

Marketing Private Funds and Discretionary Account Services

Asia and Beyond

Fifth Edition, October 2014



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Fifth edition – October 2014

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This book is designed to assist asset managers in their capital-raising and marketing activities. It uses a standard questionnaire that Deacons developed to provide practical guidance on marketing and the other activities that asset managers can conduct in each location. The book includes answers for various jurisdictions in Asia, as well as Australia, Luxembourg, Switzerland, the United Kingdom and the United States. Deacons worked with specialist law firms in each jurisdiction to answer the questionnaire. We trust you will find it useful.

About Deacons

Deacons is the oldest and largest independent law firm in Hong Kong. We provide an extensive range of legal and commercial services to local and international corporations. With over 160 years of experience in providing legal services, our clients are assured of the integrity and stability of one of the region's oldest and most respected law firms.

Financial Services at Deacons

Deacons Financial Services Group is a dedicated team of funds and regulatory lawyers with substantial experience in funds, regulatory, licensing, compliance and securities matters. Deacons is credited as being the market leader in Hong Kong in terms of depth of client base and range of funds we have established. Individuals in the team offer a diverse range of international and local experience and are capable of conducting transactions in English, Cantonese, Mandarin, Japanese and Malay.

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Questionnaire for Thailand (the “Jurisdiction”)

Law Firm:	Tilleke & Gibbins	Website:	www.tilleke.com
Lawyer:	David Duncan	Telephone:	+66.2.653.5555
Date:	31 October 2014	Email:	david.d@tilleke.com

In this questionnaire:

“Fund” means an open-ended offshore fund structured as a company that:

- (a) is managed by the Manager or an affiliate;
- (b) is not registered or authorised in the Jurisdiction for public sale;
and
- (c) either invests directly in investments or invests substantially all its assets in a master fund.

“Manager” means an offshore investment manager that is not licensed or registered in the Jurisdiction and that does not have a physical presence in the Jurisdiction.

Whilst every effort has been made to ensure the accuracy of this questionnaire, it is for general guidance only and should not be treated as a substitute for specific advice. If you would like advice on any of the issues raised, please speak to the contact listed above.

Part I – General Cross-Border Marketing Activities

1. Please indicate which of the following activities the Manager is permitted to undertake. If any activity is permitted subject to restrictions, please describe those restrictions.

(a) Attend seminars, conferences and other relevant industry events in the Jurisdiction.

A natural person who is an employee of the Manager could attend seminars, conferences, and industry events of a like nature, subject to (assuming the employee is not a Thai citizen) visa and work permit requirements.

Other requirements apply regardless of the employee's citizenship. Note that the employee's activities, such as talking with clients/potential clients and handing out business cards, at such seminars, conferences, and industry events of a like nature, would be subject to restrictions. Similarly, the content of the employee's discussions and distributed material(s), as well as other communications, in the context of such activities, would be subject to restrictions. In addition, depending on the employee's activities in Thailand on behalf of the Manager, it is possible that the Manager may require a Foreign Business License or Foreign Business Certificate, to authorize the Manager to engage in such business in the Jurisdiction, if such activities extended beyond the scope of those lines of securities business which are allowed as an exception under the Foreign Business Act.

(b) Speak at seminars, conferences and other relevant industry events in the Jurisdiction.

In addition to the requirements in Part I(1)(a), such person would also have to be a person licensed to undertake securities business, by a securities and exchange regulator which is a member of IOSCO. In the case of giving investment advice to retail investors, the advice must be given through a duly licensed Thai investment advisory company or brokerage company which has arranged the giving of such investment advice; or in case of giving investment advice to institutional investors, the advice must be specifically intended for institutional investors and, in case the subject is investment in structured notes, a document showing the worst case scenario of any investment therein, must be disclosed. The content must not offer or provide any other services related to securities ("securities business", as defined in the Securities and Exchange Act), or offer any securities (as defined in the Securities and Exchange Act).

(c) Sponsor seminars, conferences and other relevant industry events in the Jurisdiction. Does it make a difference if the Manager is the primary sponsor or only one of a number of sponsors?

Mere sponsorship (i.e. giving of money) of seminars, conferences, and industry events of a like nature, is not addressed in the regulations. Of greater concern would be the activities in which the Manager and/or the Manager's employees might engage in connection with such sponsorship, and/or the materials, communications, and/or signage that may be distributed and/or otherwise publicized in connection with such sponsorship;

these are areas where breach of the regulations would be likely.

- (d) Whilst *in* the Jurisdiction, give to people the Manager meets at seminars, conferences and other relevant industry events in the Jurisdiction:
- (i) business cards;
 - (ii) general information about the Manager;
 - (iii) publications of the Manager that are educational in nature or general market commentary only;
 - (iv) the website address of the Manager;
 - (v) other information about the Manager and its services and products.

An employee of the Manager giving the above materials whilst attending seminars, conferences, and industry events of a like nature, would be subject to the same requirements as in Part I(1)(a), but there are restrictions with respect to the content of such materials. With respect to the materials, it is imperative to ensure that none would constitute an offer for any securities or related services. Moreover, the materials must not be used to directly or indirectly give advice concerning the value of securities, the suitability of making investment related to such securities, or the purchase or sale of any securities, unless the requirements mentioned in Part I(1)(b) are met, in which case advice can be given, provided it is not advice in response to any particular person's investment objectives, financial condition, and/or specific need, the advice is publicly disseminated, such that one who needs the information can acquire it easily and need not enroll as subscriber, the main objective of the advice must not be with respect to the value of particular securities or suitability of investing in those securities, or the purchase or sale of specific securities, and it must otherwise be in conformity with the SEC's rules and procedures.

- (e) From *outside* the Jurisdiction, send to people the Manager meets at seminars, conferences and other relevant industry events in the Jurisdiction:
- (i) business cards;
 - (ii) general information about the Manager;
 - (iii) publications of the Manager that are educational in nature or general market commentary only;
 - (iv) the website address of the Manager;
 - (v) other information about the Manager and its services and products.

Attendance at seminars, conferences, and industry events of a like nature would be subject to the requirements mentioned in Part I(1)(a).

With respect to the materials, even when sent from outside the Jurisdiction, it is imperative to ensure that none would constitute an offer for any securities or related services. Moreover, the materials, even when sent from outside the Jurisdiction, must not be used to directly or indirectly give advice concerning the value of securities, the suitability of making investment related to such securities, or the purchase or sale of any securities, unless the requirements mentioned in Part I(1)(b) are met, in which case advice can be given, provided it is not advice in response to any particular person's investment objectives, financial condition, and/or specific need, the advice is

publicly disseminated, such that one who needs the information can acquire it easily and need not enroll as subscriber, the main objective of the advice must not be with respect to the value of particular securities or suitability of investing in those securities, or the purchase or sale of specific securities, and it must otherwise be in conformity with the SEC's rules and procedures.

- (f) Invite (and pay for) people in the Jurisdiction to attend lunches, dinners, sporting events, theatrical shows and other entertainment in the Jurisdiction.

Assuming an employee of the Manager were present in the Jurisdiction to invite people to the above events and attend such events, the requirements in Part I(1)(a) would be applicable. The content discussed at such events would be subject to the requirements in Part I(1)(b).

- (g) Invite (and pay for) people in the Jurisdiction to attend lunches, dinners, sporting events, theatrical shows and other entertainment outside the Jurisdiction.

The requirements in I(1)(f) would be applicable, except that, of course, there would be no requirements to have Thai visas or work permits, in respect of activities undertaken outside the Jurisdiction.

2. Does the Jurisdiction have restrictions on "cold calling" e.g. communicating with a prospective investor face-to-face, by telephone, email etc where the prospective investor has not requested the communication? If yes, please describe the restrictions.

Regulations require licensees to have policies in place such that cold calling will not present an annoyance to the recipients of the calls, and so that recipients of the calls are not pressured to make investment decisions. More specific requirements have developed in implementation of these principles.

3. Are there any other general marketing activities that the Manager is permitted to undertake in the Jurisdiction?

The Manager could undertake a range of other general marketing activities in the Jurisdiction, subject to the applicable requirements mentioned and/or referenced herein, being met. The Manager should take advice to determine the permissibility of each aspect of its specific marketing plans.

4. Are there any other general marketing activities that the Manager is permitted to undertake from outside the Jurisdiction in relation to people who are in the Jurisdiction?

The Manager could undertake a range of other general marketing activities outside the Jurisdiction, subject to the applicable requirements mentioned and/or referenced herein, being met. The Manager should take advice to determine the permissibility of each aspect of its specific marketing plans.

Thailand

5. Are there any restrictions on how frequently representatives of the Manager can (or should) visit the Jurisdiction e.g. personal or corporate tax?

Pursuant to Thai domestic law, the Manager would be subject to corporate income tax in respect of income generated out of the Jurisdiction, if, *inter alia*, the Manager has an employee, representative, or go-between physically located in the Jurisdiction. Likewise, persons earning income from work performed in Thailand or a position held in Thailand would be subject to Thai personal income tax. Each of the foregoing tax positions may be modified by the terms of a double taxation avoidance agreement, if applicable.

Part II – Cross-Border Marketing of Investment Management Services

1. Are investors in the Jurisdiction permitted to appoint an offshore investment manager to manage a segregated mandate? If only certain categories of investor are permitted to do so, please describe those categories.

Pursuant to regulations issued under the Exchange Control Act, mutual funds (but not private funds), securities companies, certain financial institutions, Thai juristic persons with assets of at least THB 5 billion, provident funds, insurance companies, the Social Security Fund, and the Government Pension Fund, are allowed to invest in foreign securities; such investment must not exceed applicable limits set by the relevant supervisory authority of the investor or set internally by the investor's directors or management (as the case may be). Other investors may invest in foreign securities through private funds or securities companies existing under Thai law, but must not exceed limits and other regulatory conditions imposed by the SEC. Investment via employee share schemes is handled separately; purchase of shares, warrants, and/or options issued by companies abroad which are related to the investor's Thai employer, are allowed up to USD 1 million per person per year. In cases where foreign investment is permitted by law, the investors could choose to engage offshore investment managers to manage such investments; the performance of such investment management services would be subject to other conditions and regulatory requirements.

If the answer to the above question is no, please go to Part III.

2. Are there any restrictions on the marketing activities the Manager can undertake outside the Jurisdiction in relation to prospective investors in the Jurisdiction?

Marketing activities undertaken by the Manager outside the Jurisdiction in relation to prospective investors in the Jurisdiction could only be conducted if such did not constitute an offer of securities or any other services relating to securities.

3. Can the Manager provide details of its investment management services in response to an unsolicited request from a prospective investor in the Jurisdiction?

Whilst the Manager could provide certain details in response to an unsolicited request, review would be necessary to ensure that the details to be provided, and the method by which they would be provided, would not contravene applicable requirements.

4. Can the Manager respond to a "request for proposal" from a prospective investor in the Jurisdiction? Does it make a difference whether the "request for proposal" is private (i.e. sent to the Manager directly) or public (i.e. open to anyone)?

Whilst the Manager could respond to a request for proposal, review would be necessary to ensure that the response to be provided, and the method by which it would be provided, would not contravene applicable requirements.

5. Can the Manager meet with a prospective investor in the Jurisdiction to discuss the Manager's investment management services at the request of that prospective investor?

The position would be the same as that described in Part I(1).

6. Can the Manager attend a "beauty parade" or "finals presentation" in the Jurisdiction to discuss the Manager's investment management services at the request of a prospective investor?

The position would be the same as that described in Part I(1).

7. If an investor in the Jurisdiction enters into an agreement appointing the Manager to provide investment management services:

- (a) is there a requirement that the agreement be in a particular language?

Subject to some exceptions, the law does not require that agreements be made in a particular language. Among the exceptions, agreements with the state, including state enterprises, must be made in Thai. When agreements are to be enforced in Thai court, they will have to be translated into Thai, for the court.

- (b) can the agreement be governed by a law other than the laws of the Jurisdiction?

Subject to some exceptions, the law does not require that Thai law be applicable to an agreement for foreign investment management services. Among the exceptions, agreements with the state, including state enterprises, must be governed by Thai law. Note also that even if a particular agreement provides for law other than Thai law to be applicable, certain provisions of Thai law may nonetheless apply, as a matter of public order and good morals.

- (c) are there any other provisions that must be included in the agreement as a result of regulatory requirements in the Jurisdiction?

Numerous requirements apply to engagement of offshore investment advisors; these vary substantially, from investor to investor. In each case, the agreement must accommodate the applicable requirements.

Part III – Cross-Border Marketing of Unregistered Offshore Funds – “Non-Public Offering”

1. Are investors in the Jurisdiction permitted to invest in the Fund? If only certain categories of investor are permitted to do so, please describe those categories.

The position would be the same as described in Part II(1).

If the answer to the above question is no, please go to Part IV.

2. Please describe the requirements for a “non-public” offering of the Fund in the Jurisdiction, including (where applicable):
 - (a) whether the Fund needs to be authorised or registered in the Jurisdiction in order for it to be offered in a “non-public” offering;
 - (b) the types of prospective investors that may be approached;
 - (c) the number of prospective investors that may be approached;
 - (d) the minimum investment amount; and
 - (e) recommended or required disclaimers in offering documents and marketing materials.

As a general matter, the Securities and Exchange Act provides that the offer for sale of securities to the public or any person/entity may be made only after a registration statement and a draft prospectus, which have been filed with the Office of the Securities and Exchange Commission (the “Office”) have become effective, and must meet other regulatory requirements generally applicable to public offerings of securities (collectively “General Public Offering Requirements”). The law provides an exception to these requirements in respect of the offer for sale of newly issued investment units offered by a securities company licensed to manage mutual funds, as the law sets out a separate process for securities companies licensed to manage mutual funds to apply for approval to establish individual mutual funds, and sets out separate requirements for on-going regulation thereof. However, on the basis that the Manager would not be licensed or registered in the Jurisdiction, the Manager would, as a practical matter, be unable to utilize such separate process or avail itself of the aforementioned exemption.

Consistent with Thailand’s commitments to the ASEAN Economic Community, the Securities and Exchange Commission has issued a notification to provide an exemption to the General Public Offering Requirements, in respect of units of certain foreign collective investment schemes (“CIS”) established in an ASEAN member country, the regulator in which is a member of IOSCO that is a signatory to MMoU Appendix A, provided the foreign CIS meets the requirements explained in Part III(3).

3. If the Fund needs to be authorised or registered in the Jurisdiction in order for it to be offered in a “non-public” offering, what ongoing obligations does the Fund or the Manager need to comply with in order to maintain the authorisation or registration?

The Fund must be a foreign CIS established in an ASEAN country, which has been approved or registered by the Fund’s home regulator. Requirements differ whether the Fund would be offered for sale only to

institutional or high net worth investors, or to general investors.

For a Fund offered only to institutional or high-net-worth investors, the following requirements apply:

1. The CIS operator must:
 - be under the supervision of its home regulator, and the home regulator must have the authority to impose sanctions and to order the CIS operator to take action or refrain from acting, in situations in which damage may be caused to the interests of investors;
 - not have had its approval to conduct business suspended or revoked by its home regulator; and
 - not have a record of violating laws or regulations under the responsibility of its home regulator, in matters relating to disclosure of material information to investors or its home regulator, or pertaining to the submission of such documents to investors or its home regulator.

2. The Fund must:
 - have an investment policy that provides for similar assets and investment ratios as would be required for mutual funds established in Thailand with SEC approval (special requirements apply to feeder funds);
 - be offered for sale in the jurisdiction of its home regulator and not be subject to an order banning such sale;
 - have a brokerage firm acting as local representative responsible for selling, repurchasing, and redeeming units of the Fund in Thailand; and
 - have a local representative, being a securities company or representative office in Thailand (pursuant to Section 93 of the Securities and Exchange Act), to coordinate the following matters in Thailand:
 - disclosing and sending information on the Fund, as required by law under the responsibility of the home regulator, to investors, and any other information related to the Fund, which the manager intends to disclose to investors; and
 - receiving notices, orders, summons, and/or any other documents on behalf of the Fund or the CIS operator.

For a Fund offered to general investors, the Fund must:

- be subject to supervision by its home regulator, which shall have jointly signed with the Office, the *Memorandum of Understanding on Streamlined Authorisation Framework for Cross-Border Public Offers of ASEAN Collective Investment Schemes* (the “**Memorandum**”);
- be in conformity with Parts I and II of Appendix C to the Memorandum, which sets out standards for qualifying Funds;
- offer its units for sale in the jurisdiction of the home regulator and not be under an order banning such sale;
- assign a brokerage firm to act as a local representative responsible for selling, repurchasing, and redeeming units of the Fund in Thailand; and
- having a local representative being a securities company or representative office in Thailand (pursuant to Section 93 of the Securities and Exchange Act), in order to coordinate and facilitate the following matters in Thailand:

- disclosing and sending information on the Fund, as required by law under the responsibility of the home regulator, to investors, and any other information related to the Fund, which the manager intends to disclose to investors;
- receiving notices, orders, summons, and/or any other documents on behalf of the Fund or the CIS operator;
- Verifying the establishment of the Fund (its constitutive documents);
- Contacting the Fund registrar on behalf of unit holders in Thailand;
- Providing a dispute resolution mechanism other than court, unless the Fund has specified that it will comply with the ASEAN capital markets *Dispute Resolution and Enforcement Mechanism* (“DREM”); and
- Disclosing material information as would be disclosed to unit holders of mutual funds established in Thailand with SEC approval.

For both categories of Fund, there is a regulatory examination process mandated by the Thai Capital Markets Supervisory Board, which must be completed before the Fund can lawfully be offered in Thailand. Approved foreign CIS are to be listed on the website of the Office. As a general matter, Thai securities companies are prohibited from providing trading service for units of foreign CIS that are not listed on the website of the Office.

Other regulatory requirements also apply, both for initial approval and on an ongoing basis.

4. Are there any restrictions on the marketing activities the Manager can undertake outside the Jurisdiction in relation to prospective investors in the Fund who are in the Jurisdiction?

The position would be the same as in our response to Part II(2).

5. Can representatives of the Fund or the Manager market the Fund to prospective investors whilst the representatives are in the Jurisdiction?

The positions in Part I(1) would be applicable.

6. Can a local agent be appointed to market the Fund to prospective investors in the Jurisdiction? If yes, what licences or approvals does the local agent require?

See Part III(3). In providing trading service for units of the Fund, the Thai securities company (appointed as described in Part III(3) above) must comply with the requirements as specified in the Notification of the Capital Markets Supervisory Board, concerning rules for giving investment advice and providing service related to trading of investment units, *mutatis mutandis*, except where specified otherwise in the relevant regulations of the Capital Markets Supervisory Board which are specific to foreign CIS.

7. If a local agent is appointed to market the Fund to prospective investors in the Jurisdiction, can representatives of the Fund or the Manager accompany the local agent to meet with prospective investors? If yes, what activities are the representatives permitted to undertake and what information are the representatives permitted to discuss with prospective investors?

The position would be the same as in Part III(5).

8. Can the Manager provide details of the Fund in response to an unsolicited request from a prospective investor in the Jurisdiction?

The Manager could provide certain details about the Fund within the Jurisdiction, but review would be necessary to avoid the Manager finding itself in a position of engaging in the securities business of mutual fund management, without the necessary regulatory approvals.

9. Can the Fund accept an unsolicited investment from a prospective investor in the Jurisdiction?

On the basis that the Fund is outside Thailand and has no presence in Thailand, Thai law would not address whether the Fund could accept the investment. However, the investor may be under restrictions or conditions which the investment may contravene. As a practical matter, it is sometimes the case that assets are held in accounts outside the Jurisdiction, without having received the necessary approvals; such is contrary to law.

10. Can the Manager give information about the Fund in response to a “request for proposal” from a prospective investor in the Jurisdiction? Does it make a difference whether the “request for proposal” is private (i.e. sent to the Manager directly) or public (i.e. open to anyone)?

The position would be the same as in Part III(8).

11. Can the Fund or the Manager meet with a prospective investor in the Jurisdiction to discuss the Fund at the request of that prospective investor?

The position would be the same as in Part III(5).

12. Can the Manager attend a “beauty parade” or “finals presentation” in the Jurisdiction in order to discuss the Fund at the request of a prospective investor?

The position would be the same as in Part III(5).

13. If an investor in the Jurisdiction subscribes for shares in the Fund:

- (a) is there a requirement that the subscription agreement be in a particular language?

The position would be the same as in Part II(7)(a).

- (b) can the subscription agreement be governed by a law other than the laws of the Jurisdiction?

The position would be the same as in Part II(7)(b).

- (c) are there any other provisions that must be included in the subscription agreement as a result of regulatory requirements in the Jurisdiction?

The position would be the same as in Part II(7)(c).

14. Would your answers to the above questions in this Part III be different if:

- (a) shares in the Fund were listed on a stock exchange?

There would be no difference.

- (b) the Fund was structured as a unit trust rather than as a company?

There would be no difference.

- (c) the Fund was structured as a limited partnership rather than as a company?

There would be no difference.

- (d) the Fund (or where the Fund is a feeder fund, the master fund in which it invests) was a "fund of funds" that invests in other investment funds?

There would be no difference.

- (e) the Fund was a closed-end fund (i.e. investors do not have the ability to redeem their investments)?

There would be no difference.

Part IV – Servicing Clients in the Jurisdiction

1. Are there any restrictions on the information the Manager can send to an existing client in the Jurisdiction in relation to the client's investment portfolio or investment in the Fund?

For an offshore investment made otherwise lawfully, information on the client's investment portfolio or investment in the Fund should be provided according to the terms of the agreement between the Manager and the client; similarly, in the case of a foreign CIS approved as described in Part III(3) above, there are regulatory obligations with respect to provision of information, which must be met. In circumstances other than the foregoing, i.e. with respect to investments which are not lawful, such information could serve as evidence of illegal investment or other breach of law.

2. Can the Manager meet with an existing client in the Jurisdiction, at their offices or elsewhere in the Jurisdiction, to discuss the client's investment portfolio or investment in the Fund?

For an offshore investment made otherwise lawfully, an employee of the Manager could meet with an existing client in the Jurisdiction, provided the requirements in Part I(1) were met.

Part V – Miscellaneous Information

1. What is the name(s) of the government department or regulator that is responsible for regulating the marketing of investment management services and the marketing of investment funds in the Jurisdiction?

The primary regulator is the Securities and Exchange Commission, but the Ministry of Finance also plays an important role. Additionally, the Bank of Thailand regulates in certain areas that have relevance to investment, e.g. exchange control, as mentioned above.

2. What is the principal legislation governing the marketing of investment management services and the marketing of investment funds in the Jurisdiction?

The primary law on the marketing of investment management services and investment funds in the Jurisdiction is the Securities and Exchange Act B.E. 2535 (as amended). Note that derivatives are addressed under a separate law—the Derivatives Act B.E. 2546 (as amended)—which establishes a separate though similar regulatory regime applicable to derivatives, derivative funds, and services pertaining thereto. There are numerous regulations promulgated under both the Securities and Exchange Act and the Derivatives Act.

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