



THE YEAR IN REVIEW

AN ANNUAL SURVEY OF INTERNATIONAL LEGAL DEVELOPMENTS AND
PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2017 • VOLUME 51

INTERNATIONAL LEGAL DEVELOPMENTS YEAR IN REVIEW: 2016

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International Financial Products and Services

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I. Developments in Brazil²

The procedures applicable to public tender offers for the total or partial voluntary acquisition of units issued by real estate investment funds (Fundos de Investimento Imobiliário – FII), executed through auction on the trading system of BM&FBOVESPA S.A. - Bolsa de Valores, Mercadorias e Futuros (BVMF), are presently regulated by BVMF Circular-Letter No. 050/2016-DP, dated May 31, 2016 (CL 50).³ This type of transaction is known as Oferta Pública de Aquisição de Cotas (OPAC).

The OPAC will observe a number of principles for these transactions, including: (a) to be directed without distinction to all holders of units issued by the FII; (b) to be carried out in such a way as to ensure equal treatment to the recipients, allowing them adequate information as to the background of the FII and the offeror so that the recipients may have the necessary elements to decide about the acceptance of the OPAC; (c) to be represented by a Full Trading Participant or a Trading Participant authorized to trade by

* The committee editor of this Year In Review is Mohamed Hashish, Soliman, Hashish & Partners, Egypt. The authors are Alan B. Rabkin, USA, Ibrahim Sattout, ASAR- Al Ruwayeh & Partners, Kuwait, James Stull, King & Spalding, KSA and UAE, Laurent Levac, ASAR - Al Ruwayeh & Partners, Kuwait, Osama Audi, King & Spalding, KSA and UAE, Pouyan Bohloul, Iran, and Walter Stuber, Walter Stuber Consultoria Jurídica, Brazil. The International Financial Products and Services Committee is a very active and vibrant committee focusing on international and comparative legal, regulatory, and supervisory issues related to financial institutions worldwide. We are the primary committee of the Section that provides a broad look at worldwide financial laws, rules and regulations that community banks, commercial banks, investment banks, central banks, pension companies, insurance carriers, investment companies and related financial service providers care the most about. Our membership includes some of the finest financial services lawyers in the world and our world-wide focus is often cutting edge and very current and allows practitioners from within and outside of the United States to quickly and efficiently learn about U.S. laws and world-wide trends. Whether it is a cross-border merger of banks, the legality of Bitcoin in a country or the use of microfinancing in a region, we have the knowledge, programs and resources to assist you as a member of the Committee.

2. Authored by Walter Stuber, Walter Stuber Consultoria Jurídica, São Paulo, Brazil.

3. Edemir Pinto & Cícero Augusto Vieira Neto, *Circular Letter 050/2016-DP*, BM&FBOVESPA (May 31, 2016), *available at* http://www.bmfbovespa.com.br/en_us/regulation/circular-letters-and-external-communications/. CL 50 was issued pursuant to the terms of article 6, section 3 of Instruction 472/2008, amended by Instruction 571/2015, by the Brazilian Securities and Exchange Commission (CVM). *Id.*

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BVMF (the intermediary institution), which should ensure the financial settlement of the OPAC and the payment of the acquisition of remaining units; (d) to be launched with uniform price and payment terms; (e) to be paid at sight and in currency; (f) to be executed through auction on the trading system of BVMF; and (g) to be allowed the conduct or interference of a competing OPAC formulated by a third party other than the offeror or person linked to the offeror.

For the purposes of CL 50, “person linked” means any individual, legal entity, fund, or universality of rights representing the same interest of another individual, legal entity, fund, or universality of rights. Consequently, “outstanding units” mean those units which are not owned by the offeror or any person linked to the offeror.⁴

The offeror, the intermediary institution, the persons linked to them involved in the OPAC (determined or designed), and the persons with whom they are working or assisting in any way will be restricted from trading units issued by the FII object of the offer, and they shall adopt appropriate procedures to ensure compliance with this restriction.

The prohibition of trading referred to above does not apply to the following situations: (a) negotiation on behalf of third parties; (b) operations clearly designed to track real estate reference indices; (c) transactions carried out as a market-maker pursuant to the CVM rules in force; or (d) discretionary portfolio management.

This restriction is applicable based on the protocol of the notice or disclosure to the market of the intention to carry out the offer or the date of the intermediation contract, whichever occurs first, until the close of the auction of the OPAC.

In order to obtain the request for authorization to perform the OPAC, the intermediary institution must send a number of documents and specific information depending on the structure of the OPAC. The competing OPAC shall occur within five days before the date of the auction by a price that it is at least 5 percent higher than the price of the OPAC. The subsequent offers must be at least 1 percent above the price of the highest bidder registered until then. The competing OPAC will acquire the minimum amount of 10 percent of the total units of the FII’s original offer, except if the original offer is made to acquire more than two-thirds of the units of the FII, in which case, the competing OPAC must have the same number of units as the original offer.⁵

The buyer interference at the auction will be allowed, provided that the same conditions applying to the competing OPAC are observed, other than the release of the public notice. The interested party that is willing to

4. Walter Stuber, *Brazil: Procedures for Public Tender Offers for Brazilian Real Estate Investment Fund Units*, MONDAQ (June 9 2016), <http://www.mondaq.com/brazil/x/499100/Project+Finance+PPP+PFI/Procedures+For+Public+Tender+Offers+For+Brazilian+Real+Estate+Investment+Fund+Units>.

5. *Id.*

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interfere in the auction shall inform the Chief Operating Officer at BVMF of its intention, in addition to providing him with information about price, quantity of units, and complete data of the interfering party and of the intermediary institution. BVMF will have a period of ten business days to review the notice of the OPAC. The offeror will also have a period of ten business days from the receipt of the notice analyzed by BVMF to meet the requirements. After receipt of the notice of the OPAC with the requested changes, BVMF will have a deadline of three business days to authorize the holding of the auction of the OPAC.⁶

After examining the documentation and approval of the final version of the notice, the Chief Operating Officer of BVMF shall authorize the auction be held. Once the authorization to hold the OPAC is granted, the offeror shall forward the notice to the administrator of the FII in order to give notice of the offer to the unitholders through the disclosure of the notice on the website of the FII and develop and make public a reasoned opinion based on any OPAC for the issuance of units of the FII covering: (a) the convenience and opportunity of the offer as to the interest of all unitholders and the liquidity of their units; (b) the impact of the offer on any tax benefits applicable to the FII; (c) strategic plans disclosed by the offeror in connection with the FII; and (d) other points deemed to be relevant.

The FII administrator must express a reasoned opinion favorable or contrary to the acceptance of the OPAC, warning that each unitholder is responsible for accepting or not accepting the OPAC. The manifestation about the conditions of the offer will have to be made public until five days before the auction. Any manifestation of the FII manager whose units are the object of the OPAC, if published by the administrator, shall supply the obligation in the offer.

The deadline for disclosure of the notice is a maximum fifteen business days after the approval of BVMF. The deadline for completion of the auction after the disclosure of the notice is at least fifteen and no more than thirty business days. Should the offer be modified, the date of the auction may be extended if the change occurs after seven business days of the date of publication of the notice.

BVMF may determine at any time: (a) the disclosure of any additional information other than those laid down in CL 50; (b) the suspension of the OPAC procedure, if it is found that the identified irregularity can be corrected, keeping the suspension until such correction happens; or (c) the cancellation of the OPAC, if it concludes that the identified irregularity or illegality cannot be corrected. Exceptional situations, omissions, or cases not provided for in CL 50 will be decided by BVMF based on the particularities of the fact at hand.

6. *Id.*

II. Developments in Iran⁷

On March 17, 2016, the Islamic Republic of Iran (Iran) enacted for the first time a new law on Combating Terrorism Finance (Law)⁸ that may be summarized as follows.

A. METHODS OF FINANCING

Article 1 of the Law has put together a non-exclusive list of financing methods that constitute terrorist financing. The list is non-exclusive and encompasses a broad scope of financial activities. The list includes, *inter alia*, foreign currency smuggling, accepting assets or funds as charity, transfer of funds, purchase and sale of financial papers and credit, and direct or indirect opening of bank account.⁹

One example that has become widespread in the past few years around the world is fundraising for “start-ups” or fundraising for charities aiming at international humanitarian reliefs. This financing begs for a comprehensive and sophisticated due diligence and anti-corruption compliance program for the purpose of complying with the Law in order to detect suspicious activities and avoid violations of the Law, as well as to avoid audits or subpoenas.

B. TERRORIST FINANCING CRIME

Commission of the following crimes with the knowledge and intent of affecting policy, decisions, or actions of Iran by organizations having a representative office in Iran or in other countries also constitutes terrorist financing and is punishable by the Law. These acts are:

- Committing or threatening to commit any act of violence such as murder, assassination, kidnapping, and hostage-taking of individuals;
- Knowing acts of violence or endangering the life or liberty of individuals with legal immunity;
- Sabotaging public assets and utilities of the public or private sector;
- Inflicting severe damage to the environment;
- Manufacturing, assuming ownership, transferring, carrying, keeping, distributing, stealing, acquiring by deceit, and smuggling of:
 - Pesticides;
 - Radioactive elements; and
 - Chemical, biological, and biochemical articles; or
- Manufacturing, acquiring, purchasing, selling, illegally using, or smuggling:
 - Explosives;
 - Guns; and

7. Authored by Pouyan Bohloul, Esq.

8. See The Law of Combating Financing of Terrorism (CFT law) of 17 Mar. 2016, art. 1 (Iran).

9. See *id.*

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- Ammunition.¹⁰

C. CONDUCTS ILLEGAL PER SE

Certain enumerated acts constitute terrorism financing per se regardless of the specific intent or the outcome of the case. But it is noteworthy that these crimes are separately punishable by Iranian law as well as under the current Law. These acts are:

- Commission of dangerous acts against the safety of aerospace, airplanes, and vessels;
- Commission of dangerous acts against the safety of crew and passengers;
- Piracy;
- Illegal possession or taking control of vessels, ports, and endangering the life of the crew; or
- Implanting bomb(s) in the public, government facilities, infrastructures, and public transportation facilities.¹¹

D. INTERNATIONALLY RECOGNIZED TERRORIST CRIMES

Finally, article 1 of the Law recognizes terrorist crimes according to international conventions to which Iran is a signatory and to other Iranian laws and regulations as they may apply. Terrorism as described by the Law includes “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”¹² But as an important exception to the general rule of article 1, the legislator has delegated an important authority to the High National Security Council to identify and exempt nations, people, and groups who are fighting against foreign occupation, colonialism, and discrimination.¹³

E. COMPLIANCE MEASURES & THE DUTY TO INFORM

According to the Law, judicial authorities and law enforcement personnel under the direction of a judicial authority must identify and block the funds and assets procured and collected for terrorist activities.¹⁴ All individuals and entities falling under the auspices of Iran Anti-Money Laundering law shall, for the period of no less than five years, maintain records of all suspicious transactions and customers.¹⁵ Any suspicious activity shall be reported to the High Commission of Anti-Money Laundering for further action.¹⁶ Failure

10. *Id.* art. 1(b).

11. *Id.* art. 1(c).

12. 28 C.F.R. § 0.85(l) (2015).

13. The Law of Combating Financing of Terrorism (CFT law), *supra* note 8, art. 1, n. 2.

14. *See id.* arts. 5(a)-(b).

15. *Id.* arts. 13(a)-(b).

16. *Id.* art. 14.

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to report is deemed as an accessory to the crime and if the failure is due to negligence of the personnel, administrative penalties shall follow.¹⁷ But it is prescribed that reporting such activities shall not constitute a violation of privacy laws and regulations.¹⁸

F. PROSECUTION

Generally speaking, Iran exercises long-arm jurisdiction in prosecuting matters of a criminal nature and has codified its extraterritorial reach in its penal code.¹⁹ Therefore, if under an international convention or a special law, an accused should be prosecuted and sentenced in the country in which he or she was found. If he or she is found in Iran or extradited to Iran, he or she will be prosecuted and sentenced according to the Iranian laws.²⁰ The Law also provides that, upon reciprocity, Iran commits to prosecute and sentence a financier of a terrorist activity aimed at another country, regardless of the nationality of the accused, place of residence, or place of the commission of the crime.²¹

G. SENTENCING

A terrorist financier who is convicted under the Iranian laws, if not convicted as Mohareb or Efsad-e-fel-arz, shall be subject to a penalty from two to five years of imprisonment, expropriation of assets, and a civil fine from two to five times the value of the funds collected, payable to the local government.²²

The presiding judge shall also, as part of the judgment, impose a complimentary punishment through deprivation of at least two social rights enumerated under Iran's Penal Code.²³ If the terrorist financing activities also lead to money laundering, the court shall impose the more severe of the two sentences.²⁴ Finally, assuming a leadership role in a terrorist financing scheme increases the sentence.²⁵

H. INTERNATIONAL COOPERATION

Article 16 allows for the judicial and intelligence cooperation of the government of Iran with other countries in compliance with guidelines of article 77 of the Iranian Constitution. There is a great deal of debate left on the table around the enforceability of the Law at the moment. The debate

17. *Id.* art. 14, n. 1.

18. *Id.* art. 14, n. 2.

19. See MAJMU'AH QAVANINI JAZAI [CODE OF CRIMINAL LAWS] Tehran 1392 [2013], arts. 8-9 (Iran).

20. See The law of Combating Financing of Terrorism, *supra* note 8, art. 11.

21. *Id.* art. 1, n. 1.

22. *Id.* art. 2.

23. *Id.* art. 6.

24. *Id.* art. 15.

25. *Id.* art. 7.

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derives from the language of Principle 77 of the Iranian Constitution that requires treaties, transactions, contracts, and all international agreements to be ratified by the Islamic Consultative Assembly.

III. Developments in Saudi Arabia²⁶

A. AMENDMENTS TO INVESTMENT FUNDS REGULATIONS

In May 2016, the Saudi Arabian Capital Market Authority (CMA) issued amended Investment Funds Regulations (New Funds Regulations) to replace the previous funds regulations issued in 2006.²⁷ These New Funds Regulations became effective on November 6, 2016. The CMA intends the New Fund Regulations to provide clarity and to encourage more managers to launch funds. These regulations have been a long time coming. It has been public knowledge for years that the CMA has intended to revamp the 2006 regulations in order to codify unwritten practices of the CMA to address problems of investor protection that arose during the financial downturn, and cover the launch of a diverse range of new funds, many of which were not contemplated by the 2006 regulations.

The processes for launching a private fund remains essentially unchanged, but the required documentation has been detailed, particularly regarding real estate funds. The process for launching a public fund, which has been opaque in the past, has been expanded, with managers required to prepare an information memorandum, the form of which is set out in the New Funds Regulations.²⁸ The information memorandum contains much greater disclosure requirements than the 2006 regulations.

Under the New Fund Regulations, the fund manager may not restrict investors of certain nationalities without the approval of the CMA. The CMA has indicated that the only restrictions it will apply will be those on private real estate funds, which invest in the cities of Mecca and Medina to Saudi Arabian nationals only.²⁹

Further, all funds must have an independent custodian. Accordingly, the role of the custodian has been expanded so that they control cash flow. Previously, independent custodians were required only for public funds and real estate funds. This new requirement potentially adds significant costs to the fund, though the CMA has determined that the heightened protection for investors outweighs the costs.³⁰

26. Authored by James Stull and Osama Audi, King & Spalding LLP.

27. See generally *Real Estate Investment Funds Regulations*, CAP. MKT. AUTH. (July 15, 2006) (Saudi Arabia), https://cma.org.sa/en/RulesRegulations/Regulations/Documents/REAL%20ESTATE%20INVE%20FUND%20REG_.pdf; *Investment Funds Regulations*, CAP. MKT. AUTH. (May 23, 2016) (Saudi Arabia), <https://cma.org.sa/en/RulesRegulations/Regulations/Documents/IFRs%20Regulations-%20Final%20English.pdf>.

28. *Id.* art. 32.

29. *Id.* art. 8.

30. *Id.* art. 15.

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Administrators, advisers, and certain other corporate service providers performing activities in relation to a fund investing in Saudi Arabia must be licensed by the CMA.³¹ The fund manager and its affiliates are not entitled to vote on any units they hold in an investment fund under the New Funds Regulations. Previously, the fund manager was treated equal to other third-party investors in the fund.³²

Unitholders are also afforded statutory rights under the New Funds Regulations. Now the manager must obtain the consent of the unitholders prior to making material changes to the fund's documentation, such as changing the strategy or the risk profile or significantly increasing fees and expenses, which would reasonably be expected to cause the unitholders to reconsider participation in the fund.³³

The fund manager may be removed by a supermajority vote of the unitholders and the process for replacing the fund manager has been clarified under the New Funds Regulations.³⁴ The 2006 regulations, by comparison, were silent on this issue, which created a grey area due to the nature of a CMA fund. A CMA fund is a contract between the manager and the investors. It had been widely assumed that if the manager was removed, the contract would become void, and, as such, the fund would be terminated.

B. AMENDMENTS TO CAPITAL MARKETS AUTHORITY LISTING RULES

In March 2016, the CMA adopted amendments and clarifications to the existing Listing Rules which clarified the CMA's existing practice.³⁵ Such clarifications include, among others, the issues summarized below.

1. Listed companies wanting to undertake a capital reduction are required to appoint legal and financial advisors to advise on such a reduction. Accordingly, the listed company must submit the letters of appointment of the legal and financial advisors to the CMA as part of the application with respect to the capital reduction.³⁶
2. Listed companies who undertake capital increases for the purpose of acquiring a company or an asset are required to prepare legal and financial due diligence reports and submit such reports to the CMA.³⁷
3. Listed companies or new issuers may now apply to the CMA for a waiver from disclosing a matter which the disclosure obligations under the Listing Rules would otherwise require to be disclosed. Such a waiver would only be granted if the listed company or issuer is

31. *Id.* art. 13.

32. *Id.* art. 11.

33. *Id.* arts. 20, 40, 45.

34. *Id.* art. 14.

35. See generally *Listing Rules*, CAP. MKT. AUTH. (May 26, 2016) (Saudi Arabia), <https://cma.org.sa/en/RulesRegulations/Regulations/Documents/ListingRules-En.pdf>.

36. *Id.* art. 7(a).

37. *Id.* art. 8(b)(2).

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of the opinion that disclosure would be harmful to the company and that non-disclosure would not mislead investors. If the CMA approves such non-disclosure it can, at a later stage, require the company to disclose the relevant information.³⁸

4. Listed companies must now determine whether a public announcement is required to address rumors of “material developments” with respect to the listed company. The CMA has the right to require a company to make an announcement with respect to any such rumor.³⁹

C. REAL ESTATE INVESTMENT TRADED FUNDS INSTRUCTIONS

In August 2016, the CMA released draft Real Estate Investment Traded Funds Instructions (REIT Regulations), which provide for certain public real estate funds to be listed on the Tadawul. These REIT Regulations were initially subject to a consultation period, which ended in late August, with final regulations adopted in October 2016.⁴⁰ The REIT Regulations allow managers to list public real estate funds on the Tadawul, subject to certain restrictions on the size of the funds, underlying assets, and distribution policies.

The REIT Regulations contemplate the listing of real estate funds (REITFs) on the Tadawul and are meant to focus on developed properties that generate periodic income. Such periodic income must at least be on an annual basis. At least 90 percent of the REITF’s net profits must be distributed annually to the unitholders.⁴¹ REITFs must be closed-ended funds with a nominal value per unit of SAR 10.⁴² The REITF manager must be a licensed CMA investment manager.

The REIT Regulations permit the underlying assets to have leverage. But leveraging should not exceed 50 percent of the total asset value of the REITF.⁴³ The REITF manager is required to appoint both an independent custodian⁴⁴ and a licensed property management company.⁴⁵ The custodian is to ensure that it segregates its assets from those belonging to the REITF and from the assets of its other clients. At least 75 percent of such investments must be in Saudi Arabia⁴⁶ in developed assets generating periodic income, resulting in the need to identify 75 percent of the assets

38. *Id.* art. 19(e).

39. *Id.* arts. 40(d)-(e).

40. See generally *Real Estate Investment Traded Funds Instructions*, CAP. MKT. AUTH. (Oct. 24, 2016) (Saudi Arabia), <https://cma.org.sa/en/RulesRegulations/Regulations/Documents/REITF%20Instructions%20en.pdf>.

41. *Id.* pt. 4, § B(3).

42. *Id.* § A(1).

43. *Id.* § B(5).

44. *Id.* pt. 3, § B.

45. *Id.* § G.

46. *Id.* pt. 4, § B(1).

prior to launching the REITF.⁴⁷ The REIT Regulations require evidence of binding agreements in relation to the pre-identified income-generating properties.

The minimum amount to be raised is SAR 100,000,000⁴⁸ and must include at least fifty unitholders from the public, unrelated to the manager.⁴⁹ REITFs are not to invest in vacant land, but may invest up to 25 percent of the fund's assets in real estate development or the redevelopment of properties.⁵⁰

IV. Developments in Kuwait⁵¹

The conducting of securities activities in Kuwait is governed by the Capital Markets Law (CML)⁵² and the bylaws thereto (CML Bylaws and, together with the CML, the CML Rules). The CML Bylaws were amended at the end of 2015 by virtue of CMA Resolution No. 72 of 2015 (CML Amendments)⁵³ that contain significant amendments to the securities regulatory regime, and the impact thereof has been more fully assessed during 2016.

A. REPO TRANSACTIONS

The CML Amendments have for the first time introduced clarifications in the CML Bylaws with regard to repurchase transactions (repos). Article 8.11 of Module XI (Dealing in Securities) of the CML Bylaws now states that:

[c]ontracts for the sale of listed and unlisted Securities may state that the seller reserves the right to repurchase the Securities in return for payment of a certain amount during a specified period of time. Such contracts shall include an agreement to deposit the Securities concerned with a Custodian, who shall manage and dispose of them in accordance with the agreement between the seller and buyer. Such agreement shall be noted in the Securities register. Securities trading rules shall include provisions which regulate such agreements and these agreements shall

47. *Id.*

48. *Id.* § A(2).

49. *Id.* § B(2)(a).

50. *Id.* § B(4).

51. Authored by Ibrahim Sattout (Partner) and Laurent Levac (Senior Associate), ASAR - Al Ruwayeh & Partners.

52. See generally *Law No. 7 of 2010 Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities and its Amendments*, CAP. MKTS. AUTH. (Feb. 21, 2010) (Kuwait), <https://www.cma.gov.kw/documents/20622/347647/Law+No.+7+of+2010+-ew+logo/8468eb04-a890-4caa-81b1-0826adf37df8>.

53. See generally *Resolution No. (72) of 2015 the Issuance of the Executive Bylaws of Law No. 7 of 2010 Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities and its Amendments*, CAP. MKTS. AUTH. (Nov. 12, 2015) (Kuwait), <https://www.cma.gov.kw/documents/20622/373579/Resolution+72/75b111a6-64dd-4bd5-9336-99425f6838fb>.

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be excluded from the trading rules of the listed Securities. The provisions of article (508) of the [Kuwait Civil Code] shall not apply to such contracts.⁵⁴

Under the Law of Commerce,⁵⁵ upon the date of adjudication of bankruptcy, the court will fix a provisional date on which the suspension of payment of debts occurred. In the absence of such a determination, the date of adjudication of bankruptcy will be deemed the provisional date. Furthermore, the Law of Commerce⁵⁶ imposes a suspect/preference period. The suspect/preference period is that period of time starting from the suspension of debts and ending on the adjudication of bankruptcy. Accordingly, certain disposals, which the debtor makes after the date of suspension of payment and before the adjudication of bankruptcy, cannot be claimed against the general body of creditors and will be set aside automatically. The date of suspension of payment is a date fixed by the court based on the point in time at which the debtor has failed to make its payments as they become due.

Disposals that will be set aside include donations or gifts other than small presents that are customary, any kind of premature discharge of debt, payment of debts by any other manner than had been agreed upon prior to the suspension of payment, and every mortgage or other contractual security.⁵⁷ It may also include the instance where a vendor reserves a right to recover anything sold against restitution of the price and costs. In this instance, and in the absence of article 8.11 of Module XI (Dealing in Securities) of the CML Bylaws, such an agreement would be deemed to be a loan secured by a possessory mortgage in accordance with article 508 of the Kuwait Civil Code.

But the CML Bylaws now expressly exclude the application of article 508 of the Kuwait Civil Code⁵⁸ to repos and, therefore, repos should not be set aside pursuant to the Law of Commerce.

B. NEW DISTINCTION BETWEEN RETAIL AND PROFESSIONAL INVESTORS

The CML Amendments have introduced a distinction in the CML Bylaws between retail and professional investors. More specifically, under the CML

54. *Resolution No. (72) of 2015 Regarding Issuance of the Executive Bylaws of Law No. (7) of 2010 and its Amendments Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities, Module XI: Dealing in Securities*, CAP. MKTS. AUTH. art. 8.11 (Kuwait), <https://www.cma.gov.kw/pdfviewer/?file=/documents/20622/453321/Module+11-November+2016/fbf43db8-becc-4fd7-aafc-928955296bc4#page=1&zoom=page-fit,-22,849>.

55. *See generally Law No. 68 of 1980*, CAP. MKTS. AUTH. (Oct. 15, 1980) (Kuwait), http://www.wipo.int/wipolex/en/text.jsp?file_id=196499.

56. *See generally id.*

57. There is currently no definition under the Law of Commerce for the term “other contractual security.” *See generally id.*

58. *Module XI: Dealing in Securities, supra* note 54.

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Amendments, a private placement of interests in collective investment schemes (i.e. investment funds) established outside of Kuwait can only be marketed to investors located in Kuwait (i.e. onshore of Kuwait) to a professional investor via a local agent.

Under the CML Bylaws, a professional investor is either a professional investor by nature or a professional investor by qualification. A professional investor by nature is now defined as: (a) a government, governmental institution, central bank, or international institution (World Bank or the IMF); (b) a Licensed Person or a regulated financial institution in Kuwait or outside of Kuwait; or (c) “a company with a paid-up capital of at least one million Kuwaiti Dinars or its equivalent.”⁵⁹ A professional investor by qualification is now defined as: (a) a person who trades in securities in large volumes and on average that is no less than 250,000 Kuwaiti Dinars in each quarter for the past two years; (b) an investor whose assets and funds with the Licensed Person are no less than 100,000 Kuwaiti Dinars; or (c) an investor who is working or had previously worked in the financial sector for at least one year in a position which requires knowledge of the provided services and transactions in the financial sector.⁶⁰

C. CUSTODIAN ACTIVITIES AS REGULATED SECURITIES ACTIVITIES

In addition, the CML Rules regulate central depository systems and the treatment of client funds and assets. The CMA is the primary regulator which regulates all securities activities in Kuwait and licenses entities that engage in securities activities, including licensing and regulation of Kuwaiti central depositories and custodians of funds, collective investment schemes, and/or holding securities listed on the Kuwait Stock Exchange (KSE), collectively referred herein as Licensed Persons.

Pursuant to the CML Amendments, the definition of securities activities contained in the CML Bylaws has been amended to namely refer specifically to custodian activities. More specifically, the CML Bylaws⁶¹ provide that the following activities are within the realm of securities activities:

- Security Exchange;
- Clearing Agency;
- Investment Portfolio manager;
- Collective Investment Scheme manager;

59. *Resolution No. (72) of 2015 Regarding Issuance of the Executive Bylaws of Law No. (7) of 2010 and its Amendments Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities, Module I: Glossary*, CAP. MKTS. AUTH. at 25 (Kuwait), <https://www.cma.gov.kw/pdfviewer/?file=/documents/20622/453321/M+1+-+ec+2016/024f1605-35e4-4fb6-8f1f-515205dd7af3#page=1&zoom=page-fit,-22,849>.

60. *Id.* at 27.

61. *Resolution No. (72) of 2015 Regarding Issuance of the Executive Bylaws of Law No. (7) of 2010 and its Amendments Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities, Module 5*, CAP. MKTS. AUTH. art. 1.2. (Kuwait), <https://www.cma.gov.kw/pdfviewer/?file=/documents/20622/453321/Module+5+-+Jan+2017/004556c3-a594-4906-9e94-241e5ba4fa1f#page=1&zoom=page-fit,-22,849>.

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- Investment Advisor;
- Subscription Agent;
- Custodian;
- Market Maker;
- Securities Broker registered in the Securities Exchange;
- Securities Broker not registered in the Securities Exchange;
- Investment Controller;
- Credit Rating Agency;
- Valuation of Assets; and
- “Any other activities which the [the CMA] may specify.”⁶²

The CML Amendments have clarified that any party (including the local Kuwait branch of a foreign bank or a subsidiary of a foreign bank) conducting custody activities in Kuwait would be required to obtain the appropriate license from the CMA in order to conduct such regulated activities and, as such, will be subject to the rules applicable to Licensed Persons under the CML Bylaws (namely with respect to client funds and assets).

D. VOIDABILITY OF TRANSACTIONS ENTERED IN CONTRAVENTION OF THE CML RULES

The CML now provides for the voidability of transactions entered in contravention to the CML Rules. More specifically, article 146 of the CML now provides that “[i]n all cases, the Disciplinary Council may cancel all transactions related to the violation and the entailed effects, or require the violator to pay amounts equal to the benefit he/she acquired or the value of the loss he/she avoided as a result of the violation. The amount may be multiplied if the Person repeats committing the violations.”⁶³

V. Developments in the United Arab Emirates⁶⁴

A. UAE BANKRUPTCY REGULATIONS

On September 20, 2016, the UAE Federal Law on Bankruptcy (Bankruptcy Law) was approved by the President of the United Arab Emirates (UAE).⁶⁵ The Bankruptcy Law became effective on December 31, 2016. Many of the points in the Bankruptcy Law will be clarified further in procedural regulations, which are anticipated to be issued by the UAE

62. *Id.*

63. *Law No. 7 of 2010 Regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities and its Amendments*, *supra* note 52, ch. 11, art. 146.

64. Authored by James Stull and Osama Audi, King & Spalding LLP.

65. Vince Gordon, et al., *The New UAE Bankruptcy Law*, REED SMITH LLP (Nov. 23, 2016), <https://www.reedsmith.com/The-New-UAE-Bankruptcy-Law-11-23-2016/>. See generally Federal Law No. 9 of 2016 of 20 Sept. 2016 (U.A.E.).

Cabinet based on a proposal to be put forward by the UAE Minister of Finance.

1. *Application of the Bankruptcy Law*

The Bankruptcy Law will apply to: (a) companies subject to the Commercial Companies Law (i.e. most companies incorporated outside of the UAE free zones); (b) decree companies which are totally or partially owned by the federal or local Emirati governments and which stipulate in their bylaws, memorandum of association, or articles of association that they are subject to the law; (c) free zone companies save for companies incorporated in the financial free zones (i.e. the Dubai International Financial Centre or Abu Dhabi Global Market); (d) traders; and (e) professional civil companies (e.g. consultancies).⁶⁶

2. *Committee of Financial Reorganization*

A Committee of Financial Reorganization will be formed which will be responsible for: (a) supervising financial reorganizations with the aim of reaching mutual agreement between debtors and creditors; (b) approving experts who will be tasked with undertaking the financial reorganization; (c) maintaining a register of individuals who are subject to financial reorganization; and (d) to the extent required, removing their legal capacity with respect to a company subject to a financial reorganization.⁶⁷

3. *Two Forms of Protection: Preventative Composition vs. Bankruptcy*

Two forms of protection are set out in the Bankruptcy Law.

- a. Preventative composition, akin to a “pre-packaged bankruptcy,” can only be commenced by a debtor with the assent of creditors.⁶⁸ Such a preventative composition stays any bankruptcy filings while the filing debtor seeks court protection and assistance to reorganize its debts;⁶⁹ and
- b. The more serious bankruptcy procedure is akin to a court-supervised reorganization of a debt or, in certain circumstances, a liquidation of the assets of the relevant debtor for the benefit of creditors.⁷⁰ Unlike a preventative composition, a bankruptcy can only be triggered by the debtor or by creditors with ordinary debt of at least 100,000 AED (approximately 27,000 USD).⁷¹

While a preventive composition will not be permitted if the applicant has not paid its outstanding debts for a period greater than thirty days or is

66. *Id.* art. 2.

67. *Id.* art. 3.

68. *Id.* art. 64.

69. *Id.* art. 65.

70. *Id.* art. 68.

71. *Id.* art. 69.

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otherwise insolvent,⁷² a bankruptcy will only be permitted if the debtor has stopped paying debts at its maturity date for more than thirty days.⁷³ In addition, in order to proceed to either a preventive composition or a bankruptcy, a debtor (or, in the case of a bankruptcy, a debtor or a creditor) must submit an application containing detailed information with respect to the debtor, anticipated cash liquidity, a list of creditors and debtors, assets of the debtor, and details of the debtor.⁷⁴

With respect to a preventative composition, the debtor will also be required to deposit with the competent court (e.g. the Dubai courts) a sum of money or bank guarantee in an amount suitable to cover the expenses and costs of the court, the trustee nominated by the debtor, and any appointed expert. In a bankruptcy, the submitter of the request to commence bankruptcy proceedings shall be required to deposit 20,000 AED (5,500 USD) with the competent court to cover the court's costs and expenses unless they are waived by the court.⁷⁵

4. Order of Priority of Debtors' Obligations

The order of priority of debtors' obligations is clearly set out in the law with equality of priority being shared by: (a) judicial fees or charges including the fees of experts and the trustee; (b) employee entitlements, e.g. end of service entitlements, unpaid wages and salaries; (c) amounts due to UAE governmental bodies; (d) fees, costs, or expenses which arise with the aim of securing the debtors business after they file for the preventative composition or bankruptcy (this would presumably include legal fees though this is not explicitly set out).⁷⁶

5. Suspension of Criminal Liability for Bounced Checks

The commencement of preventative composition or bankruptcy by a debtor will stop any attempts to file criminal proceedings for a debtor who provided a bank check as a security in respect of any of their debt obligations.⁷⁷

B. INVESTMENT FUNDS REGULATIONS

In August 2016, the Emirates Securities and Commodities Authority (SCA), the federal securities regulator of the UAE, adopted new investment funds regulations (2016 Fund Regulations), which repealed the prior funds regulations (which were adopted in 2012 and amended in 2013), clarified the formation process for the establishment of locally-domiciled funds, and

72. *Id.* art. 65.

73. *Id.* art. 68.

74. *Id.* art. 9.

75. *Id.* art. 76.

76. *Id.* art. 184.

77. *Id.* art. 212.

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introduced significant changes to the marketing of foreign-domiciled investment funds in the UAE.⁷⁸ The 2016 Fund Regulations impose substantial hurdles and costs⁷⁹ for managers seeking to promote foreign funds in the UAE and have generally been subject to negative feedback.

Managers wishing to market foreign funds onshore in the UAE now have far fewer options. They can register the fund with SCA and enter into a distribution arrangement with a locally licensed placement agent,⁸⁰ engage in reverse solicitation (where the investor inside the UAE initiates the transaction),⁸¹ or rely on a private placement exemption when offering to sovereign entities.⁸² Funds established in a free zone inside the UAE, including funds established in the Dubai International Financial Centre (DIFC) or the Abu Dhabi Global Market (ADGM), are considered by SCA to be foreign funds.⁸³

C. DIFC – INTERMEDIATE SPV REGIME

The DIFC announced that it will soon issue regulations in relation to a new corporate form called an Intermediate SPV (ISPV).⁸⁴ The reference to intermediate implies that ISPVs will not be the primary holding entity, nor will they be actual operating entities further down the line in any relevant structure. In addition, only entities with a substantive presence in the DIFC will be permitted to establish ISPVs.

A party with a substantive presence in the DIFC can establish an ISPV as a joint venture vehicle so long as the entity with a substantive presence maintains control of the ISPV. Accordingly, ISPVs may be useful to regional family offices, holding companies, or funds with a presence in the DIFC in order to structure shareholder arrangements with respect to their various joint ventures or subsidiaries which are not wholly owned. The use of an ISPV will enable such parties to entrench enforceable shareholder arrangements without moving such arrangements offshore. The use of an ISPV could enable parties with a substantive presence in the DIFC to take advantage of the DIFC's flexible corporate laws, which are based on English

78. See generally *The SCA Board of Directors' Chairman Decision No. (9/R.M) of 2016 Concerning the Regulations as to Mutual Funds*, SEC. & COMMODITIES AUTH. (June 6, 2016) (U.A.E.), <http://www.sca.gov.ae/mservices/api/regulations/GetRegulationByIdAsPdf/119>.

79. See generally *The Chairman of the Authority's Board of Directors' Decision No. (10/R. M) of 2016 Concerning the Fees of Mutual Funds*, SEC. & COMMODITIES AUTH. (June 6, 2016) (U.A.E.), <http://www.sca.gov.ae/mservices/api/regulations/GetRegulationByIdAsPdf/120>.

80. *The SCA Board of Directors' Chairman Decision No. (9/R.M) of 2016 Concerning the Regulations as to Mutual Funds*, *supra* note 78, art. 35.

81. *Id.* art. 2.

82. *Id.*

83. *Id.* art. 1.

84. The DIFC has not yet published draft or final regulations relating to the ISPV program, but some information is available on its website. *DIFC Non-Retail Activities*, DUBAI INT'L FIN. CTR., <https://www.difc.ae/operating/registrars-companies/non-financial-activities/non-retail-activities> (last visited Apr. 19, 2017). The information in this section is based on presentations provided by representatives of the DIFC.

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law and common law legal system, while also maintaining the favorable regulatory and tax treatment of a resident company of the Gulf Cooperation Council.

VI. Developments in the United States of America⁸⁵

A. CONSUMER FINANCIAL PROTECTION BUREAU (CFPB)

The CFPB, an agency of the U.S. Government, was created as part of the major Dodd-Frank financial reform legislation in 2010, which adopted, amongst others, the following summarized significant rules and amendments in 2016 with regard to financial products and services.

1. Transfer of Existing Regulations To CFPB Under the Dodd-Frank Act⁸⁶

On May 3, 2016, Title X of the Dodd-Frank Act transferred rulemaking authority for certain consumer financial protection laws to the CFPB. The CFPB republished the existing regulations implementing those laws as interim final rules with technical and conforming changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act.

2. Mortgage Servicers May be Cited for Technology Failures⁸⁷

One June 22, 2016, the CFPB issued findings stating that some mortgage servicers continue to use failed technology that has already harmed consumers which could place an institution in violation of the CFPB's new servicing rules. In its examinations covering numerous mortgage servicers since the new CFPB rules took effect in January 2014, CFPB examiners have found repeated violations due to clearly deficient technology and process breakdowns. Specifically, examiners have observed problems with loss-mitigation and servicing transfers.

3. Mortgage Servicing Safe Harbor Rules Under FDCPA⁸⁸

On August 4, 2016, the CFPB issued an interpretive rule to clarify the interaction of the FDCPA and certain mortgage servicing rules in Regulations X and Z. It provides safe harbors from FDCPA liability for servicers under certain circumstances.

85. Authored by Alan B. Rabkin.

86. Dodd-Frank Act, 81 Fed. Reg. 25,323 (Apr. 28, 2016) (to be codified at 12 C.F.R. pts. 1002-03, 1005-16, 1022, 1024, 1026, 1030).

87. *Supervisory Highlights Mortgage Servicing Special Edition*, CONSUMER FIN. PROT. BUREAU 8 (June 2016), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Mortgage_Servicing_Supervisory_Highlights_11_Final_web_.pdf.

88. Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 72,160 (Oct. 19, 2016) (to be codified at 12 C.F.R. pts. 1024, 1026).

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4. *New Exam Procedures Under the Military Lending Act Rule Updated in 2015*⁸⁹

On September 30, 2016, the CFPB issued the procedures its examiners will use in identifying consumer harm and risks related to the Military Lending Act rule, which was updated in July 2015. The exam procedures released by the CFPB provide guidance to industry on what the CFPB will be looking for during future reviews covering the amended regulation. In 2006, Congress passed the Military Lending Act to help address the problem of high-cost credit as a threat to military personnel and readiness.

5. *Final Rule Regarding Consumer Protections for Prepaid Accounts*⁹⁰

On October 5, 2016, the CFPB issued a series of comprehensive consumer protections for prepaid accounts under Regulations E and Z, including tailored provisions governing disclosures, limited liability and error resolution, periodic statements, and the posting of account agreements. The final rule also regulates overdraft credit features that may be offered in conjunction with prepaid accounts.

6. *Protections for Foreign Remittance Transfers*⁹¹

On October 5, 2016, the CFPB released a final rule to correct certain clerical and non-substantive corrections to errors it had identified in Regulation E. Prior amendments to Regulation E, which became effective in 2013, provided new protections to consumers who send remittance transfers to other consumers or businesses in a foreign country.

B. THE FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC)

The FDIC, an agency of the U.S. Government, adopted, amongst others, the following summarized significant rules and amendments in 2016 with regard to financial products and services.

1. *Small Institution On-Site Examination Cycles*⁹²

On March 4, 2016, the FDIC and the other federal financial institution regulatory agencies jointly adopted interim final rules permitting insured depository institutions (IDIs) with up to \$1 billion in total assets and that

89. See generally *Military Lending Act (MLA), Interagency Examination Procedures—2015 Amendments*, CONSUMER FIN. PROT. BUREAU (Sept. 2016), http://files.consumerfinance.gov/f/documents/092016_cfpb_MLAExamManualUpdate.pdf.

90. Truth in Lending Act (Regulation Z), 12 C.F.R. pt. 1026 (2016); Electronic Fund Transfer Act (Regulation E), 12 C.F.R. pt. 1005 (2016).

91. *Id.*

92. *Examination Cycle: Joint Interim Final Rules and Request for Comments on Expanded Examination Cycle for Certain Small Insured Depository Institutions and U.S. Branches and Agencies of Foreign Banks*, FDIC (Mar. 4, 2016), <https://www.fdic.gov/news/news/financial/2016/fil16017.pdf>.

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meet certain other criteria to qualify for an eighteen-month on-site examination cycle instead of a twelve-month cycle. The implementation of these rules allows the agencies to better focus supervisory resources on IDIs that present capital, managerial, or other issues of supervisory concern, while reducing regulatory burden on small, well-capitalized, and well-managed institutions.

2. *Deposit Insurance Assessments for Small Institutions*⁹³

On April 26, 2016, the FDIC approved a final rule to improve the deposit insurance assessment system for small, established, and insured depository institutions (generally, those banks with less than \$10 billion in total assets that have been insured for at least five years). The final rule is effective July 1, 2016. If the reserve ratio of the Deposit Insurance Fund (DIF) reaches 1.15 percent before that date, the final rule will determine assessment rates beginning July 1, 2016. If the reserve ratio has not reached 1.15 percent by that date, the final rule will determine assessment rates beginning the calendar quarter after the reserve ratio reaches 1.15 percent.

3. *Cybersecurity and Wholesale Payment Network Risk*⁹⁴

On June 7, 2017, the FDIC, as a member of the Federal Financial Institutions Examination Council (FFIEC), issued a statement advising financial institutions to actively manage the risks associated with interbank messaging and wholesale payment networks. Recent cyber-attacks have targeted interbank messaging and wholesale payment networks, resulting in large-dollar fraud at several foreign institutions. These attacks have demonstrated a capability to: (a) compromise the financial institution's wholesale payment origination environment and bypass information security controls; (b) obtain and use valid operator credentials to create, approve, and submit messages; (c) employ a sophisticated understanding of funds transfer operations and operational controls; (d) use highly customized malware to disable security logging and reporting, as well as other operational controls, to conceal and delay the detection of fraudulent transactions; and (e) quickly transfer stolen funds across multiple jurisdictions to avoid recovery. Financial institutions should conduct a risk assessment to determine whether effective risk-management practices and controls are in place. Institutions should consult their payment system provider's guidance for specific security control recommendations.

93. *Statement of Martin J. Gruenberg Chairman, Federal Deposit Insurance Corporation on the Final Rule on Deposit Insurance Assessments for Small Banks*, FDIC (Apr. 26, 2016), <https://www.fdic.gov/news/news/speeches/spapr2616b.html>.

94. *See generally FFIEC Joint Statement on Cybersecurity of Interbank Messaging and Wholesale Payment Networks*, FDIC (June 7, 2016) <https://www.fdic.gov/news/news/financial/2016/fil16037.pdf>.

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4. *New Accounting Standard on Financial Instruments—Credit Losses*⁹⁵

On June 17, 2016, the federal financial institution regulatory agencies issued a Joint Statement on the New Accounting Standard on Financial Instruments – Credit Losses regarding the Financial Accounting Standards Board’s new standard, which introduces the current expected credit losses methodology (CECL) for estimating allowances for credit losses. The joint statement also provides initial supervisory views regarding the implementation of the new accounting standard. This Financial Institution Letter applies to all FDIC-supervised banks and savings associations, including community institutions. Under CECL, the allowance for credit losses is a valuation account measured as the difference between the amortized cost basis of financial assets and the net amount expected to be collected on the assets (i.e., lifetime credit losses). The new accounting standard will take effect in 2020 or 2021, depending on the institution’s characteristics. It applies to financial assets carried at amortized cost, including loans held for investment and held-to-maturity securities. The standard allows expected credit-loss estimation approaches that build on existing credit risk-management systems and processes as well as existing methods for estimating credit losses. But certain inputs into these methods will need to change to achieve an estimate of lifetime credit losses. To estimate expected credit losses under CECL, institutions will use a broader range of data than under existing accounting standards. These data include information about past events, current conditions, and reasonable and supportable forecasts relevant to assessing the collectability of the cash flows of financial assets.

⁹⁵. *Joint Statement on the New Accounting Standard on Financial Instruments - Credit Losses*, FDIC (June 17, 2016), <https://www.fdic.gov/news/news/press/2016/pr16051a.pdf>.