August 2014

UCITS V

Update – Publication of the UCITS V Directive in the Official Journal

Following much debate, the final UCITS V Directive (Directive 2014/91/EU) ("**UCITS V**") has now been published in the Official Journal of the European Union. UCITS V amends Directive 2009/65/EC on undertakings for collective investment in transferable securities ("**UCITS**") and will come into force on 17 September 2014. Member States will have to transpose UCITS V into their domestic laws, regulations and administrative provisions by 18 March 2016. A link to the publication of the directive is attached here.

As outlined in previous updates, UCITS V proposes new rules designed to increase the level of protection enjoyed by UCITS investors and is seen as a key step towards restoring investor confidence in the wake of the financial crisis at the end of the last decade. While UCITS V proposes a number of changes to the overall UCITS regime there are a couple of key provisions of the directive that have drawn the attention of industry participants, notably changes to the financial sanctions regime, depositary regime and those in relation to remuneration (the latter two being summarised below).

Remuneration

Taking its lead from the provisions contained under the Alternative Investment Fund Managers Directive (Directive 2011/61/EU) ("**AIFMD**"), UCITS V provides that Member States shall require management companies to establish and apply remuneration policies and practices. Such policies are required to be consistent

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with and promote sound and effective risk management and not encourage risk- taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the UCITS they manage. Such policies must not impair compliance with the management company's duty to act in the best interests of the UCITS.

UCITS V compliant remuneration policies are intended to apply to those categories of staff whose professional activities have a material impact on the risk profiles of the UCITS that they manage. Such categories of staff include decision takers, fund managers and persons who take real investment decisions (and persons who have the power to exercise influence on such members of staff) including investment advisors and analysts, senior management and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and decision takers.

It should be noted that UCITS managers will, however, have the flexibility to apply their remuneration policies in a manner proportionate to the UCITS' size, its internal organisation as well as the nature, scale and complexity of its activities.

Depositary Regime

As outlined previously, UCITS V more closely aligns various aspects of the UCITS' depositary regime with the provisions of AIFMD. This is particularly the case in respect of the areas of delegation and liability.

Delegation

Under UCITS V, a UCITS depositary will only be permitted to delegate all or part of its safekeeping tasks to a sub-custodian where, inter alia, the tasks are not delegated with the intention of avoiding the requirements of the UCITS Directive, there is an objective reason for the delegation and the depositary has exercised all due skill, care and diligence in the selection and appointment of any sub-custodian. Such delegation must also be subject to periodic review and ongoing monitoring.

Liability

Similar to AIFMD, UCITS V introduces new requirements regarding depositary liability which distinguish between:

(i) financial instruments that are capable of being held in custody, where the depositary will be liable for the loss of such assets on a strict liability basis unless the depositary can prove that the loss of assets is due to an "external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary"; and

(ii) all other assets (such as OTC derivatives), which are subject to recordkeeping and ownership verification duties and where the depositary will only be liable if a loss is suffered as a result of its negligence or intentional failure to properly fulfil its obligations under the UCITS Directive.

In the case of (i) above, a UCITS depositary is obliged to return a financial instrument of the identical type or corresponding amount to the UCITS, without undue delay, if it is deemed liable for the loss. In addition, the depositary's liability will not be affected by the fact that it has entrusted to a third party all or some of its custody tasks. Unlike AIFMD, depositaries of UCITS will not be permitted to limit or discharge their liability under contract.

UCITS V also includes a uniform list of oversight duties as well as new cash flow monitoring requirements for depositaries.

Should you have any queries or require more detailed information than outlined in this bulletin your usual Dillon Eustace contact will be able to advise and assist you in this regard.

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