

A horizontal banner image with a grid overlay. It features a scale of justice on the left, a computer keyboard in the center, and a gavel on the right. The text "JONES DAY COMMENTARY" is overlaid in white, with "COMMENTARY" in a larger font.

JONES DAY COMMENTARY

OFFERING FOREIGN INVESTMENT FUNDS IN THE UAE— A NEW REGIME

The Securities and Commodities Authority of the United Arab Emirates (“ESCA”) in July 2012 published regulations relating to investment funds (the “Regulations”) that significantly increase the regulation of both foreign and local investment funds active in the United Arab Emirates (the “UAE”). These came into force in August 2012.

The Regulations are designed to implement a new and more stringent investment regulation regime within the UAE. Six months after their introduction, we assess to what extent they have changed the fund raising market in the UAE.

SHIFT IN REGULATORY APPROACH IN THE UAE

The operation and marketing of investment funds in the UAE (outside of the Dubai International Financial

Centre¹) was previously regulated by the UAE Central Bank (the “Central Bank”).

However, it is evident from the Regulations that a large part of this regulatory responsibility has now passed to ESCA, although the Central Bank retains a significant role in systematic oversight of the investment funds market.

The Regulations govern the establishment and regulation of domestic funds in the UAE as well as the promotion and offering of foreign investment funds in the UAE. The Regulations demonstrate a material strengthening of regulatory oversight in respect of foreign investment funds being offered into the UAE.

¹ The Dubai International Financial Centre is an economic free zone located in Dubai, established in 2005 as an international financial hub with its own laws and regulations.

PRE-APPROVAL REQUIRED FOR OFFERING FOREIGN INVESTMENT FUNDS

The Regulations make a distinction between an offering of foreign investment funds to the public in the UAE (a “Public Offering”) and a private offering of foreign investment funds into the UAE (a “Private Offering”).

Both Public Offerings and Private Offerings now require pre-approval from ESCA before they are permitted to be made in the UAE.

For the purposes of the Regulations, funds established in the Dubai International Financial Centre (“DIFC Funds”) are considered to be foreign investment funds. This means that DIFC Funds are now subject to the same scrutiny as other foreign funds notwithstanding the fact that they are located within the UAE.

The Regulations state that ESCA may take up to 30 business days to issue its decision on whether the Public Offering or Private Offering may or may not proceed. Any foreign funds contemplating a form of offer or fund raising activity in the UAE may wish to factor such time scales into their road show activities.

PUBLIC OFFERINGS OF FOREIGN INVESTMENT FUNDS

In order for ESCA to approve a Public Offering, the foreign investment fund must be licensed and supervised by an authority in its home jurisdiction that is the equivalent of ESCA, and it must also be authorized to make a Public Offering in that jurisdiction.

ESCA has the right to impose any conditions on a Public Offering that it sees fit and has wide powers to request detailed information from the foreign investment fund while deciding whether to grant approval for the relevant Public Offering.

PRIVATE OFFERINGS OF FOREIGN INVESTMENT FUNDS

For an offering to qualify as a Private Offering as set out in the Regulations, various criteria must be fulfilled. These include the following:

- The offer must be made to identified investors.
- There must be minimum subscription amounts of:
 - AED500,000 (approx. USD136,100) (in respect of foreign funds from outside of the UAE); or
 - AED1,000,000 (approx. USD272,200) (in respect of foreign funds incorporated in “free zones” outside of the UAE²).

There are certain limited specific exemptions to these requirements. These exemptions include offers made in the context of, for example, portfolio management activities and saving plans.

ESCA also has the right to impose any conditions on a Private Offering as it sees fit and has wide powers to request detailed information from the foreign investment fund in deciding whether to grant approval for the relevant Private Offerings.

Six months after the introduction of the Regulations, it remains to be seen to what extent the process of approval for a Private Offering is quicker or more easily satisfied than the process required for a Public Offering.

Unlike certain other jurisdictions, there do not *prima facie* appear to be carve outs provided for in the Regulations relating to a potential investor being a sophisticated or high net worth investor and the corresponding qualification of an offer to such investors being a Private Offering.

² The Regulations do not provide a definition of what constitutes an overseas free zone, and ESCA has not provided guidance on this point at this stage. However, it seems likely that this may be intended to refer to recognized offshore financial centers.

ALL FOREIGN INVESTMENT FUNDS REQUIRE LOCAL PROMOTER

All offerings in the UAE of foreign investment funds must be made through a UAE company licensed or permitted by ESCA to act as a promoter (the “Promoter”).

For both Public Offerings and Private Offerings, generally the Promoter must be a bank or investment firm regulated by the Central Bank or licensed by ESCA to make such offerings. While it still remains to be seen which banks or investment firms will be granted these licenses, it seems likely that a local UAE bank or investment firm (or one with a registered presence in the UAE) will need to be used in the context of making such an offer.

In the case of Private Offerings where the minimum subscription is for AED10 million or more (approx. USD2,722,000) and the offer is limited to institutional investors, the offer may be promoted in the UAE through a representation office of the foreign company.³

The Promoter has various obligations set out in the Regulations, including a responsibility to use necessary care in selecting funds that it chooses to promote in the UAE so that investors’ subscriptions are, on the face of it, protected.

NO “TOLERATED PRACTICE” EXEMPTION FOR LIMITED OFFERS

Under the previous regulatory regime in the UAE, a view had historically been taken by some commentators that the promotion of foreign investment funds in the UAE on a discrete basis to a small number of sophisticated investors was tolerated by the UAE authorities without the need for formal approval or licensing by ESCA or the Central Bank.

³ The relevant Regulation states that “the units...may be promoted within the UAE in private offering through the representation office of the foreign company, provided that the promotion in such case shall be to institutions only and subject to a minimum of 10 million Dirhams per subscriber.”

The Regulations do not contain specific provisions that exempt placements made to sophisticated investors from the Regulations. Although the concept of a Private Offering does exist in the Regulations, making such an offer is still subject to ESCA’s pre-approval as indicated above.

CONCLUSION

The Regulations appear to herald a new era of more stringent regulation of fund offerings in the UAE; however, six months after their introduction, it remains unclear to what extent local Promoters have benefitted from the introduction of the Regulations.

Given the new Regulations, it is clear that any proposed offer of foreign funds into the UAE will need to be carefully considered before it is intended to be made. Any offerors who have previously taken a “tolerated practice” view of making limited private placement type offerings into the UAE may now wish to reassess their approach and related fund raising activities in the UAE.

LAWYER CONTACTS

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