Preface

The International Financial Products and Services Committee ("IFPSC") publishes a newsletter on a quarterly focusing on new international and comparative legal, regulatory, and supervisory issues related to financial institutions worldwide.

The next Issue of the IFPSC’s newsletter will be issued in October 2017.

If you have any comments or are interested in taking a part of the next newsletter or any other IFPSC’s publications, please do not hesitate to contact the Publications and Year-In-Review Vice-Chair at IFPSC who is currently:

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Almost there! Closer to the lift of foreign exchange controls in Argentina

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I. Introduction

In furtherance of the Federal Government’s quest to increase the flexibility of the foreign exchange regulations (“FX Regs”), to facilitate FX transactions and to promote the transparency of the local single and free foreign exchange market (“FX Market”), the Central Bank of Argentina (“CBA”) issued Communication “A” 6244 (5/19/17) (“Com. 6244”) by which it abrogated all regulations (i) on foreign exchange transactions, (ii) on financial institutions (“FIs”) foreign exchange general position, (iii) related to Executive Order Nr. 616/05 and (iv) on remittances of exports’ proceeds into the FX Market and its oversight by FIs through the Exports’ Collections Tracking System (“SECOEXPO”), effective as from July 1st, 2017.

Com. 6244 kept the validity of the reporting regimes related to such matters and also included an annex with a set of new FX Regs that will become valid and binding as from such date. It is worth noting that not all Com. 6244 provisions are crystal clear in some of the aspects they cover and therefore this rule has raised some questions and doubts amongst the financial and banking community that might be solved out once it becomes valid and applicable.

Com. 6244’s annex lists the topics addressed by the new regulation, as follows: (i) general rules; (ii) other rules; (iii) operational guidelines for entities licensed to operate in FX (especially with regards to KYC and AML controls, clients’ identity in FX transactions, etc.); (iv) a glossary of FX and foreign trade frequently-used terms; (v) rules on Argentine goods’ exports; (vi) tracking of collections of proceeds of goods’ exports; and (vii) tracking of advances and other financings of goods’ exports.

The purpose of this article is to briefly review the most significant changes introduced by Com. 6244, as follows:

II. General rules

- Freedom to transact in FX: It reaffirms that all physical and juristic persons, as well as universalsities (estates and trusts) may freely operate in the FX Market at the FX rates freely agreed by the relevant counterparties. FIs may freely fix the level and use of their general foreign.

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1 For further information about the changes to and evolution of the foreign exchange controls introduced by President Macri’s administration see Hernán D. Camarero, “Winds of change in Argentina: New reforms in foreign exchange controls”, March 2016 Volume 5, Issue 1, International Financial Products & Services Committee Newsletter, American Bar Association, Section of International Law; and “Untying the Gordian Knot: Progressive liberalization of foreign exchange controls in Argentina”, December 2016 Volume 5, Issue 4, International Financial Products & Services Committee Newsletter, American Bar Association, Section of International Law.
exchange position. All FX transactions, swaps and arbitrages pursuant to FX Regs should be executed through an FIs or FX-licensed entities.

- **Obligation to transfer proceeds of goods’ exports** (inclusive of ancillary services included in FOB and CIF values) into the FX Market stays: in fact this is not new. The term to do so is 10 years as from the goods’ loading date (cumplido de embarque).²

### III. Other rules

- **Freedom to operate in the FX Market without mandatory business hours:** current business hours for entities licensed to operate in the FX Market are 10AM to 3 PM. As from July 1, 2017 they may transact in foreign exchange with extended business hours, previously reported to the CBA by the relevant FX-licensed entities.

- **Compliance with reporting regimes:** the corresponding subjects should keep on complying with the foreign liabilities reporting regime (CBA Com. “A” 3602, as amended) and/or the direct investments regime (CBA Communications “A” 4237 and ancillary).

- **Automatic credit of foreign transfers of funds:** Com. 6244 introduces the possibility of automatic credit of fund transfers coming from abroad in the beneficiary’s local account –when the transfer includes the local account information- without the client’s participation, unless otherwise instructed by the client.

- **Paperless FX transactions:** CBA is taking another huge leap towards doing “away with tons of paperwork that clients had to file to the banks every time they wanted to access to the FX Market, except for FX transactions related to goods’ exports and reporting regimes, as indicated above. FX transactions slips and affidavits will be no longer necessary; this will be a relief for clients and especially for those licensed to operate in the FX Market. Clients’ electronic and digital signatures are allowed, subject to specific requirements.

### IV. Operational guidelines for entities licensed to operate in FX

- **Global FX transactions daily records:** The entities authorized to operate in FX transactions may carry a global ledger for certain kind of FX transactions insofar as much all conditions required for each case are met. These transactions are (i) collections and payments in consideration of retirement and pensions, (ii) clients’ personal transfers (residents and foreigners human and juristic persons), and (iii) transactions of payments’ processing companies.

### V. Glossary

- **Uniform terms used in FX transactions:** it includes such terms as resident, economic group, cash transactions (operaciones al contado), time transactions (operaciones a término) and other kind of FX-related terms.

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² Resolution Nr 47 –E/2017, Secretariat of Trade, Jan 20 2017 sets a 3,650 calendar days-term to transfer the exports’ proceeds to the FX Market.
VI. Rules related to Argentine goods’ exports

- **Comprehensive set of rules**: Com. 6244 unifies these rules in a single comprehensive chapter, ordering them in a clearer way, in benefit of exporters, financial institutions and even foreign lenders – trade finance- demanding the match (hedge) of the collections of exports’ proceeds by the resident exporter with their loans and facilities’ schedule of principal and interests’ payments. Current rules on this topic are included in several scattered communications that since 2001 have been issued by the CBA and that they constitute a very complex and entangled specific regulatory regime.

- **Exports’ proceeds may not come from foreign importers**: Upon or prior to the expiry of the 10-years term to transfer the exports’ proceeds into the FX Market, the local exporter may opt to transfer its own funds deposited abroad and not necessarily those effectively paid by the foreign importer. This allows the local exporter to freely use the proceeds collected within such term easing the burden of being bound to seek interim financing until the expiry of the term to remit the proceeds into Argentina.

- **Exports’ proceeds may not be credited in the exporter’s local bank account**: this was a former requirement that shall no longer apply as from July 1st, 2017.

- **Increases threshold for exports without consideration**: There are certain goods’ exports that may not include a monetary consideration (e.g. *inter alia* goods without commercial value, samples not for commercial use, gratuitous goods, etc.) or which net consideration is lower than the amount stated in the export deed. In these cases in order to show the CBA that there was no duty to remit a collection from abroad into the FX Market or that any shortfall thereof is justified (e.g. banking transactional expenses), exporters should meet certain requirements. One of these requirements is that the FOB or CIF value of the export deed does not exceed US$ 25,000, a new threshold amount.

VII. Tracking of advances and other financings of goods’ exports

- **General amendments to the SECOEXPO**: the tracking system’s rules were generally reviewed and modified in order to adapt them to the new regulations.

Since the FX control still applies in Argentina – i.e. although the system was substantially amended and simplified it was not abrogated-, any infringement to FX Regs shall still be punished under the foreign exchange criminal regime. Likewise, standard Anti-Money Laundering and Know Your Customer statutory controls by FIs and FX-licensed entities remain in place and should be complied with.

The trend towards full liberalization of FX controls in Argentina continues to move forward as one of the current Administration’s goals. However, Com. 6244 may require some further amendments by the regulator in order to avoid unclear provisions that may hinder the fulfillment of such ambitious target.
Simplifying FX controls restores foreign trade in Argentina to internationally-used and standard practices, with less intervention of the State in private transactions, allowing local importers and exporters to bargain with their counterparties’ the habitual commercial and business terms and conditions for trade-related operations.

The decrease of bureaucratic steps in the execution of FX transactions shall not be only beneficial to clients but also to FIs, which in the last 15 years have been overwhelmed and overloaded by the quantity of information and documentation they were bound to collect prior to giving access to the FX Market.

Undoubtedly, these regulatory changes shall be very appreciated by international direct investors wishing to set their business operations in Argentina, either as a first-landing investment or by acquiring local ongoing business and assets.
Condo Hotels in Brazil

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I. Introduction

On April 5, 2017 the Brazilian Securities and Exchange Commission (Comissão de Valores Mobiliários – CVM) enacted CVM Instruction No. 585 (ICVM 585/2017), which amends the applicable regulation on Brazilian Depositary Receipts (BDRs) constituted by: (i) CVM Instruction No. 332, of April 4, 2000 (ICVM 332/2000), which provides for the issuance and trading of BDRs; (ii) CVM Instruction No. 476, of January 16, 2009 (ICVM 476/2009), which provides for public offerings of securities distributed with restricted efforts; (iii) CVM Instruction No. 480, of December 7, 2009 (ICVM 480/2009), which provides for the registration of issuers, foreign and domestic, of securities admitted to trading on regulated markets in Brazil; and (iv) CVM Instruction No. 494, of April 20, 2011 (ICVM 494/2011), which provides for the incorporation and operation of investment clubs.

The goal of ICVM 585/2017 is to improve the access of foreign issuers to the Brazilian capital market, eliminating potential regulatory barriers to the development of this market.

II. Preliminary Considerations

BDRs are certificates issued by a depositary institution in Brazil that represent securities (stocks) issued by publicly-held corporations with headquarters overseas. The BDR is issued by a depositary institution in Brazil, backed by stocks of a foreign company not registered as a publicly-held corporation in Brazil. The depositary institutions must be authorized by the Central Bank of Brazil (Banco Central do Brasil - Bacen) and CVM to issue BDRs. The responsibility of disclosing the financial information of the issuing foreign company lies with the depositary institution.

According to the current CVM regulation, there are three types of BDRs for trading: Level I, II and III. Level I BDRs can be Sponsored or Unsponsored. Sponsored BDRs are issued by a depositary institution that has an agreement with the foreign issuer (the foreign company that issues the stocks) and can only be Level II and III. Unsponsored BDRs can only be Level I and do not involve the foreign issuer.

The main characteristics of Level I BDRs are: (a) trading is limited exclusively to the non-organized over-the-counter (OTC) market or in specific segments for Level I BDRs of an entity of the organized OTC market or of Stock Exchanges and only between the authorized investors listed by CVM; (b) disclosure of financial information on a regular basis in accordance with the regulation to which the issuing foreign company is submitted (in the Portuguese language); (c) it is not necessary to register the issuing foreign company with CVM; and (d) exclusive acquisition by the authorized investors listed by CVM.

The main characteristics of Level II BDRs are: (a) admission to trading on Stock Exchanges or the organized OTC market; and (b) registration of the issuing foreign company with the CVM.

Level III BDRs presents the following characteristics: (a) public distribution on the market; (b) admission to trading
on the Stock Exchanges or the organized OTC market; and (c) registration of the issuing foreign company with CVM.

The decision to issue Un-sponsored Level I BDRs comes from a depositary institution established in Brazil, which requests the program’s registration with CVM and the Brazilian Exchange (BM&FBOVESPA S.A. – Bolsa de Valores, Mercadorias e Futuros - BMVF), without having to involve the foreign company that issues the stocks.

According to survey conducted by BMVF, the participation of foreign companies in volumes traded on the BMVF is 0.6% – percentage far below the participation in other stock markets abroad, as for example: Colombia (17%), Lima (15.4%), Mexican (9.5%), NASDAQ (8.5%) and London (16.19%)³.

The main changes introduced by ICVM 585/2017 are as follows: (i) permission for public offering with restricted efforts of Level I and II BDRs; (ii) verification of the framework as foreign issuer; (iii) waiver procedure of the location of assets’ criterion to be deemed a foreign issuer; (iv) composition of the investment clubs’ portfolio; and (v) other relevant amendments.

III. Permission for public offering with restricted efforts of Level I and II BDRs

One of the main obstacles for the entry of a large number of foreign issuers in the Brazilian capital market was the impossibility to publicly offer BDRs with restricted efforts.

The permission for distribution of Sponsored Level I and II BDRs by means of a public offering with limited efforts aims to expand the access of the foreign issuers to the Brazilian market, through a public offering released from registration and limited to a maximum number of investors.

The inclusion of Sponsored Level I and II BDRs in the list of securities that may be offered to the public with restricted efforts falls into the same context of the reform initiated by CVM Instruction No. 551, of September 25, 2014 (ICVM 551/2014), which added Level III BDRs to the list of assets that can be the object of this type of offer. In the case of Level II BDRs, this inclusion is consistent with the rationale adopted in ICVM 551/2014, because likewise the issuers of Level III BDRs the issuers of Level II BDRs must be also registered in category A⁴.

CVM also considered relevant the permission to offer Sponsored Level I BDRs, whose issuers are not subject to registration, because the specific regulation allows the offer of these certificates of deposit without resulting in additional risks to the securities market.

ICVM 332/2000 establishes that Level I BDRs will be purchased by qualified investors and employees of the sponsoring company; and will be traded on the unorganized OTC market or in specific segments of the organized OTC market or Stock Exchanges. These limitations are consistent with those present in ICVM 476/2009, which restricts the supply and trading of securities to professional and qualified investors, respectively.

4 Under the current regulations there are two different categories of registry: (i) category A, which authorizes the trading of any types of securities; and (ii) category B, which excludes shares and share certificates of deposit as well as securities which attribute to the holder the right to acquire shares and share certificates of deposit as a result of the conversion or the exercise of inherent rights, provided that these securities are issued by the same issuer or by a company belonging to its economic group.

³ Source: WFE; London; Bloomberg (January-April/2014).
Depending on the characteristics of the Sponsored Level I BDRs, there are two exceptions to the provisions of ICVM 476/2009, dealing with the offer with restricted efforts of securities issued by non-registered issuers. The first exception relates to paragraph 3 of article 14 of ICVM 476/2009, which determines that Sponsored Level I BDRs will be traded in specific segments of the organized OTC markets and Stock Exchanges, under the specific regulation, even if it is a non-registered offeror, in accordance with ICVM 332/2000. The second exception provided for in item III of paragraph 1 of article 17 of ICVM 476/2009, releases the offeror of Sponsored Level I BDRs of the informational obligations required from unregistered issuers, once ICVM 332/2000 establishes a system of provision of information for the sponsoring companies of BDR programs.

The incentives for access from the sponsoring companies of Level I BDRs programs are high, when compared to Level II BDRs programs, since they can sell their certificates with restricted efforts in the Brazilian securities market without the need of obtaining the registration of the issuer. This creates an intermediate step to the sponsoring companies wishing to access the Brazilian market through BDRs that still do not want to be registered in category A.

IV. Verification of the framework as foreign issuer

CVM believes that the elimination of regulatory barriers to stimulate the offer of Sponsored BDRs must come accompanied by normative improvements to ensure the framework of the sponsoring company as foreign issuer.

Foreign issuer is the legal entity that has its headquarters outside Brazil and whose assets located in Brazil does not exceed the percentage of 50% according to its consolidated or separate individual financial statements, prevailing whichever best represent the essence of business for classification purposes.

The existing regulation provided that the condition of foreign issuer must be verified in the cases of registration of: (i) the issuer; (ii) the public offering of BDRs, and (iii) the BDR program, but it was silent about the possibility of conducting a public offering with restricted efforts. ICVM 585/2017 expressly clarifies that the verification of the condition of foreign issuer also applies in this type of offer.

For the same reason, other changes have been made. Articles 4-A and 4-B of ICVM 476/2009 determine that to perform a public offering of BDRs with restricted efforts, the sponsoring company must be framed as foreign issuer and this condition must be attested through a statement of its legal representative, accompanied by the memory of calculation of the percentage of assets located in Brazil. Since a public offering with restricted efforts is not registered with CVM, a new item X was included in article 11 of ICVM 476/2009 to predict that the intermediary leader of the offer will have to verify compliance with this requirement by the issuer.

In addition, the procedure for verification of the framework as foreign issuer of the sponsoring companies of Level I BDR programs has also been improved. Accordingly, ICVM 585/2017 amends item VIII of article 5 of ICVM 332/2000, establishing that the application of Level I BDR program must be accompanied by the statement of the legal representative of the sponsoring company certifying that such company falls into the condition of foreign issuer.

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5 This definition is contained in paragraph 1 of article 1 of Annex 32-I of ICVM 480/2009.

6 Paragraph 2 of article 1 of Annex 32-I of ICVM 480/2009 has been amended for this purpose.
issuer, together with the memory of calculation proving this condition.

In view of the potential increase in the participation of foreign issuers in the Brazilian capital market, CVM requires that this condition be checked both at the time of registration of the Sponsored Level I BDR program (in the absence of registration of the issuer in these cases) and in making an offer with restricted efforts.

V. Waiver procedure of the location of assets’ criterion to be deemed a foreign issuer

The procedure for waiver of the verification of the criterion of assets located in Brazil does not confer any predictability about the assumptions on which the exemption request of the issuer will be granted. This criterion is provided for in paragraph 4 of article 1 of Annex 32-I of ICVM 480/2009.

For this reason, ICVM 585/2017 reformulates such paragraph 4 to set up an automatic exemption to issuers to prove, in the case of a public offering of BDRs, that the percentage of assets located in Brazil does not exceed the maximum limit of 65% contained in the consolidated or separate individual financial statements, prevailing whichever best represent the essence of business for classification purposes.

This provision does not change the definition of foreign issuer contained in paragraph 1 of Annex 32-I of ICVM 480/2009 because this definition has served the intended purpose of preventing that genuinely Brazilian companies be registered as foreign issuers. CVM believes that a regulation that allows Brazilian issuers organized as foreign companies is undesirable but does not wish to restrict the coming of foreign issuers for the Brazilian market because Brazil has the capacity to become at least a regional center of liquidity in Latin America that would contribute to the sound growth of the securities market.

In summary, the following benefits were considered in the new proposed waiver procedure: (i) predictability and legal certainty for the market, in comparison with the discretionary waiver procedure previously in force, since foreign issuers will know the exact limits admitted by CVM for granting the exemption; (ii) maintenance of the same criterion of location of assets, which has been adopted by CVM since the enactment of ICVM 480/2009 (50%); and (iii) increased flexibility for foreign companies who wish to expand their activities in Brazil and could become unframed as foreign issuer, after the initial registration of the BDR program, due to a percentage of assets located in Brazil beyond 50% (which can be raised up to 65%).

VI. Composition of the investment clubs’ portfolio

ICVM 585/2017 also amends article 27 of ICVM 494/2011 to include BDRs in the list of securities which can compose the portfolio of investment clubs up to the limit of 33% of their respective net worth. This change is in line with the recent changes in CVM regulation in order to allow greater exposure of institutional investors to the securities issued by foreign companies.

However, the permission for investment in BDRs by investment clubs does not exempt compliance with any restrictions whatsoever regarding the acquisition and trading of BDRs. Therefore, in cases where the acquisition of BDRs is restricted to qualified or professional investors, only investment clubs that fit in these categories can purchase BDRs, in accordance with the provisions CVM Instruction No. 539, of November 13, 2013, which regulates the duty of checking the suitability of products, services and operations to the client’s profile.

VII. Other relevant amendments
Among other changes, ICVM 585/2017 modified paragraph 3 of article 3 of ICVM 332/2000 in order to determine that, in the case of Unsponsored Level I BDR programs, the depository institutions must disclose the information of the company whose securities underlying the BDRs “until the opening of the trading day following their release in the country of origin”. The amendment made by CVM seeks to give greater legal certainty to the depository institutions, since the former wording of such paragraph 3 did not contain any objective forecast in relation to the time of disclosure of this information.

Furthermore, articles 6 and 7 of ICVM 332/2000 have been changed and standardized the procedure for registration and cancellation of BDR programs by the Superintendence of the Securities’ Registration (Superintendência de Registro de Valores Mobiliários – SRE), with the adoption of the deadlines and procedures of analysis applicable to the request for registration of the public offering of securities provided for in ICVM 400/2003, since these parameters are widely known both by the competent technical area of CVM (SRE) and the market participants.

The wording of article 10 of ICVM 332/2000 was also improved in order to clarify the performance of the depository institution to exercise the right to vote the shares that serve as ballast for the BDRs, following the pattern adopted by CVM Instruction No. 559, of March 27, 2015, which regulates the depositary receipt programs for trading abroad. Now article 10 establishes that the right to vote the shares that serve as ballast for a BDR program must be exercised by the depository institution in the manner instructed by the BDR holders whenever so permitted by the contracts for the program, or in the best interest of the BDR holders, when such contracts prevent voting instructed by them.

The informational regime of Level I BDRs, sponsored and non-sponsored has been updated, with the aim to clarify that the dissemination of information on these programs can be held in Portuguese or in the language of the country of origin, and consists of an obligation of the depository institutions.

It is now possible to transfer the BDR program to another depository institution on request forwarded to CVM, without the need for cancellation of the respective program, provided that: (i) the BDR holders are duly informed about the transfer with at least 60 days in advance; and (ii) the characteristics of the BDR program are not changed, except for the possibility of modification of the custodian institution, which is allowed.

The BDRs were assimilated to the shares and other variable income securities under ICVM 476/2009. Therefore, BDRs are not subject to the lock-up period and the restriction which requires that the securities be only acquired by qualified investors is also not applied to BDRs.

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7 Pursuant to article 13 of ICVM 476/2009, the securities offered in accordance with such instruction can only be traded on regulated securities markets after 90 days of each subscription or acquisition by investors. This period is known as lock-up period and does not apply to shares, subscription bonus, share certificates of deposit and BDRs.

8 This restriction is contemplated in the preamble of article 15 of ICVM 476/2009 and the exceptions are regulated by paragraphs 3, 4 and 5 of article 15, as follows: (i) § 3 - such restriction does not apply to shares distributed with restricted efforts, if: (a) the closure of public offering distribution of shares of the same type and class registered with CVM has already occurred or will occur; or (b) the period of 18 months from the date of admission to trading on a stock exchange of shares of the same type and class has elapsed; (ii) § 4 - in the case of public offerings distributed with restricted efforts which have as purpose shares of issuers in pre-operational phase, such restriction will cease from the date on which, cumulatively: (a) the company become operational; (b) 18 months has elapsed following the closure of the offer; and (c) 18 months has elapsed from the admission to trading of the shares on the stock exchange; and (iii) § 5 - The provisions of § 4 shall not apply if the company: (i) has carried out the first public offering registration with CVM; and (ii) has satisfied the restriction imposed on the registered offer.
In view of the various changes made in ICVM 332/2000, CVM understand convenient to republish a consolidated version of it.

For the purposes of article 15, the company will be considered pre-operational while it has not presented revenue from its operations in the annual financial statement or in the consolidated annual financial statement prepared according to CVM standards and audited by an independent auditor registered with CVM.
The European General Data Protection Regulation

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I. Introduction

The long-awaited European General Data Protection Regulation ("GDPR") entered into force on 24 May 2016 and, following a two year transition period, will apply from 25 May 2018. The GDPR will replace Directive 95/46/EC (the "Directive") on which the Irish Data Protection Regime is based. The GDPR will be directly applicable in all Member States without the need for implementing national legislation and it is hoped that the use of a Regulation will bring greater harmonisation throughout the European Union ("EU").

The GDPR does not fundamentally change the core rules regarding the processing of personal data which are contained in the Directive but rather seeks to expand and strengthen the rights of data subjects. The GDPR aims to make businesses more accountable for data privacy compliance and offers data subjects extra rights and more control over their personal data. This bulletin aims to summarise some of the main changes that will arise under the GDPR.

II. Consent

Obtaining consent for the lawful processing of personal data is more onerous under the GDPR. Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her. The data controller is required to be able to demonstrate that consent was given.

If consent is given in the context of a written statement/declaration which also concerns other matters, the request for consent must be presented in a manner which is clearly distinguishable from other matters, in an intelligible and easily accessible form using clear and plain language.

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9 The GDPR is accompanied by the Criminal Law Enforcement Data Protection Directive (2016/680) (which applies to the processing of personal data by law enforcement authorities) and must be implemented in all Member States by 6 May 2018 however it is not considered further in this article.

10 The Directive was transposed into Irish law by virtue of the Data Protection Act 1998 and the Data Protection Amendment Act 2003 (the "DPA").
A data subject will have the right to withdraw his or her consent at any time.

III. **Data Subjects’ Rights**

The GDPR largely retains and in some cases enhances existing rights of data subjects whilst also introducing new rights relating to (i) data portability, (ii) restricting processing and (iii) the right to be forgotten.

*Data Portability*

Under the right to data portability, data subjects have the right to obtain their data and to have their data transmitted to another data controller without hindrance where technically feasible. This right only applies to personal data provided to the data controller and does not therefore extend to personal data generated by the data controller.

*Restricting Processing*

The GDPR gives data subjects the right to restriction of processing in certain circumstances; i.e. a data subject can ask a data controller to restrict processing. This right to restrict processing replaces the right to blocking which is contained in the Directive.

*Right to be Forgotten*

Data subjects have the right to be forgotten without undue delay in certain circumstances including where the data subject withdraws his/her consent and there is no other legal ground for the processing. A data controller must provide information on the action it has taken to comply with the request to be forgotten without delay and in any case at least within one month of the receipt of the request from the relevant data subject.

IV. **Accountability and Governance**

Under the GDPR, the data controller must be able to both comply with the principles relating to processing of personal data and also be able to demonstrate its compliance with the GDPR.

The data controller and data processor must implement appropriate technical and organisational measures to ensure that data is processed in a manner that ensures appropriate security and confidentiality of the personal data.

The GDPR also requires data controllers and data processors to retain records of their processing activities, which should be made available to the supervisory authority on request. Organisations with less than 250 employees are exempt from the record retention obligation unless the processing
it carries out is likely to result in a risk to the rights and freedoms of data subjects, the processing is not occasional, or the processing includes special categories of data or personal data relating to criminal convictions and offences.

Where processing operations are likely to result in a high risk to the rights and freedoms of natural persons, the data controller must, prior to the processing, carry out a data protection impact assessment of the envisaged processing operations on the protection of personal data to evaluate, in particular, the origin, nature, particularity and severity of that risk. The precise meaning of ‘high risk’ has not yet been defined. The GDPR sets out some examples of circumstances which should be regarded as high risk processing however it is hoped that further guidance on this point will issue from the Article 29 Working Group in due course. Data controllers should consider the outcome of the assessment when determining the appropriate measures to be taken in order to demonstrate compliance with the GDPR.

V. International Data Transfers

The rules in the GDPR regarding the transfer of data outside the EEA are broadly similar to the current regime. The GDPR prohibits the transfer of personal data outside the EEA unless certain conditions can be satisfied. In particular, the consent exemption has been amended such that explicit consent is required where an entity wants to transfer personal data outside the EEA.

VI. Territorial Scope

The GDPR expands the territorial scope of EU data protection law. The GDPR applies to both data controllers and data processors established in the EU regardless of whether the data processing takes place in the EU or not.

It also applies to the processing of personal data of data subjects who are in the EU by a data controller or data processor not established in the EU where the processing activities relate to:

- the offering of goods or services to such data subjects in the EU, irrespective of whether a payment of the data subject is required; or
- the monitoring of their behaviour as far as their behaviour takes place within the EU.

Where data controllers and data processors outside of the EU are caught by the new territorial rules, they will need to designate a representative in the EU unless they can avail of an exemption. This representative must be established in one of the Member States in which the data subjects, whose personal data is processed in relation to

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11 There is a limited exemption to the obligation to appoint a representative where the processing is occasional, is unlikely to be a risk to individuals and does not involve large scale processing of sensitive personal data.
the offering of goods or services to them, or whose behaviour is monitored, are located.

VII. **One Stop Shop**

Under the GDPR, Member States must establish a supervisory authority that will be responsible for monitoring the application of the GDPR in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the EU. The supervisory authority must be independent of the Member State and appointed for a minimum period of four years. There will also be a European Data Protection Board made up of one member from each of the supervisory authorities of each Member State.

In respect of cross-border processing, the GDPR also introduces the concept of the “one stop shop” whereby a lead supervisory authority will be appointed to the data controller or data processor that will cooperate with the other national supervisory authorities, where relevant. A business that carries out cross border processing should be primarily regulated by the supervisory authority in which it has its main establishment. There are circumstances in which the lead supervisory authority will be required to co-operate and consult with authorities of other Member States.

VIII. **Data Processors**

The GDPR will apply directly to data processors. The GDPR also expands the list of provisions data controllers must include in their contracts with data processors. This is a significant change as data processors were largely exempt from regulation under the Directive. Some of the main obligations imposed on data processors by the GDPR include the following:

- the obligation to appoint a representative if not established in the EU;
- the obligation to ensure certain minimum clauses in contracts with data controllers;
- the obligation to keep a record of all categories of processing activities carried out in behalf of a data controller;
- the obligation to cooperate with the supervisory authority;
- the obligation to notify the data controller in the event of a data breach without undue delay;
- the obligation to appoint a data protection officer, where applicable; and
- the obligation to comply with the rules on the transfer of personal data outside of the EU.

Data processors will now be liable for material or non-material damage suffered by any person as a result of an infringement of the GDPR. However, a data processor’s liability will be limited to the extent that it has not complied
with the data processor obligations of the GDPR or where it has acted outside or contrary to lawful instructions of the data controller.

IX. Data Protection Officer

Under the GDPR, certain data controllers and data processors will need to appoint a Data Protection Officer ("DPO"). The entities that are caught by the requirement to appoint a DPO are (i) public authorities, (ii) data controllers and data processors whose core activities consist of regular and systematic monitoring of data subjects on a large scale or (iii) data controllers and data processors which consist of large scale processing of personal data. A group of undertakings may appoint a single DPO provided that the DPO is easily accessible from each establishment. The DPO may be an employee of the data controller or data processor or fulfil the tasks on the basis of a service contract. Details of the DPO shall be published by the data controller or data processor. The DPO is responsible for monitoring compliance with the GDPR and must report to the highest level of management within an entity.

X. Data Breach Notifications

The GDPR requires data controllers to notify the supervisory authority without undue delay, and where feasible, not later than 72 hours after having become aware of a personal data breach unless the breach is unlikely to result in a risk to the rights and freedoms of natural persons. If the data controller does not notify the supervisory authority within 72 hours, it must give reasons for the delay. The GDPR sets out what should be included in the notification to the supervisory authority. The data controller must document any personal data breaches.

When the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, the data controller must communicate the personal data breach to the data subject without undue delay.

Under the GDPR, the data processor must notify the data controller without undue delay after becoming aware of a personal data breach.

XI. Sanctions

The GDPR increases the sanctions which may be imposed on organisations that breach EU data protection law. Organisations may now be subject to administrative fines of up to €20,000,000 or 4% of annual global turnover, whichever is higher. Administrative fines may be imposed in addition to, or instead of, the supervisory authority’s corrective powers. The GDPR sets out a list of factors for supervisory authorities to consider when deciding on whether or not to impose a fine and the level of any fine to impose.
Currently in Ireland, the Data Protection Commission (the “DPC”) does not have the power to impose administrative fines for infringements of the data protection law. The DPC’s power to issue fines under the GDPR will significantly increase the risk profile of data protection compliance/non-compliance.
The Long and Winding Road to FATF Compliance – Case Study of Iran

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I. Introduction

In 2016, the Financial Action Task Force (FATF) suspended counter-measures against Iran for a year, in response to Iran’s high-level political commitment to an Action Plan to address its strategic AML/CFT deficiencies. FATF will assess Iran’s progress in June 2017, the outcome of which will be based on a subjective fact-specific determination through counsel with government officials, inspections, and visitations of Iranian banking sites and more.

Passing the assessment is key to the country’s economy and commerce, especially after the ease of economic sanctions under the Nuclear Deal of 2015. Modern trade is dependent on banking ties and Iran is currently re-establishing its ties to make the most of the Post-Nuclear Deal phase. FATF’s 2016 statement indicated that the counter-measures against Iran would be re-imposed should Iran fail the assessment in 2017.

Currently, FATF urges all jurisdictions to continue to advise their financial institutions to apply “Enhanced Due Diligence” to business relationships and transaction with Iran. Failure to pass the assessment will place Iran back among jurisdictions against which counter-measures are enforced. Relisting is harmful to the economy as it deters foreign investment by increasing “the cost of compliance”. Relisting leads to stringent requirements for identifying clients (“KYC” and “CDD”), enhancement of relevant reporting mechanism or systematic reporting of financial transactions. Consequently, it decreases the trust in doing business with Iran due to signals of heightened financial risks for foreign investors.

The assessment will soon reveal whether Iran’s efforts were enough to persuade FATF of the overall compliance and relative success in line with the promised Action Plan.

II. The Assessment

The assessment will be based on FATF Recommendations; Evaluation Methods; and, Methodology. Evaluations are comprised of two inter-related bases: (1) Technical Compliance, which evaluates whether the requisite laws, regulations and measures are in force and effect and whether the supporting institutional AML/CFT frameworks are present; and, (2) Effectiveness

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12 See, U.S. Department of State, Joint Comprehensive Plan of Action, available at: https://www.state.gov/e/eb/tf/spi/iran/jcpoa/

of the measures in place, which analyzes the extent to which a country has achieved AML/CFT outcomes. Both criteria are of equal importance in the assessment process.\textsuperscript{14}

- Technical Compliance

Technical compliance evaluates whether the requisite laws, regulations and measures are in force and effect and whether the supporting institutional AML/CFT frameworks are present. It cannot be done in a vacuum and without consideration for the element of 'time'. A comprehensive evaluation requires a reasonable passage of time and a quantitative and qualitative analysis of statistics, data and outcomes.

- Effectiveness

Assessing Effectiveness, is based on the extent as to which certain outcomes are achieved. Iran is responsible to persuade and convince FATF experts of its achievements between 2016 and 2017.

The framework is complex and is comprised of eleven immediate outcomes. Based on FATF Methodology, every country is assessed separately considering its risk profile and structural and contextual information. FATF’s favorite outcomes can be achieved through lawmaking process; policy making; law enforcement programs; supervisions; intelligence activities; or, preventive measures in place.

The final goal is to appreciate the country’s overall AML/CFT system and how well the system is working altogether.

III. What are the Chances of Success and Failure?

The method by which a country mitigates risk and threats of AML/CFT are measured by laws, policies and enforcement regimes, inter alia, and their implementations. Therefore, Technical Compliance and Effectiveness, affect each other in different ways. Safety, security, and integrity of financial systems and the broader economy are measured by a hierarchy of Eleven Immediate Outcomes that FATF considers on a subjective basis.\textsuperscript{15}

The final determination is based on successful demonstration of sufficient progress in implementing the Action Plan\textsuperscript{16}. Country’s totality of circumstances, context, and the number and the relative importance of the criteria met or not met are among most important determining factor.\textsuperscript{17}

Regarding laws and regulations in place as of 2016, money laundering was already recognized as a crime punishable under the Penal Code in Iran. A significant development during 2016, was the introduction of the first set of independent law on combating terrorism finance in

\textsuperscript{14} FATF Methodology (update of 2017), available at: \url{http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology-March%202017-Final.pdf}

\textsuperscript{15} Id.

\textsuperscript{16} Id.

\textsuperscript{17} Id.
March. The new law includes most deterring and preventive measures adopted by modern legislations.

It embodies seventeen articles and accounts for adherence to certain International Conventions against terrorism; International Cooperation in fight against terrorism finance; Customer Due Diligence measures; Know Your Client measures; establishment of Financial Intelligence Units; Reporting Requirements; Asset Freezing; recognition of terrorism financing as a crime punishable by law (imprisonment and monetary penalties and even execution); and, Record Retention.

With a subjective assessment system in place, balanced on the country’s context, in theory, author anticipates that Iran has a chance to meet the FATF’s scrutiny in 2017 for the following reasons:

- Anti-Money Laundering law in place and effective (2008);
- Promulgation of the first independent set of CFT law (2016) and mandatory implementation of the law by financial institutions like banks;
- Criminalization of Money Laundering and Terrorism Financing in the CFT law;
- International Judicial and Intelligence Cooperation (subject to Constitutional restrictions);
- International Cooperation in the prosecution process among local and international bodies (subject to reciprocity);
- Recognition of terrorism as a crime under international conventions;
- Mandatory Reporting requirements at the Government and Private sector levels;
- Recognition of liability for legal entities as well as individuals for failure to report;
- KYC and processes of identification of customers in financial transactions;
- Five-years mandatory Records Retention policy for financial institutions (after the transaction is completed);
- Mandatory obligation to Report Suspicious Activity to the AML High Commission; and,
- Adoption of policy towards protection of Whistleblowers.\(^\text{18}\)

However, next rounds can be more challenging when statics are released, and effectiveness of outcomes are evaluated. Iran has always criticized certain U.S. sanctions that prevent access to relevant technology and training by U.S. companies and U.S. persons. There have been debates over the definition of terrorist groups as referred to in Iranian new legislation and international conventions. Iran needs to provide increased clarity in its financial and banking system; advance its KYC provisions; implement a system for identifying and forfeiting assets and Asset Sharing; and, demonstrate proportionate success in identifying and neutralizing incidents of corruption during the next 12 months.

This is a long and winding road to compliance, which requires constant efforts on the part of Iranian banking system.

\(^{18}\) See, Islamic Republic of Iran, The Law on Combating Terrorism Finance (2016).
I. Introduction

From the start of 2018, all entities manufacturing packaged retail and insurance-based products (“PRIIPs”) for sale to retail investors in the EU and entities advising on or selling PRIIPs to retail investors in the EU will be required to comply with a new set of rules as set out in the Regulation on key information documents (“KIDs”) for packaged retail and insurance-based investment products (“PRIIPs Regulation”).

With the clock ticking, entities should take stock of the new requirements and, if applicable, start taking active steps to prepare for the PRIIPs Regulation.

II. Background

Aim

The aim of the PRIIPs Regulation is to encourage efficient EU markets by helping retail investors to better understand and compare the key features, risks, rewards and costs of different PRIIPs, through access to a highly prescriptive and consumer-friendly three page Key Information Document. The PRIIPs KID is similar, but not identical, to the UCITS KIID.

Legislative Framework


III. What is a PRIIP?

PRIIPs stands for Packaged Retail and Insurance-based Investment Products. A PRIIP is an investment where, regardless of its legal form, the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets that are not directly purchased by the retail investor; or an insurance-based investment product which offers a maturity or surrender value that is wholly or
partially exposed, directly or indirectly, to market fluctuations. PRIIPS include investment funds, insurance-based investment products, retail-structured securities and structured-term deposits.

Stakeholders will need to review product ranges to identify PRIIPs. Identifying whether a particular product is a PRIIP may not be straightforward as the concept of ‘exposure to reference values’ is wide. In some cases, affected entities will need to consider the specific terms of a product before determining whether or not it is a PRIIP.

IV. Scope - Who will the PRIIPs Regulation apply to and what are affected entities required to do?

The PRIIPs Regulation applies to persons who:

- manufacture PRIIPs for sale to retail investors in the EU, for example, fund managers, life insurance companies, credit institutions and investment firms.

- advise on or sell PRIIPs to retail investors in the EU, for example, stockbrokers, distributors, advisers and other firms that provide advice to retail clients on funds, structured products and derivatives.

A PRIIP manufacturer (or any other person who changes an existing PRIIP, such as a distributor) is required to produce a PRIIPs KID and publish each PRIIPs KID on their website.

A person who advises a retail investor on a PRIIP or sells a PRIIP to a retail investor must provide the retail investor with a PRIIPs KID in good time before any transaction is concluded. However, the responsibility to produce the PRIIPs KID rests with the manufacturer.

Where the retail investor initiates the transaction by means of distance communications, the PRIIPs KID may be provided after the conclusion of the transaction, as long as it is not possible to provide the PRIIPs KID in advance and the retail investor consents. The retail investor must be told that it is not possible to provide the PRIIPs KID in advance, and that they can delay the transaction in order to receive and read the PRIIPs KID before concluding the transaction.

It is important to note that the PRIIPs Regulation only applies if the PRIIP is made available to retail investors. The definition of a “retail investor” under the PRIIPs Regulation is in essence very restrictive and defined as meaning a “retail client” as set out in Directive 2014/65/EU (“MiFID II”), which is a client “who is not a professional client”.

V. Which Irish Funds are considered PRIIPs?

UCITS Funds

UCITS fall within the definition of PRIIPs but are exempt from the requirement to produce a PRIIPs KID until 31 December 2019 due to the UCITS KIID regime.
While the UCITS KIID shares similar goals as the PRIIPs KID, there are significant differences between the two:

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<thead>
<tr>
<th>UCITS KIID</th>
<th>PRIIPS KID</th>
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<td>Two pages</td>
<td>Three pages</td>
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<td>Risk indicator based on</td>
<td>Risk indicator based on market risk and credit</td>
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<td>market risk</td>
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Whilst UCITS are exempt from the PRIIPs KID regime until 31 December 2019, there may be situations where a UCITS could be required to produce data required for a PRIIPs KID before 31 December 2019. If we consider the case where UCITS are sold via unit linked insurance products for instance, there will be an obligation on the life insurer (as the PRIIP Manufacturer) to produce a PRIIPs KID for the underlying investment, the UCITS Fund in this case. This will necessitate data exchange between the asset manager and the life insurer as the insurer will require data input from their asset managers in order to produce the PRIIPs KID.

**Retail Investor Alternative Investment Funds**

RIAIFs generally fall within the definition of PRIIPs and will be required to produce a PRIIPs KID from 1 January 2018 where they are sold to retail investors.

**Qualified Investor Alternative Investment Funds**

QIAIFs are generally out of scope given that they are typically marketed to non-retail investors. As counterintuitive as it may seem, one surprising consequence for QIAIFs is that the definition of “Qualifying Investor” under the Central Bank AIF Rulebook may in certain limited circumstances bring a QIAIF within the definition of a PRIIP where QIAIFs do not limit investor eligibility to professional clients under MiFID. QIAIF managers may need to consider this potential issue.

**VI. Content of PRIIPs KID**

The PRIIPS RTS specify the exact contents of the PRIIPs KID. The PRIIPs KID must outline the product's aims, how risky it is, when investors can get their money back, how much it costs and its expected returns. All of this
information must be set out in a standard way, irrespective of the type of investment product.

More specifically the PRIIPs RTS provides for:

- a mandatory template for the PRIIPs KID, covering the texts and layout to be used;
- a methodology for the assignment of each PRIIP to one of the seven classes in the summary risk indicator and narrative explanations to be included;
- details on performance scenario and a format for their presentation, including possible performance for different time periods;
- a methodology for the calculation of costs and the requirements relating to the presentation of costs;
- rules on revision and re-publication of the PRIIPs KID; and
- rules regarding the timeframe for providing the PRIIPs KID to a retail investor to ensure they have sufficient time to consider its contents when making an investment decision.

VII. Some other Issues to consider

Data Exchange Model

The PRIIPS Regulation will necessitate data exchange between different stakeholders of a PRIIP. For example, insurers may need data from fund manager as they will be required to provide PRIIP KIDs for their insurance products that have an investment component managed by an independent asset manager. An appropriate data exchange model should be implemented among stakeholders.

Review of Distribution Process

The distribution process and relevant agreements governing the distribution process should be reviewed to ensure compliance with the PRIIPs Regulation and clarify the respective obligations and liabilities of the manufacturer and adviser/seller in relation to the PRIIPs KID.

Review of process governing production and translation of marketing material of PRIIP

The PRIIPs Regulation requires marketing communications that contain specific information relating to the PRIIP shall not include any statement that contradicts the information contained in the PRIIPs KID or diminishes the significance of the PRIIPs KID. In addition, marketing communications shall indicate that a PRIIPs KID is available and supply information on how and from where to obtain it, including the PRIIP manufacturer's website. The PRIIPS Regulation also requires that if a PRIIP is promoted in a Member State through marketing documents written in one or more official languages of
that Member State, the PRIIPs KID shall at least be written in the corresponding languages.

The arrangements and agreements governing production of marketing material should be reviewed to ensure these requirements are complied with.

VIII. How can Dillon Eustace help?

Dillon Eustace has a dedicated PRIIPs working group. Please contact your usual Dillon Eustace contact with any queries you may have.