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## 1. Overview

This newsletter discusses the applicable rules and procedures concerning registering and offering in Thailand, as a Host economy, of a cross-border collective investment scheme (“**CIS**”)<sup>1</sup> established in a foreign jurisdiction via the Asia Region Funds Passport (“**ARFP**”), a multilateral framework intended to promote the development of a funds management industry in Asia and other signatory economies, i.e. Australia and New Zealand, by way of market access improvements and regulatory harmonization. Thailand signed the ARFP Memorandum of Cooperation (“**MOC**”) in 2016 (along with Australia, Japan, New Zealand, and the Republic of Korea).<sup>2</sup>

In order to sell a registered ARFP-CIS (“**Passport Fund**”) within other MOC signatory economies, it must comply with the ARFP criteria (“**Passport Rules**”<sup>3</sup>), which define, among other things, matters relevant to permitted investment types, portfolio restrictions and limits, breach reporting, change notification procedures for home and host regulators, custody, financial reporting, annual compliance reviews, redemption and valuation, and deregistration. Passport Funds compliant with the criteria and registered in one country (“**Home economy**”) can make an offering in another country (“**Host economy**”) through a licensed intermediary of the Host country.

## 2. Passport Rules

Annex 3 to the MOC sets out the Passport Rules, which list criteria in relation to the Passport Fund based on the subject matter and type of fund. In this newsletter, we will only emphasize significant matters and elaborate upon the important criteria of the *preliminary stage of Passport Fund knowledge* before exploring Annex 3 in depth, which includes the criteria stipulated upon (i) *Passport Fund Operators*; (ii) *Custodians*; and (iii) *Permitted assets under Passport Funds*.

### i) Passport Fund Operators

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<sup>1</sup> A CIS includes any arrangement with respect to property of any description, inclusive of money, the purpose or effect of which is to enable persons taking part in the arrangements (whether as owners of a property or any part of it) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.

<sup>2</sup> Resource from <https://fundspassport.apec.org/>.

<sup>3</sup> Under the MOC Paragraph 4 clause 4.1 (l) stated that “*Passport Rules means the rules in Annex 3 that are to apply as requirements in each Participant’s economy*” and under the clause 4.1 (i) stated that “*Participant means a signatory to this MOC*”

The operator of a Passport Fund (“**operator**”) is the entity that operates the Passport Fund complying with the regulations of the Home Country and provisions stipulated to impose obligations on the Passport Fund,<sup>4</sup> including, in part, the following:

- The operator must ensure that at all times it has officers or employees with certain qualifications:<sup>5</sup>
  - (a) a chief officer (or equivalent) with at least ten years’ relevant experience within the previous 15 years as an officer or employee in an International Organization of Securities Commissions (“**IOSCO**”) financial services related business, with five of the ten years in a managerial or supervisory role;
  - (b) at least two executive directors (or equivalent) which may include the chief officer, each with at least five years’ relevant experience within the previous seven years as an officer or employee in a managerial or supervisory role in an IOSCO financial services related business; and
  - (c) one or more officers or employees jointly responsible for making decisions or supervising all the discretionary investment decisions of the Passport Fund, each with either:
    - (i) a bachelor degree, or equivalent, or higher qualification in a relevant discipline, together with at least three years of experience within the previous five years as an officer or employee with responsibility for making or supervising discretionary investment decisions in an IOSCO financial services related business; or
    - (ii) at least five years of experience within the previous seven years as an officer or employee with responsibility for making or supervising discretionary investment decisions in an IOSCO financial services related business.
- The Passport Fund operator shall meet the financial resources criteria including the financial resources test, calculating the operator’s equity, the total assets under management and other related issues, as specified in Part 3, clause 7 of the MOC.
- The operator must, within 3 months after the end of the annual implementation review period, provide a copy of the annual implementation report to:
  - The Home regulator;
  - Each Host regulator for an economy where the Passport Fund had, during the review period, members who became members of the Passport Fund following an application made in that economy;
  - Each Host regulator of an economy in which interests in the Passport Fund were offered during the period from the beginning of the review period to the time the reports are provided to the Home regulator; and
  - The independent oversight entity<sup>6</sup> for the Passport Fund.
- The operator must notify the Home regulator and the Host regulator (for Thailand the competent authority will be the SEC) as soon as applicable but not later than seven days after the following event(s) have occurred:<sup>7</sup>
  - Interests in the Passport Fund are permitted to be lawfully offered as a Passport Fund in a Host country;

<sup>4</sup> The MOC: Part 3 clause 5

<sup>5</sup> The MOC: Part 3 clause 6

<sup>6</sup> The independent oversight entity shall subject to the Home economy laws and regulations as specifying in the Passport Rules, clause 14.

<sup>7</sup> Clause 12 of the Passport Rules.

- The operator has first disclosed to any person, other than an associate of the Passport Fund or its operator, or by way of a lawful disclosure on a confidential basis in relation to incomplete negotiation relating to a transaction, that it intends to propose a change in the operator or the Passport Fund be wound up;<sup>8</sup>
- The operator is changed in accordance with the Home economy laws and regulations;
- The Passport Fund commences or completes being wound up in accordance with the Home economy laws and regulations;
- The operator has first disclosed to any person, other than an associate or its operator, that it intends to apply for the deregistration of the Passport Fund; or
- The operator applies for deregistration of the Passport Fund (if the intention to apply has not been notified).

## ii) Custodian

The custodian is an entity that holds assets of the Passport Fund,<sup>9</sup> who is responsible for the safekeeping of such assets and, as such, subject to any limitation in the Home economy laws and regulations.

The custodian in each Home economy shall be the following entity:<sup>10</sup>

Home economy of the Passport Fund	Responsible holding party
Australia	The operator of the Passport Fund
Japan	The trust company or a financial institution engaged in trust business designated by the Investment Trusts and Investment Corporations Act.
Korea	The trust business entity for the collective investment scheme under the Financial Investment Services and Capital Markets Act of Korea.
New Zealand	The supervisor of the registered managed investment scheme who is licensed under the Financial Market Supervisor Act 2011.
Singapore	An approved trustee under securities, and Future Act of Singapore of an authorized scheme.
<b>Thailand</b>	In case of a scheme established as a mutual fund, the mutual fund supervisor appointed for the mutual fund under the Securities Act of Thailand (to be specific i.e. the Securities and Exchange Act B.E. 2535 (1992) (the "SE Act").

<sup>8</sup> For instance, in the case where the operator is in a process of negotiation for a change in its operator that has not settled yet and the operator discloses to the third parties such information other than an associate of the Passport Fund, then, the operator shall notify both Home and Host regulator.

<sup>9</sup> Specified in clause 13(3) of the Passport Rules

<sup>10</sup> Clause 13(1) of the Passport Rules

	In case of a scheme established as a trust, the entity approved by the SEC under the law on Trust for Transactions in Capital Market (to be specific i.e. Trust for Transactions in the Capital Market. Act B.E. 2550 (2007)) to perform the custodian function of assets of the authorised scheme
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Under the Passport Rules, the custodian must ensure that Passport Fund assets are properly held and accounted for as the Passport Fund's assets (and identifiable as such in the custodian's records), which entails being separately held from assets that are not those of the Passport Fund.

### iii) Permitted assets under Passport Funds

The Passport Rules provide various rules concerning Passport Fund-associated investments, including the permitted investment types, restrictions on portfolio allocations, and limits on exposure. However, our focus in this newsletter only shall be certain parts of the rules of the permitted assets for the Passport Fund investment.

The Passport Rules allows the Passport Funds to acquire only assets, in addition to entering into certain derivatives or securities lending arrangements, that are issued in an IOSCO jurisdiction and only of the following types:

- a) Currency;
- b) Deposits;

The requirements for deposits are specified in the Passport Rules and only allow the Passport Fund to make deposits with deposit-taking institutions regulated by a financial supervisory authority in its place of incorporation that, in the written opinion of the Home regulator, is largely compliant with the guidelines of the Basel Committee on Banking Supervision.<sup>11</sup> The Passport Fund may create a depository if:

- The amount deposited can be withdrawn under the terms of the deposit on no more than 31 days notice; and
- It is not subject to loss of interest or to penalty if the amount is withdrawn more than 12 months after it was deposited.

- c) Gold Deposit Receipts;

Gold depository receipts represent an enforceable and documented obligation upon an entity that is authorized in its principal place of business to carry out banking business (the "issuer") that includes making available a specified amount of gold at the direction of the holder of such receipts (the "holder"). Under this system, the issuer has an obligation, enforceable by the holder, to at all times hold gold reserves:

- of a specified amount allocated from the holder and that must be made available at the holder's direction

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<sup>11</sup> The Basel Committee on Banking Supervision is the primary global standard setter for the prudential regulation of banks and provides a forum for regular cooperation on banking supervisory matters.

- sufficient in amount and availability to enable performance of the obligation to the holder and any other obligations of the issuer in relation to gold held thereby.

d) Transferable securities; and

The requirement for transferable securities shall be:

- A share or stock in a body corporate;
- A bond or other form of debt security (other than a money market instrument);
- An interest in a CIS;
- Any interest in an asset covered by the above securities; and
- A right to be issued an asset covered by the above securities on payment of a specified amount for that asset that is granted by the issuer of that asset.

e) Money market instruments.

Under the Passport Rules, the Passport Fund must not acquire any money market instruments unless the operator has reasonable grounds to believe the following conditions are satisfied:

- The instrument:
  - (i) has maturity at issuance or a residual maturity of not more than 397 days; or
  - (ii) may be reasonably expected to undergo regular yield adjustments that are in line with money market conditions at least once every 397 days; and
- On any business day in the place in which it is acquired by the Passport Fund, the instrument:
  - (i) can be reliably valued; and
  - (ii) can be closed out or sold for that value.

### 3. Registration of the ARFP entry to Thailand as a host economy

#### (1) Application for entry of Passport Fund in Thailand

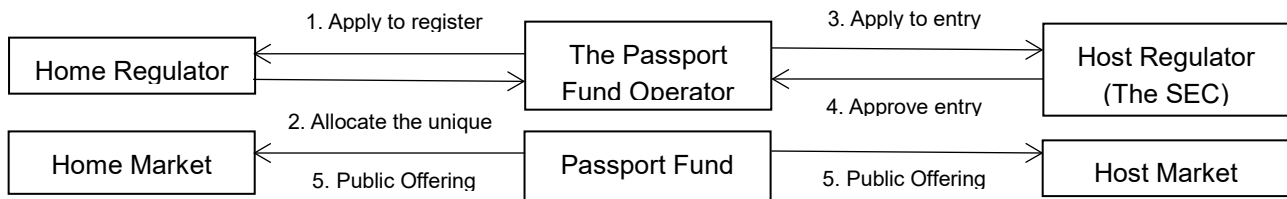
The operator of a Passport Fund registered in a foreign jurisdiction (Home jurisdiction), which desires to rely on the ARFP, must apply for approval<sup>12</sup> by the Securities and Exchange Commission of Thailand (the “**SEC**”) prior to a public offering<sup>13</sup> to sell units of such fund to investors in Thailand.

The SE Act is the main law governing Passport Funds established as mutual funds. In addition, Passport Funds established as trusts must comply with the Trust for Transactions in Capital Market Act B.E. 2550 (2007) (the “**Trust Act**”) that provides rules concerning trust deeds. The SEC is the regulator of Passport Funds and responsible for the development of the Passport Fund in Thailand.

The following diagram provides an overview of the process for Passport Fund cross-border public offerings in Thailand:

<sup>12</sup> The SEC uses “approval” as the word corresponding to the “authorisation” provided in “5 Streamlined entry process” of Annex 2 of the MOC.

<sup>13</sup> According to our discussion with the SEC’s officer, currently, Passport Fund is currently available for public offering only.



An application for entry to a Host economy may be refused if the Host regulator (the SEC) is of the opinion that:<sup>14</sup>

- a) The Passport Fund, or its operator, does not comply with or is not likely to comply with the:
  - Host economy laws and regulations;
  - Home economy laws and regulations; and
  - Passport rules;
- b) It is not in the public interest of the Host economy to authorize the Passport Fund for offer in the Host economy or authorizing the Passport Fund would breach sanctions applied against another economy by the Host economy; or
- c) The name of the Passport Fund to be used in the Host economy is not permitted for use in the Host economy because it is already in use or the use of the name is subject to restrictions of the Host economy applicable to Regulated CIS in the Host economy, unless the Passport Fund or its operator notifies the Host regulator and the Home regulator, in writing, that the Passport Fund will adopt an available alternative name in the Host economy.

If an application for public offering of a Passport Fund in Thailand obtains SEC approval, the Passport Fund's units may be directly offered to investors so long as its operator finds and appoints a Thai local licensed intermediary or distributor who is authorized by the SEC.<sup>15</sup>

## **(2) Required documents to apply for an entry and a public offering in Thailand**

<sup>14</sup> The MOC Annex 2 clause 4(5)

<sup>15</sup> SEC Ann. No. Tor Thor. 8/2561 SEC Ann. No. Tor Thor. 8/2561. Under Thai law, the fund units offering to investors in Thailand is the securities business under the SE Act B.E. 2535, and securities business can be undertaken only after having obtained a license (Section 90 of SE Act), and therefore a foreign CIS operator that wishes to offer units in Thailand is required to appoint the local intermediary or distributor. In addition, an applicant who wishes to offer for sale of units of a Passport Fund, an application must be submitted with a letter appointing a brokerage firm to perform duties as a representative responsible for the trading of units, which is interpreted to include repurchase or redemption of units, of APEC Asia Region Funds Passport in Thailand and a letter appointing a local representative, which may be but does not have to be a brokerage firm, in Thailand to be the person responsible for the operation of APEC Asia Region Funds Passport to perform duties as specified under the Notification of the Capital Market Supervisory Board concerning Provisions relating to Offering for Sale of Units of Foreign Collective Investment Scheme (Clause 6 (4) of Notification of the Capital Market Supervisory Board No. Tor Jor. 4/2561 Re: Provisions relating to Offering for Sale of Units of Foreign Collective Investment Scheme).

Prior to the public offering of a Passport Fund in Thailand, such Passport Fund shall apply for approval of an entry and an 'offer for sale' by submitting an application and other evidentiary documentations to the SEC in accordance with the rules, conditions, and procedures prescribed by the SEC.<sup>16</sup>

An applicant for an offer for sale of units of a Passport Fund shall submit the following evidentiary documentation:

- (1) an application form for an offer for sale of units of Passport Fund by using Form 35-ARFP CIS as provided on the website of the SEC Office;
- (2) documents containing details in relation to the Passport Fund to be offered for sale which shall have the same characteristics of the forms and list specified in the Registration Statement pursuant to the Notification of the Capital Market Supervisory Board concerning Provisions relating to Offering for Sale of Units of Foreign Collective Investment Scheme. In the case where the applicant files the Registration Statement and draft prospectus together with filing the application to obtain approval, it shall be deemed that the submitted Registration Statement is evidentiary documentation supplemented to the application;
- (3) document demonstrating that the Passport Fund is established legally under the law of the jurisdiction where the home regulator is established;
- (4) a letter appointing a brokerage firm to perform duties as a representative responsible for the trading of units of the Passport Fund in Thailand, and a letter appointing a local representative in Thailand to be the person responsible for the operation of the Passport Fund to perform duties as specified under the Notification of the Capital Market Supervisory Board concerning Provisions relating to Offering for Sale of Units of Foreign Collective Investment Scheme.<sup>17</sup>

Form 35-ARFP CIS includes Form 69 CIS as an integrated part, and the following documents shall be attached to the Form 69 CIS:

- Fund fact sheet;
- Key information, including:
  - a) the registration statement shall, at a minimum, contain the following information:
    - 1.1 Investment objective / policy
    - 1.2 Capital of the CIS
    - 1.3 Amount and details of units of the CIS offered for sale
    - 1.4 Expected selling price per unit (e.g. NAV or NAV plus front-end fee)
    - 1.5 Financial statement (if applicable)
    - 1.6 Fund manager and major unit holders of the CIS (if applicable)
    - 1.7 Auditor name and CPA Number
    - 1.8 Procedures for offering of the CIS units
  - b) prospectus;
- Certification of information accuracy; and
- Evidence on the appointment of an authorized person of the CIS Operator.

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<sup>16</sup> SEC Ann. No. Sor Jor. 4/2561, and Tor Jor.4/ 2561.

<sup>17</sup> SEC Ann. No. Sor Jor. 4/2561.

Documents and information can be submitted in: (a) Thai; (b) English; and (c) Thai and English unless the SEC Office has otherwise specified.<sup>18</sup>

### **(3) Thai Local Intermediary or Distributor and Representative for public offerings in Thailand**

An operator of a foreign fund needs to have a local intermediary or distributor pursuant to the SE Act, and an operator of a Passport Fund needs to have a local representative.

The Thai local intermediary, distributor or representative for public offering in Thailand shall meet required qualifications, among others:<sup>19</sup>

(1) the local intermediary, distributor or representative shall be a:

- (a) commercial bank;<sup>20</sup>
- (b) securities company under SE Act or securities brokerage company under SE Act; or
- (c) newly established company with the specific purpose to apply for a securities business license.

(2) the local intermediary, distributor or representative shall have the SEC license type A, type C, or type D<sup>21</sup>; and

(3) the licensed intermediary, distributor or representative's personnel with management authority shall not have any prohibited characteristics as following;<sup>22</sup>

a) being or having been bankrupt;

b) having been sentenced by a final judgment to imprisonment for an offence related to property committed with dishonest intent;

c) having been a director, a manager or a person with power of management of a financial institution whose license was revoked, unless an exemption has been granted by the Capital Market Supervisory Board;

d) being a director, a manager or a person with power of management of any other securities companies, unless it complies with the rules, conditions and procedures as prescribed by the notification of the Capital Market Supervisory Board;

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<sup>18</sup> SEC Ann. No. Tor Jor. 4/2561.

<sup>19</sup> *Ministerial Regulation Concerning the authorization to operate securities business. B.E. 2551 (2008)*

<sup>20</sup> Commercial bank means commercial banks under the Financial Institution Business Act B.E. 2551 (2008)

<sup>21</sup> License type A means a securities business license to perform (1) securities brokerage, (2) securities trading, (3) securities underwriting, (4) investment advisor service, (5) mutual fund management, (6) private fund management, (7) borrow and lending securities, and (8) venture capital management.

License type C means a securities business license to perform (1) mutual fund management (2) private fund management (3) securities brokerage for unit fund or unit trust (4) securities trading for unit fund or unit trust (5) securities underwriting for unit fund or unit trust (6) investment advisor service (7) venture capital investment.

License type D means a securities business license to perform (1) securities brokerage for unit fund or unit trust (2) securities trading for unit fund or unit trust (3) securities underwriting for unit fund or unit trust.

<sup>22</sup> SE Act section 103, 144, and 145.



e) having been removed from the board Chairperson, director or manager under the punishment of SE Act, or having been removed under the provisions of other laws;

f) being a political official; or

g) having other prohibited characteristics as prescribed by the notification of the Capital Market Supervisory Board.

#### **4. List of Registration Passport Funds in Thailand**

As of 20 October 2021, there are no Passport Funds approved for public offering in Thailand.

#### **5. Summary**

The ARFP is an international initiative led by Asia-Pacific Economic Cooperation (“**APEC**”) that aims to facilitate cross-border offerings of eligible collective investment schemes among APEC member economies while ensuring investor protection in the economies participating in the ARFP. The ARFP allows units of funds authorized in a home economy to be offered publicly in host economies through locally licensed or regulated distributors upon approval as a Passport Fund and host jurisdiction authorization. Under the ARFP framework, efforts are made to unify the mutual entry processes for funds that are managed in accordance with the ARFP rules, agreed upon among the relevant regulators of the participating economies. The ARFP emphasizes investor protection by ensuring that participating countries must meet the standards of the IOSCO.

The key objectives for the ARFP include:

- Providing investors in the economy of each of the Participants with a more diverse range of investment opportunities, enabling them to better manage their portfolio and meet their investment objectives;
- Deepening the region’s capital markets to attract finance for economic growth in the region;
- Facilitating the recycling of the region’s savings locally, growing the pool of funds available for investment in the region;
- Strengthening the capacity, expertise and international competitiveness of financial markets in the region and the fund management industry, with a view to supporting sound economic development; and
- Maintaining the legal and regulatory frameworks which promote investor protection, fair, efficient and transparent markets for financial services, supporting financial stability and providing high standards in the management and distribution of collective investment schemes.

As for Thailand, it seems that the ARFP, in practice, has yet to reach widespread notoriety, as to date no Passport Funds have been approved by the SEC.

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