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Banking Bulletin

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SEC Adopts the ASEAN Sustainable and Responsible Fund Standards and Establishes Rules on Recognition of Foreign Collective Investment Schemes

On April 13, 2023, the Securities and Exchange Commission ("***SEC***") issued Memorandum Circular No. 4, Series of 2023 ("***MC 4-23***") to adopt the ASEAN Sustainable and Responsible Fund Standards ("***ASEAN SRFS***") and establish rules on the qualifications of local investment companies under the ASEAN SRFS and the recognition of foreign investment collective schemes qualified under the ASEAN SRFS that seek to offer in the Philippines under the ASEAN Collective Investment Scheme ("***CIS***") framework ("***ASEAN CIS Framework***").

MC 4-23 took effect on April 27, 2023, after its publication in two newspapers of general circulation in the Philippines.

MC 4-23 applies to (i) investment companies, including sub-funds of an umbrella fund, and fund managers that seek to qualify under the ASEAN SRFS and want to either offer locally or on a cross-border basis under the ASEAN CIS Framework, and (ii) CIS Operators and Foreign SRFs that seek to offer in the Philippines under the ASEAN CIS Framework.

General

1. What is the ASEAN CIS Framework?

The ASEAN CIS Framework is an initiative of the ASEAN Capital Market Forum ("***ACMF***") which allows fund managers operating in ASEAN member jurisdictions to offer CIS, such as unit trust funds or mutual funds, constituted and authorized in that jurisdiction, in other member jurisdictions under a streamlined authorisation process. This process is covered under the Memorandum of Understanding on the Streamlined Authorisation Framework for Cross-border Public Offers of ASEAN Collective Investment Schemes, as supplemented

("***MOU***").

2. What is the ACMF?

The ACMF is composed of a group of capital market regulators from Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Singapore, Thailand, Vietnam, and the Philippines.

3. Which ASEAN member jurisdictions have adopted the ASEAN CIS Framework?

As of the date of this bulletin, there are four signatories to the MOU: Securities Commission Malaysia, Monetary Authority of Singapore, the Securities and Exchange Commission of Thailand, and the Securities and Exchange Commission of the Philippines (the jurisdictions of the ACMF members that are signatories to the MOU are collectively referred to as "***Member Jurisdictions***").

4. What is the ASEAN SRFS?

The ASEAN SRFS was developed by the ACMF, in line with the growing importance of sustainable finance in ASEAN and the actionable recommendations in the Roadmap for ASEAN Sustainable Capital Markets, to provide the minimum disclosure and reporting requirements for CIS that seek to qualify under the ASEAN SRFS and to address the need for a comparable, uniform and transparent disclosure of information to mitigate the risk of, among others, greenwashing (the process of conveying a false impression or misleading information about how a company's products are environmentally sound[1]).

Philippine Investment Companies

5. What kinds of Philippine entities may qualify under the ASEAN SRFS?

Investment companies (in general terms, this means any issuer which is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities), including any sub-fund of an umbrella fund, may qualify under the ASEAN SRFS by showing satisfactory compliance with the following:

(a) registration under the Investment Company Act (Republic Act No. 2629 or "ICA") and the Securities Regulation Code ("Republic Act No. 8799 or "SRC") and their respective implementing rules and regulations ("IRR");

(b) compliance with SEC Memorandum Circular No. 11, Series of 2022 on Sustainable and Responsible Investment Funds ("SRIF") and any amendments thereto (the "Local SRIF Rules"); and

(c) compliance with the ASEAN SRFS and any amendments thereto.

6. What is the process for qualification?

The qualification process is initiated by the entity (referred to in item 5) submitting a notarized and complete SEC ASEAN SRF Form (attached as Annex B of MC 4-23) signed by at least the majority of the Board of Directors of the investment company and the fund manager.

The application is subject to a filing fee of PhP10,000.00 plus 1% Legal Research Fee ("***LRF***").

If the SEC is satisfied that the applicant complies with the aforementioned requirements, the SEC will issue a letter qualifying the investment company or sub-fund as an SRF.

7. How may Philippine investment companies qualified under the ASEAN SRFS make offers under the ASEAN CIS Framework?

Philippine entities that intend to offer shares on a cross-border basis under the ASEAN CIS Framework must:

(a) comply with the requirements for qualification in Q4 above; and

(b) comply with SEC Memorandum Circular No. 9, Series of 2021 or the Rules on Authorization of an Investment Company as a Qualifying CIS and Recognition of a Foreign CIS under the ASEAN CIS Framework ("***MC 9-21***").

If the SEC is satisfied that the applicant complies with the aforementioned requirements, the SEC will issue a Standard Letter recognizing the applicant as qualified to make offers under the ASEAN CIS Framework.

Foreign Collective Investment Schemes

8. Which foreign collective investment schemes may be offered in the Philippines under the ASEAN CIS Framework?

The foreign collective investment scheme must be a

[1] https://www.investopedia.com/terms/g/greenwashing.asp

Foreign SRF as defined in MC 4-23. This refers to a Foreign CIS that has also been qualified as an ASEAN SRF in a Member Jurisdiction other than the Philippines.

A Foreign CIS refers to a Qualifying CIS under the ASEAN CIS Framework constituted in a Member Jurisdiction other that the Philippines and is permitted/authorized to be offered to the general public of that Member Jurisdiction.

A Qualifying CIS means a CIS constituted or established in its Home Jurisdiction which has been approved by its Home Regulator for offer to the public in the Home Jurisdiction and assessed by its Home Regulator as suitable to apply to a Host Regulator for its shares/units to be offered to the public cross-border in the Host Jurisdiction pursuant to the ASEAN CIS Framework.

In addition, the Foreign SRF must show satisfactorily show compliance with the following:

(a) the Foreign SRF and CIS Operator (the person or entity which is licensed/registered with, or approved by, the securities regulator in the ASEAN jurisdiction to operate or manage CIS that may be offered in that jurisdiction) should both comply with SEC MC 9-21, and any amendments thereto, with respect to the approval and recognition of Foreign CIS to be offered in the Philippines;

(b) proof of qualification as an ASEAN SRF, which is in the form of the Standard Letter issued by its home regulator that it has qualified as an ASEAN SRF;

(c) submission of a duly accomplished SEC ASEAN SRF Form (attached as Annex B of MC 4-23);

(d) payment of an application fee of PhP80,000.00 plus 1% LRF; and

(e) compliance with requirements under the Local SRIF Rules in relation to the (i) name of the Foreign SRF and (ii) incorporation of additional disclosures in the prospectus.

9. How do qualified Foreign SRFs apply for recognition to be offered in the Philippines under the ASEAN CIS Framework?

Foreign SRFs should apply for recognition to be offered locally in the Philippines.

The application for recognition must be made by the Foreign SRF/CIS Operator or appointed local representative to the SEC, by submitting, in both electronic and physical form:

(a) a duly completed SEC ASEAN SRF Form (attached as Annex B of MC 4-23);

(b) a copy of the prospectus reflecting the additional disclosure requirements referred to in Q8 above; and

(c) other relevant documents that may be required.

If the SEC is satisfied that the Foreign SRF meets the requirements under MC 4-23, the SEC shall issue a letter recognizing the Foreign SRF.

10. What are the guidelines for the Foreign SRF's marketing materials and disclosures?

The following guidelines will apply to information regarding the Foreign SRF to be included in the marketing materials, advertisements, publications, and communications, including website content, which targets existing or potential Philippine investors:

(a) it must present a fair, balanced, and consistent description of the Foreign SRF;

(b) the sustainability aspects mentioned should be consistent with regulatory documents filed with the SEC; and

(c) the marketing materials and other communications should not include untrue statements of material facts, or false or misleading statements.

11. Are there additional reportorial requirements for Foreign SRFs based on MC 4-23?

The following information must be included in the annual and interim reports of a Foreign SRF submitted to the SEC in compliance with MC 9-21:

(a) description of how the Foreign SRF attained its sustainable investment objective during the reporting period, including a brief description of actual non-ESG investments and their percentage of the Foreign SRF's net asset value ("***NAV***");

(b) description of the strategy that is most reflective of the Foreign SRF's sustainable investment strategies, if multiple strategies are used; and

(c) description of divested investments to rectify any breach of the threshold or inconsistency/ies in the investment policies and strategies made during the reporting period and their percentage out of the foreign SRF's NAV, where applicable.

12. What should Foreign SRFs do when there is a breach of ESG investment thresholds and/or inconsistencies with sustainability investment objectives?

The Foreign SRF/CIS Operator or its local representative shall inform he SEC within five business days after it becomes aware of any of the following:

(a) a breach of the ESG investment threshold where the Foreign SRF's investments in ESG account for less than 2/3 of the NAV of the Foreign SRF, including a description of the action taken or to be taken to rectify the breach; or

(b) inconsistency of an undertaking investment/s with the Foreign SRF's stated sustainable investment objective, including any divestments made or any other action taken or to be taken to rectify the inconsistency.

The Foreign SRF/CIST Operator shall rectify the breach/inconsistency as soon as practicable, but shall not be more than 30 business days from date of discovery of the breach/inconsistency.

Once the breach/inconsistency has been rectified, the Foreign SRF/CIST Operator or its local representative must also notify the SEC through the filing of a SEC Form 17-C (Current Report) within five business days from rectification, together with a presentation of investments vis-à-vis the sustainable investment objective of the Foreign SRF, to be made in accordance with the template provided in Annex C of MC 4-23.

SEC Administrative Actions

13. What are the consequences for non-compliance with the Local SRIF Rules and/or the ASEAN SRFS?

For investment companies, including any sub-funds of an umbrella fund, the SEC may revoke the qualification as an ASEAN SRF.

For Foreign SRFs, the SEC may suspend or revoke the recognition of a Foreign SRF if:

(a) it is no longer compliant with MC 4-23;

(b) its qualification as an ASEAN SRF has been revoked by its home regulator;

(c) it fails to comply with the reporting and rectification requirements relating to breach of ESG investment threshold or inconsistency with the sustainable investment objective;

(d) its authorization as a Qualifying CIS has been suspended or revoked by its home regulator; and

(e) the approval or recognition for the sale or offering of units of the Foreign CIS in the Philippines has been suspended or revoked by the SEC.

In addition, the suspension or revocation of an investment company's qualification or a Foreign SRF's recognition as an ASEAN SRF shall be cause for removal of its name in the SEC website/microsite dedicated for investment companies as an ASEAN SRF.

The suspension or revocation of the qualification of an investment company as an ASEAN SRF shall likewise be cause for the removal of its name from the list of ASEAN SRF in the ACMF microsite dedicated for the ASEAN SRFS.

14. May an investment company or a Foreign CIS whose qualification or recognition as an ASEAN SRF has been revoked by the SEC apply for re-qualification or re-recognition?

Yes. These entities re-qualify or be recognized anew and be reinstated list of ASEAN SRF in the ACMF microsite, subject to the following:

(a) a letter request to requalify/be recognized anew as an ASEAN SRF has been filed with the SEC which states, among others, the reasons why the disqualified/derecognized entity should be reinstated;

(b) all outstanding monetary penalties have been paid;

(c) the requirements for qualification and recognition (as mentioned above) have been complied with; and

(d) there has been compliance with any other directives of the SEC.

15. May entities voluntarily withdraw their qualification as an ASEAN SRF/recognition as a foreign SRF?

Yes. The withdrawing entity must notify the SEC in writing within five days after approval of its Board of Directors, or in case of a foreign SRF, its equivalent officers, of such intention which shall include information on the timeline and procedures to implement such withdrawal.

16. What penalties are imposed on investment companies and/or its fund manager, as well as CIS Operators/Foreign SRFs?

Violation of MC 4-23 shall subject the investment company and/or its fund manager to the same sanctions

provided under Local SRIF Rules, aside from the removal of its name in the SEC and ACMF microsite dedicated for ASEAN SRFS.

The CIS Operator/Foreign SRF shall be subject to the penalties ranging from a reprimand up to fines of at least PhP20,000 up to PhP200,000 for violations of MC 4-23 in relation to

(a) overemphasizing sustainability or ESG features in any communication or advertising materials;

(b) failure to report or delays in report of breaches of recited ESG threshold or inconsistency with sustainable investment objectives of the ASEAN SRF within the time limit under MC 4-23; or

(c) failure to rectify or delay in rectifying breaches within the time limit under MC 4-23.

These penalties are without prejudice to other actions and sanctions that the SEC may impose under the IRA, SEC, their respective IRRs, the Revised Corporation Code of the Philippines, and all other laws that may subsequently implemented by the SEC, and all other rules and regulations that the SEC may issue in the exercise of its mandates. ■

BSP Clarifies Exclusions from Real Estate Loan Limit and Stress Test

On 28 April 2023, the Bangko Sentral ng Pilipinas ("***BSP***") issued Memorandum No. M-2022-039 and clarified the definition of infrastructure projects for public use as indicated in Section 363-A of the Manual of Regulations for Banks ("***MORB***") on Limits on Real Estate Exposures of Universal and Commercial Banks.

1. What are the Real Estate Loan Limit and the Real Estate Stress Test?

Under Section 363-A(a) of the BSP's Manual of Regulations for Banks (the "MORB"), the "real estate loans" of a universal bank or commercial bank must not exceed twenty-five percent (25%) of its total loan portfolio, net of interbank loans.

Under Section 363-A(b) of the MORB, the "real estate exposure" of a universal bank or commercial bank must not exceed certain percentages of its capital. Currently, the thresholds are six percent (6%) of a universal bank or commercial bank's Common Equity Tier I capital ratio and ten percent (10%) of its risk-based capital adequacy ratio, on a solo and consolidated basis (after assuming that twenty-five percent (25%) of the bank's real estate exposure is written off).

2. What are considered "real estate loans"?

For purposes of determining compliance with the real estate loan limit, the term "real estate loans" (or "RELs") refers to loans granted to land developers, construction companies or other borrowers for the acquisition and development of land and/or construction of buildings and structures, including housing units for sale/lease and/or for use in retail/wholesale, manufacturing or other income-generating purposes, including loans for the land development and construction of residential properties. Purchases by banks of receivables under contracts to sell executed between the real estate developers and home buyers on a with recourse basis shall be considered loans to real estate developers and shall be classified as commercial RELs.

Technically, the MORB also classifies "loans extended to individual households for purposes of financing the acquisition, construction, and/or improvement of housing units and acquisition of any associated land that is or will be occupied by the borrower, regardless of amount" as RELs, but these are expressly excluded for purposes of determining compliance with the twenty-five percent (25%) limit. The following are also excluded in reckoning compliance with the REL limit:

(i) loans extended to land developers/construction companies for the purpose of development and/or construction of socialized and low-cost residential properties as defined under existing guidelines of the Department of Human Settlements and Urban Development for the implementation of government housing programs, which are intended for sale to individual households;

(ii) loans to the extent guaranteed by the Philippine Guarantee Corporation; and

(iii) loans to the extent collateralized by "non-risk assets," as defined by the BSP under existing regulations (e.g., cash, debt securities issued by the Bangko Sentral or the Philippine government, and deposits maintained in the lending bank and held in the Philippines).

3. What are considered part of the "real estate exposure" of a universal bank or commercial bank?

For purposes of determining compliance with the REST, the term "real estate exposure" refers to:

(a) *commercial real estate loans*, or loans granted for purposes of financing real estate activities to: (i) individuals, other than residential real estate loans granted to individual households for occupancy; (ii) land developers/construction companies; and (iii) other corporate borrowers, such as real estate brokers, real estate lessors, and property management companies;

(b) investments in *debt securities issued by land developers/construction companies and other corporate borrowers* for purposes of financing real estate activities; and

(c) investments in equity securities issued by land developers/construction companies and other corporate borrowers for purposes of financing real estate activities. Equity securities issued by holding companies are likewise covered, if proceeds from the issue shall be/has been invested by the holding company in its subsidiary corporation/s that is/are engaged in real estate activities.

"Real estate activities" refer to the acquisition, construction and improvement of real estate; buying and selling of real estate; rental of self-owned or leased real estate; and management of real estate/real property.

4. Are infrastructure loans included in determining compliance with the 25% REL limit and REST limit?

In addition to the loans mentioned in items (i) through (iii) in the response to question 2 above, for purposes of the 25% REL limit, RELs generally do *not* include "loans to finance infrastructure projects for public use." These are loans which "finance the construction, rehabilitation and improvement of highways, streets, bridges, tunnels, railways, railroad, transport systems, ports, airports, power plants, hydropower projects, canals, dams, water supply, irrigation, telecommunications, land reclamation projects, industrial estates or townships, government buildings and housing projects, public markets, slaughterhouses, warehouses, civil work components of information technology networks and database infrastructure projects, solid waste management, sewerage, flood control, drainage, dredging and other infrastructure projects that are intended for public use."

Similarly, for purposes of the REST, the real estate exposure of banks generally does not include loans and investments in debt and equity securities, the proceeds of which are used to finance "infrastructure projects for public use" (as defined above).

5. Are all loans and investments to finance infrastructure projects intended for public use excluded from the computation of RELs and real estate exposures that are subject to the prescribed REL and REST limits?

No, only loans and investments to finance the *construction, rehabilitation and improvement of real estate* relating to infrastructure projects that are intended for public use such as fixed assets, permanent structures, immovable facilities or physical improvements thereon shall be excluded.

6. What items relating to infrastructures intended for public use are not allowed to be excluded from the prescribed prudential limits on real estate and large exposures?

Loans and investments to finance the *general administration and maintenance of operations* of entities

operating or working on such infrastructure projects including, among others, the cost of equipment, machineries and the like, as well as the services and related items are not allowed to be excluded from the prescribed prudential limits.

However, such loans and investments shall be excluded if the expenditure/cost is needed to build, rehabilitate, or improve an infrastructure project for public use and is allowed to be *capitalized* as part of the cost of the fixed asset, permanent structure, immovable facility, or physical improvement.

7. The MORB also provides that loans to finance telecommunications and civil work components of information technology networks and database infrastructure projects are excluded from RELs and real estate exposures of a bank for purposes of determining compliance with the REL and REST limits. What do these exclusions refer to?

These refer to the costs to *construct*, *rehabilitate*, *and improve* the related fixed assets, permanent structures, immovable facilities, or physical improvements thereon such as but not limited to the terrestrial and satellite stations, data center facilities, data recovery sites, or telecommunication towers. Loans to finance such costs are excluded from a universal bank or commercial bank's RELs and real estate exposures for purposes of the REL and REST limits.

However, expenses relating to the *general administration and maintenance of operations* of telecommunication and/or information technology companies including, among others, their expenditures for equipment and services and related items cannot be excluded from the prescribed prudential limits. ■

This bulletin was prepared by SyCipLaw's Banking, Finance and Securities Department. Severino Miguel B. Sanchez and Nicole Kate P. Tan assisted in the preparation of this bulletin.

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