

# United Kingdom: FCA consults on OFR operationalisation

## In brief

On 4 December 2023, the FCA published a [consultation](#) on rules and guidance to integrate the Overseas Funds Regime (OFR) into the Handbook and to enable recognition of overseas funds from jurisdictions approved by HM Treasury. The new rules and guidance will operationalise the OFR, implementing the regime's framework to allow recognised overseas funds to be marketed to UK retail investors. The proposals include the information to be submitted with an application for recognition, notifications of changes, and enhanced disclosures regarding lack of access to the Financial Services Compensation Scheme (FSCS) and Financial Ombudsman Service (FOS).

## Background and scope

The OFR allows investment funds domiciled overseas to be sold to UK retail investors, based on the principle of equivalence. If a jurisdiction has been approved as equivalent, the FCA can then recognise funds or "schemes" in the specified scheme category authorised in that jurisdiction. A jurisdiction's regulatory regime can be approved as equivalent by the Treasury if that regime:

- is assessed as offering "adequate arrangements for co-operation" between the FCA and the jurisdiction's home state regulator; and
- provides for equivalent consumer protection outcomes to the UK regime.

Recognition under the OFR depends on the Treasury making an equivalence determination. **Importantly, no equivalence determinations have been made so far.** The Treasury is currently considering the equivalence of UCITS that are authorised and supervised in the EEA. The FCA's consultation has been launched with a view to the possibility that the Treasury will make an equivalence determination in relation to EEA UCITS, and the proposals are therefore set out with UCITS equivalence in mind. Pending an equivalence decision, operators of EEA schemes will be given landing slots by the FCA indicating the date range in which to apply for recognition under OFR.

While the FCA's proposals focus on UCITS equivalence, the OFR itself encompasses two separate equivalence regimes for overseas retail investment funds and money market funds (MMFs). The FCA is not at this stage consulting on any information that it may need to obtain in future should the Treasury make an equivalence determination in relation to the recognition of MMFs.

It is important to note that, although the OFR is designed for retail funds, retail AIFs such as Irish RIAIFs would not initially be eligible for inclusion in the OFR to the extent that the Treasury solely approves its use for UCITS and MMFs; rather, they will need to go through the existing recognition process under section 272 of the Financial Services and Markets Act 2000 (FSMA).

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## Interaction with s272 regime

The recognition regime under s272 FSMA establishes a recognition process for funds established outside the UK. The s272 regime remains in place alongside the OFR and can be used for individual funds that do not fall within the scope of an equivalence determination, but still wish to market to UK retail investors. The process of individual recognition under s272 is lengthy and time-consuming: it requires the FCA to undertake an in-depth assessment of the individual scheme and its country's legislative regime, and the FCA must be satisfied that a scheme meets several tests in legislation and affords adequate protection to investors (including an assessment of the suitability of both the operator and depositary).

Funds that are capable of being recognised under the OFR's retail equivalence regime cannot be recognised under the s272 regime.

Under the FCA's proposed rules, funds which are recognised under the OFR will be 'recognised schemes' for the purposes of the FCA Handbook in the same way as s272 recognised schemes today. This means recognition of a scheme under the OFR will also bring with it further benefits attaching to recognised schemes. For example, OFR recognised funds will be considered 'permitted links' under the Conduct of Business rules and be suitable for investment by unit-linked life policy providers.

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## Timing

The target date by which the OFR will be operational remains somewhat unclear. The majority of the legislative provisions establishing the OFR are in force, and the Treasury has commenced its equivalence assessment in relation to EEA UCITS.

Responses to the FCA's consultation are due by 12 February 2024. Mhairi Jackson, the FCA's asset management policy lead, **recently indicated that the FCA is working to open the OFR to funds from April 2024**, although the FCA's consultation does not hold itself to that timeline, noting instead that it intends to issue a final policy statement and rules in the first half of 2024.

Despite the lack of clarity on timing, it is clear that the FCA is preparing for the OFR to be up and running soon: the regulator **recently asked for UCITS operators in the temporary marketing permissions regime (TMPR) to check and update their contact details** with a view to the forthcoming allocation of landing slots.

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## Disclosure requirements

The consultation sets out key data requirements for registration of funds under the OFR. The details, which the FCA notes would normally be disclosed, include the following:

- Identifying information, including basic details such as the fund's name, LEI, domicile, structure, and a confirmation statement that the fund has been authorised in its home state. The FCA notes that it is likely to refuse an application for a scheme whose name was identical to the name of an already authorised UK scheme, or whose name is inappropriate or misleading.
- Scheme profile information, including its investment objective, policy and strategy, its target UK investors and its past performance.
- Information about fees and charges at scheme and share class level, including initial and exit/redemption charges, performance fees and any other relevant fee or charge related to the scheme.
- Characteristics of the unit or share classes.
- Information on key parties connected to the scheme, including those who have an ongoing relationship with or influence on its management, or have played a critical role in establishing it. This is intended to identify parties such as the management company, depositary, and any sub-managers.
- Information about marketing and distribution, including the identity of the UK financial promotion approver, regardless of whether the approver is a group company.

Scheme operators will need to notify the FCA of changes made to an OFR recognised scheme's most important characteristics that may impact the FCA's assessment of it, or alter the information widely accessible to investors via the FCA register. Some of these changes will require a 30-day prior notification (for example, changes to a scheme's name or legal structure, a suspension of dealing in units or shares, or a fundamental change to the scheme's investment policy). For other changes,

operators will need to notify the FCA within 30 days of those changes. Schemes will also need to confirm on an annual basis that all the data the FCA holds is up to date.

There are also certain changes and events that operators of OFR recognised schemes must notify the FCA about when they occur following recognition, including for example a change of a scheme's operator, trustee or depositary, or representative of the operator in the UK.

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## Enhanced disclosures regarding lack of access to FSCS and FOS

The OFR will operate outside the scope of the FOS and FSCS – the FOS and FSCS will generally not be able to consider complaints or claims against non-FCA authorised operators or depositaries concerning the management of OFR recognised schemes, or the services they provide. The FCA proposes to require scheme operators to make certain enhanced disclosures to make this clearer to consumers.

However, regulated activities provided by other FCA-authorised firms to an investor, in relation to an OFR recognised scheme, will be in scope of the FOS and FSCS (for example, a financial adviser in the UK recommending the scheme, or a platform service provider offering an execution-only dealing service in relation to the scheme). Similarly, where a UK-authorised sub-manager provides investment management services to an OFR recognised scheme when acting as the delegate of that scheme's operator, both UK and overseas investors in the scheme could potentially benefit from compensation paid by the FSCS if the UK sub-manager becomes unable to meet its liabilities to its customers.

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## Refusal of recognition, suspension or revocation of recognition and public censure

The FCA proposes to align the processes for refusals, suspensions and censure power relating to OFR schemes with those for s272 schemes, so they are treated consistently. In other words, registering an overseas fund under the OFR will come with a degree of additional supervisory and enforcement risk.

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## UK representative

The FCA intends to require the operators of OFR recognised schemes to continue providing UK representative facilities to UK investors. For existing unitholders, it should be possible to use the UK facilities to give instructions to buy and sell units, update essential information such as a change of address, and submit complaints. Although most of the services to be provided by a UK representative will not be regulated activities, it is likely that accepting instructions to buy and sell units will fall within the scope of one or more regulated activities (for example, arranging deals in investments). Firms will need to satisfy themselves as to whether they are carrying on regulated activities by way of business, and to ensure that they are appropriately authorised by the FCA for those activities.

The FCA intends to allow OFR recognised schemes to adopt a “virtual presence” in the UK, at least in cases where the terms and conditions of investment foresee all interactions taking place via electronic media, or where the customer has individually consented to such arrangements – this is in keeping with recent changes to the UCITS Directive, which among other things allow facilities to be provided within the EEA without a physical presence in the host state. However, the FCA proposes to retain the requirement for a physical address where direct investors have not previously used electronic means of communication and do not consent to do so. In practice, given that most investors will hold units via an intermediary whose nominee is the registered unitholder, it is likely that few if any OFR recognised schemes will have unitholders in this situation who may require physical UK facilities to be available to them. So in the long term, the need for physical office facilities is likely to disappear.

The FCA intends to review the rules on UK facilities for s272 FSMA recognised schemes in due course, to consider whether to bring them in line with the proposals for OFR schemes.

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## Financial promotions

Currently, EEA UCITS in the TMPR are able to communicate financial promotions themselves, because they are deemed under FSMA to be authorised persons. However, similar to the approach taken for funds recognised under s272, operators of funds

recognised under the OFR will not be deemed to be authorised persons. This means that, notwithstanding the recognition of a scheme, financial promotions relating to units in an OFR recognised scheme will need to be communicated or approved by a UK authorised firm, unless a financial promotion exemption applies (such as, for example, the intragroup exemption from the financial promotions gateway). In practice, most overseas operators not benefitting from a UK authorised firm within their groups will still need to consider the financial promotion restrictions in the UK. It will be up to scheme operators to decide whether they choose for the functions of facilities provider and approver of non-exempt financial promotions to be carried out by the same authorised person.

The FCA notes that it intends to closely scrutinise, as part of the OFR application process, any promotional payments to entities (such as sponsors) associated with marketing or distributing the scheme.

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## Sustainability Disclosure Requirements

The Sustainability Disclosure Requirements (SDR) regime does not apply to schemes which are domiciled overseas. However, the FCA's aim is for all schemes that are marketed to UK investors to be subject to the same SDR requirements. The FCA will work with the Treasury to understand the options for extending the SDR to overseas recognised schemes, including those marketing under the OFR.

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## Additional requirements

It is worth noting also that, as part of an equivalence determination under the OFR, the Treasury may decide to set conditions by imposing certain additional requirements for recognised schemes to comply with, which the FCA would then need to consult on before the regime could be fully implemented. Mhairi Jackson has previously indicated that while the Treasury has not yet made a decision as to whether additional requirements will be imposed, the FCA is looking carefully at the valuations of assets in funds.

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## Next steps

The consultation closes to comments on 12 February 2024. As noted above, the final timing for operationalisation remains unclear: while the FCA previously expressed an intent to open the OFR to funds from April 2024, its consultation will commit only to the publication of final rules during the first half of 2024. Nevertheless, EEA UCITS (both in the TMPR, and those intending to submit new applications for recognition under the OFR) should keep a close eye on the FCA's movements regarding landing slots, and begin to prepare for the OFR's implementation. While an equivalence determination is awaited, funds should review the regime's requirements to ensure they are eligible, consider whether arrangements will need to be made for a UK representative and/or financial promotions approver, and review promotions and fund documentation to prepare for enhanced disclosures regarding FSCS and FOS availability.

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