management company • If the EEA UCITS management company becomes aware that it has contravened, or expects to contravene, a requirement imposed on it by or under FSMA (e.g. a breach of the UK financial promotion rules, or non-compliance with imposed additional requirements)
Post-event notification	Within 30 days of the change taking effect in the UK.	<ul style="list-style-type: none"> • Changes not otherwise listed above but detailed on the FCA’s website

In addition to the above the FCA proposes that EEA UCITS management companies must confirm on an annual basis that all data the FCA holds on its system is up to date.

3) ETFs as a subset of products

The CP flags that ETFs are marketed and distributed to investors differently to other OFR schemes. The FCA have questioned whether this might mean that the data the FCA is proposing to collect from EEA UCITS management companies is less relevant for ETFs.

The FCA are asking ETF providers for feedback on whether the data to be supplied to the FCA at both the point of application and on-going notification stages is appropriate and whether this should be reduced or changed for ETFs.

4) Pre-contractual disclosures triggered when in the OFR

The FCA are conscious that UK investors in an OFR scheme may not have access to the same redress schemes (i.e. the FOS and FSCS) than if they invested in UK UCITS. In this regard the FCA are proposing that:

- **Prospectus.** The prospectus of an OFR scheme include:
 - a statement that investors may not be able to seek redress under the UK regulatory system if the activities of the operator and depositary of the scheme are not covered by the FOS or the FSCS
 - an explanation as to whether a UK investor will have access to an equivalent of the FOS and FSCS (and details as to where further information can be found if they will have access)
- **Supplementary disclosures.** That disclosures on redress arrangements also be included in the COBS rules requiring supplementary information disclosures.
- **Post-KIID disclosures.** Whilst KIID contents are specified under EU legislation, once UCITS KIIDs are replaced by the new UK consumer disclosure regime (i.e. the successor to the UK PRIIPs regime), disclosures on redress for UK retail investors in OFR schemes might also be considered and consulted on as part of this project.

5) Regime for the approval of financial promotions for OFR schemes

The CP confirms that under the OFR, an EEA UCITS Management Company will no longer be deemed “*authorised persons*” for the purposes of the UK regime.

The practical implication of this is that once an EEA UCITS has been recognised under the OFR, an EEA UCITS Management Company **can no longer approve or issue financial promotions** for use in the UK under its own name.

Instead, they will need to ensure that:

- a UK authorised firm makes and issues the communication in its own name; or
- a UK authorised firm approves the financial promotion made and issued by the EEA UCITS Management Company; or
- the financial promotion falls within the scope of an exemption set out in the Financial Promotions Order (in which case it can be issued by the fund manager).

EEA UCITS Management Company will need to provide the FCA with details of the UK financial promotion approver as part of the application for recognition.

For firms who part of a wider group of companies who have UK authorised firms as part of their group, presumably they will look to these group companies to approve their financial promotions. For firms without a UK authorised firm within their group, they will need to establish how the materials they prepare to market their EEA UCITS in the UK can be approved for use in the UK.

What does CP 23/26 not cover?

Perhaps even more interesting is what we **have not learned** from the CP -

- **Equivalence decision.** Whilst the CP is published on the presumption that an equivalence decision will be reached by the UK Government for EEA UCITS in all jurisdictions, there is no further detail on the expected timing for this equivalence decision.
- **Extension of additional obligations.** The CP does not indicate which additional obligations, if any, will be imposed on EEA UCITS under the TMPR. There is widespread interest in understanding whether adherence to UK investor protection initiatives, such as the Consumer Duty, the COLL Assessment of Value requirements and the FCA’s Sustainability Disclosure Regime requirements, will be a condition of access to the OFR. All of these details are tied up with the equivalence decision to be made by the UK Government.

- Timing for the start of the OFR. Until we have clarity on the timing of the UK Government's equivalence decision, the timing for the OFR remains unclear. What we do know is that: (i) the statutory deadline for the end of the TMPR is **31 December 2025** and (ii) the FCA is working to a timeframe to have all EEA UCITS that wish to continue marketing to UK investors transitioned out of the TMPR and into the OFR in advance of this statutory deadline. We expect further clarity on timing in Q1 of 2024.
- Approach for Money Market Funds. The UK government made clear in its March 2020 consultation paper that it would introduce a standalone OFR for money market funds (MMFs). However, for now, the FCA are not consulting on the OFR for MMFs and we have no further information as to what will be required for MMFs at the end of the TMPR. Presumably this is linked to the current work by the FCA to **update the regime for MMFs** in the UK – the likely outcome being that EU UCITS MMFs would become subject to the new rules in place in the UK for UK domestic MMFs.

What should you be doing now

As a first step, EEA UCITS Management Companies should ensure that any contact information they have previously provided to the FCA is up-to-date and check that their fund population on the FCA register is correct. Any changes to firm or fund details should be communicated to recognisedcis@fca.org.uk or, if a fund registered under the TMPR is no longer being marketed in the UK, this should be removed using the FCA's Form TMPR CH (accessible on the FCA's website).

Fee disclosure will be an important element of an OFR application and for EEA UCITS Management Companies the requirements in respect of retention of management fee and payments to third party distributors may not reflect current arrangements in place albeit there has been a focus on fees and charges in funds from the European regulators. It would be a good time to review current arrangements against the FCA requirements in the CP to start to consider the impact of these new requirements.

Finally, financial promotions will need to be communicated or approved by a UK authorised firm unless an exemption applies. This is not currently the case under the TMPR as the fund itself can approve its own financial promotions. EEA Management Companies should therefore consider how they could meet this requirement either within their own organisation or start discussions with their fund clients as to how this requirement could be met.

Simmons & Simmons key contacts



Catherine Weeks

Partner

T +44 20 7825 3940

E catherine.weeks@simmons-simmons.com



Nick Colston

Partner

T +44 20 7825 4147

E nicolas.colston@simmons-simmons.com



John Dooley

Managing Associate

T +44 20 7825 4308

E john.dooley@simmons-simmons.com



Tristram Lawton

Managing Associate

T +44 20 7825 3488

E tristram.lawton@simmons-simmons.com



Camilla Jessel

Managing Associate

T +44 20 7825 5747

E camilla.jessel@simmons-simmons.com



Dan O'Toole

Supervising Associate

T +44 20 7825 4251

E dan.otoole@simmons-simmons.com

Emily Wilks

Supervising Associate

T +44 20 7825 3302

E emily.wilks@simmons-simmons.com



Dom Buxton

Associate

T +44 20 7825 3315

E dom.buxton@simmons-simmons.com

For additional information on our firm, please visit our website at [simmons-simmons.com](https://www.simmons-simmons.com).

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