

A Guide to
Qualifying
Investor Funds
in Ireland

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A GUIDE TO QUALIFYING INVESTOR FUNDS IN IRELAND

Introduction

Ireland is one of the leading international domiciles for regulated funds, offering a variety of fund structures with differing levels of investment and borrowing restrictions, investment mechanics, minimum subscription requirements, service provider requirements and authorisation timeframes depending on the proposed portfolio composition and targeted investor profile for a particular project.

Fund Types

Ireland offers two main categories of fund types – UCITS and non-UCITS, the latter being broken down into three distinct categories – *retail investors*, *professional investors* and *qualifying investors* – with few investment and no borrowing limits, but minimum subscription requirements and appropriate expertise/understanding criteria, imposed on the most flexible *qualifying investor fund* structure.

The qualifying investor fund (or “QIF”) structure is the structure used most frequently for:

- hedge funds;
- FoHFs;
- private equity funds;
- real estate funds;
- feeder structures;

and provides a high level of structuring flexibility as well as a fast track authorisation process.

This Guide focuses on the QIF structure. Other product specific Dillon Eustace guides available include:

- A Guide to UCITS in Ireland
- A Guide to Hedge Funds in Ireland
- A Guide to Irish Private Equity Funds
- A Guide to Irish Regulated Real Estate Funds

- A Guide to Selling Irish Funds Regulated in Asia
- A Guide to Multi-Manager Funds in Ireland
- A Guide to Funds Listing in Ireland
- ETFs and the UCITS Framework

These, and several other funds related publications, are all available at www.dilloneustace.ie

Regulatory Regime

The Central Bank of Ireland (the “Central Bank”) is the competent authority responsible for the authorisation and ongoing supervision of all regulated Irish fund structures.

The legislative basis for QIFs in Ireland is found in Part XIII of the Companies Act, 1990, in the Units Trusts Act, 1990, in the Investment Limited Partnership Act, 1994 and in the Investment Funds, Companies and Miscellaneous Provisions Act, 2005, expanded upon by a series of Non-UCITS related notices issued by the Central Bank (the "NU Notices") and with further clarification provided for in a series of Central Bank guidance notes ("Guidance Notes"), each of which – the legislation, the NU Notices and the Guidance Notes – have evolved and been amended over time.

QIFs

QIFs are subject to a minimum subscription requirement of Euro 100,000 per investor and investors must meet certain appropriate expertise/understanding tests.

An investor in a QIF must be either:

- (a) an investor who is a professional client within the meaning of Annex II of Directive 2004/39/EC (Markets in Financial Instruments Directive); or
- (b) an investor who receives an appraisal from an EU credit institution, a MiFID firm or a UCITS management company that the investor has the appropriate expertise, experience and knowledge to adequately understand the investment in the QIF; or
- (c) an investor who certifies that they are an informed investor by providing the following:
 - confirmation (in writing) that the investor has such knowledge of and experience in financial and business matters as would enable the investor to properly evaluate the merits and risks of the prospective investment; or

- confirmation (in writing) that the investor's business involves, whether for its own account or the account of others, the management, acquisition or disposal of property of the same kind as the property of the QIF.

Due to the types of exposures taken, leverage requirements and investment techniques, QIFs are established as non-UCITS schemes which do not benefit from the principle of mutual recognition within the European Economic Area. QIFs are normally private placement vehicles, offered in accordance with the relevant target jurisdictions' local private placement rules.

Fast Track Authorisation for QIFs

QIFs benefit from a fast track authorisation procedure – a self certification regime which allows for a 1 day authorisation process.

Principal Legal Structures

The legal structures within which QIFs can be housed are variable capital investment companies, unit trusts, investment limited partnerships (rarely used) and common contractual funds. The investment company and unit trust structure are those most frequently used (natural persons cannot invest in common contractual funds).

Umbrella type investment companies can be established with statutory based segregated liability between sub-funds within the umbrella. Segregated liability between funds within umbrella unit trusts is based on the concept of each fund being a separate trust.

Liquidity Options

QIFs can be structured as open-ended, open-ended with limited liquidity, limited liquidity or closed-ended schemes. Gates, deferred redemptions, holdbacks, in-kind redemptions and side pockets can all be facilitated within these types of funds.

Prime Brokers

The use of prime brokers to Irish funds is well established with most of the leading international prime brokers having been approved to act for Irish funds. The applicable rules dealing with the use of prime brokers focus on the rating/financial resources of the prime broker, the extent to which assets of a fund can be rehypothecated by the prime broker, the

nature of the relationship between the fund's Irish custodian and the prime broker as well as requirements as to enforceability of set-off /netting provisions.

Stock Exchange Listing

QIFs automatically meet the majority of the Irish Stock Exchange's ("ISE") listing criteria. As a result, their shares or units can easily be listed within the same timeframe as the fund's authorisation, if a listing is required or considered beneficial.

A listing on the ISE meets the "exchange listed" criteria of many European counterparts/investors.

Regulatory Categorisations

As explained in the introduction, the Central Bank sets the investment and borrowing limits for non-UCITS products based on the targeted investor profile - *retail investors*, *professional investors* and *qualifying investors* – with few investment and no borrowing limits, but minimum subscription requirements and appropriate expertise/understanding criteria, imposed on the most flexible *qualifying investor* structure.

Qualifying Investor Funds

The *qualifying investor fund* or *QIF* is the most frequently used non-UCITS vehicle due to its greater flexibility in terms of investment limits and the absence of any borrowing or leverage limits. A minimum initial subscription requirement of Euro 100,000 per investor applies and investors must meet certain appropriate expertise/understanding tests.

An investor in a QIF must be either:

- (a) an investor who is a professional client within the meaning of Annex II of Directive 2004/39/EC (Markets in Financial Instruments Directive); or
- (b) an investor who receives an appraisal from an EU credit institution, a MiFID firm or a UCITS management company that the investor has the appropriate expertise, experience and knowledge to adequately understand the investment in the QIF; or
- (c) an investor who certifies that they are an informed investor by providing the following:
 - confirmation (in writing) that the investor has such knowledge of and experience in financial and business matters as would enable the investor to properly evaluate the merits and risks of the prospective investment; or
 - confirmation (in writing) that the investor's business involves, whether for its own account or the account of others, the management, acquisition or disposal of property of the same kind as the property of the QIF.

Qualifying investors must self certify in writing to the QIF that they (i) meet the minimum initial investment per investor and appropriate expertise/understanding tests; and (ii) are aware of the risk involved in the proposed investment and of the fact that inherent in such investments is the potential to lose all of the sum invested.

Where the fund is an umbrella scheme, the investor's aggregate subscriptions across the entire umbrella are taken into account. Unless otherwise provided in the relevant prospectus, the amounts of subsequent subscriptions are unrestricted.

Although institutions may not group amounts of less than Euro 100,000 for individual investors, institutions which are themselves Qualifying Investors and which are investing monies pursuant to fully discretionary mandates may group amounts of less than Euro 100,000 being managed for individual investors.

Professional Investor Funds

A minimum subscription requirement of Euro 125,000 per investor is imposed for *professional investor funds* or *PIFs*, but no appropriate expertise/understanding criteria.

PIFs may provide a derogation from the minimum subscription requirement to investors who are trustees of pension plans, provided that the investors commit to invest the minimum subscription amount within a period of 12 months.

Where the fund is an umbrella scheme, the investor's aggregate subscriptions across the entire umbrella are taken into account. Unless otherwise provided in the relevant prospectus, the amounts of subsequent subscriptions are unrestricted.

Although institutions may not group amounts of less than Euro 125,000 for individual investors, institutions which are themselves professional investors and which are investing monies pursuant to fully discretionary mandates may group amounts of less than Euro 125,000 being managed for individual investors.

Retail Investor Funds

A fund which has no minimum subscription requirement or has a minimum subscription which is less than Euro 100,000 per investor will be considered to be a *retail investor* fund.

Knowledgeable Employee Exemption

An exemption from the minimum subscription requirement for both QIFs [and PIFs] and an exemption from the QIF qualifying investor criteria is available to the fund's promoter, managers and a limited number of other persons and entities that are closely connected with the management of the fund (the "*knowledgeable employee*" exemption).

Investment and Leverage Restrictions: Direct Investments

The investment restrictions for direct investing QIFs (i.e. not *fund of funds* or *feeders* which are dealt with in the following sections) are outlined below.

Investment Restrictions

QIFs are subject to the following investment restrictions in respect of direct investments:

- QIFs are not permitted to acquire shares carrying voting rights which would enable them to exercise significant influence over the management of issuing bodies (this restriction does not apply to holdings in underlying funds nor to private equity/venture capital schemes);
- QIFs structured as investment companies must comply with the principle of “spreading investment risk” as required under section 253(2)(a) of the Companies Act, 1990 Part XIII. It is left to the discretion of the Board of Directors to determine actual diversification with reference to particular strategies;
- QIFs may invest up to 100% of assets in underlying regulated or unregulated funds but no more than 50% of net assets in a single underlying regulated or unregulated fund;
- investment in an underlying fund in excess of 50% of net assets will be treated as a feeder type investment. The general rule is that QIFs may only invest on a feeder basis into “regulated” masters where, in this context, “regulated” means a fund which provides an equivalent level of investor protection to that provided under Irish laws, regulations and conditions governing Irish QIFs. However, for large, long established asset managers a derogation may be available for QIFs feeding into unregulated masters where the underlying unregulated master fund is managed within the same group (see **Investment Restrictions: Feeder Funds** below); and
- when transacting over-the-counter in circumstances where collateral is being passed by the QIF outside the Irish trustee / custodian’s custodial network, QIFs are generally required to deal with counterparties with a minimum credit rating of A2/P2 (or A1/P1 where the QIF’s exposure to such a counterparty may exceed 40% of its net asset value). Currently, a QIF in the form of an investment company (as opposed to a unit trust, common contractual fund or limited partnership) is limited to this 40% figure because of the statutory obligation to spread its investment risk to which it is

subject.

Certain more specific rules apply to private equity/real estate schemes, generally to do with disclosure and valuations rather than investment restrictions.

No Leverage Restrictions

For QIFs, borrowing and leverage are not subject to regulatory limit. It is a matter of prospectus disclosure only.

Investment Restrictions: Funds of Funds

The investment restrictions and prospectus disclosure rules applicable to QIF *fund of funds* (“FoF”) are outlined below.

A QIF FoF may invest up to 100% of its assets in regulated or unregulated funds, subject to a maximum of 50% of net assets in any one underlying regulated or unregulated fund. In this context, the Central Bank would consider an underlying fund to be “unregulated” where it does not provide an equivalent level of investor protection to that provided under Irish laws, regulations and conditions governing Irish QIFs.

QIF FoFs can invest in, for example, regulated and/or unregulated underlying open-ended, limited liquidation and closed-ended HFs domiciled in any jurisdiction (e.g. the Bahamas, Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, Ireland, Jersey, Malta, Luxembourg, Singapore, Hong Kong, Japan, South Africa and the US). There are no restrictions on investing in underlying funds which are leveraged, nor are any limits imposed on the amount of leverage used by underlying HFs. Underlying funds may be subject to “lock-up” periods (*i.e.*, periods during which the units/shares may not be redeemed) or “gates” (limiting the number of shares/units in such underlying HF which may be redeemed on a particular date), may employ “designated investments” (*i.e.*, particular investments for which there is no liquidity until a realisation event occurs and in which only unitholders/shareholders invested in an affected class when such an investment is so classified will participate) and/or may pay redemptions in-kind.

If the QIF intends to invest in unregulated funds, then it must disclose in its prospectus that such funds will not provide a level of investor protection equivalent to funds authorised under Irish laws and subject to Irish regulations and conditions.

QIF FoFs may also invest without limitation in units of other funds of funds and feeder funds provided that suitable disclosure regarding increased costs and lack of transparency is provided in the QIF’s prospectus.

The QIF’s prospectus must disclose the implications of the fund of funds investment policy to investors, including the fact that fees may arise at multiple levels, the lack of transparency that may arise as well as the potential lack of liquidity.

Investment Restrictions: Feeder Funds

QIFs can be established as feeder funds (where the primary objective is to take a particular exposure through investing principally in the shares or units of an underlying “master” fund). However, the Central Bank takes the general position that it will not allow use of any Irish fund as a feeder vehicle for an *unregulated* master fund.

In the case of a QIF, an investment in an underlying fund will be considered a feeder type investment if greater than 50% of the QIFs’ net assets and an underlying master fund will be considered “unregulated” where that underlying master fund is not authorised in Ireland, nor authorised in another jurisdiction by a supervisory authority established in order to ensure the protection of unitholders and which, in the opinion of the Central Bank, provides an equivalent level of investor protection to that provided under Irish laws, regulations and conditions governing equivalent (i.e. QIF) Irish collective investment schemes.

What this means is that, except where a derogation has been granted to a QIF, an Irish feeder fund may only feed into an underlying regulated master fund.

A QIF feeder can invest in an underlying fund of funds but cannot invest in an underlying feeder unless Irish and by way of derogation.

Prospectus Disclosure

The feeder fund prospectus must provide sufficient information in relation to the underlying master to enable investors in the feeder fund make an informed judgment of the investment proposed to them and must also disclose the relationship between the feeder and the underlying master including information relating to the charges and expenses in respect of the underlying master.

Any preliminary or initial charges which the manager of the underlying master may be entitled to charge for its own account in relation to the acquisition of shares or units in it by the feeder fund must be waived and any commission received by the manager of the feeder arising from the investment in the shares or units of the underlying master must be paid into the feeder scheme.

In addition, the periodic reports (i.e. audited financial statements) of the underlying master should be attached to the corresponding reports of the feeder.

In the context of hedge funds wishing to pursue a feeder type investment, the most common issue is that the underlying master is considered unregulated. For that reason, we have concentrated on the QIF derogation below.

QIF Derogation

The derogation to allow a QIF invest on a “master / feeder” basis into an underlying unregulated master fund is subject to strict parameters, is only granted on a case-by-case basis following detailed review of the derogation application by the Central Bank and is only available to very large (in terms of AUM), experienced managers.

(i) Principal Derogation Requirements

The principal requirements for such a derogation are that:

- the Irish QIF and the unregulated master must be managed by / within a single group;
- the group involved must be a large institution with a proven relevant track record with shareholders funds of at least Euro 100 million and assets under management of at least Euro 4 billion and have a track record of at least ten years in asset management;
- the underlying master fund must meet Irish rules regarding independent custody and the appointment of prime brokers and other financing counterparties;
- the unregulated master fund must be subject to annual independent audit;
- the underlying master must issue an offering document/prospectus; and
- the QIF must demonstrate significant control mechanisms over the master fund as well as over any third party underlying managers or underlying investment funds.

(ii) Independent custody arrangements

The assets of the underlying master must be entrusted to an independent custodian for safekeeping. Where the underlying master has the ability to enter into transactions whereby its assets may pass to prime brokers and/or other financing counterparties, the applicant QIF feeder scheme must demonstrate to the Central Bank that the arrangements meet with the prime brokerage requirements imposed on Irish QIFs.

(iii) *Unregulated Master investing directly*

Where the unregulated master invests directly (i.e. not via other funds), the manager of the unregulated master must:

- have the ability at any time upon notice to close the account of any or all sub-managers, or to instruct a lending counterparty to close out particular positions or to stop accepting instructions from individual managers;
- independently monitor positions taken in the scheme from a risk perspective;
- receive daily reports from brokers or lending counterparties and have real time access to all trades and positions through the broker accounts;
- monitor on a daily basis the market risk and other factors associated with the activities of each underlying manager;
- require that off-exchange contracts be subject to normal market rules (ISDA or equivalent);
- apply daily stress and scenario tests;
- monitor overall leverage of the scheme;

and any sub-manager must be subject to a detailed due diligence test before appointment.

Note that managed accounts are considered direct investments to which the above requirements apply.

(iv) *Unregulated Master investing in other funds*

As is often the case in such structures, the underlying unregulated master may invest itself in a number of underlying schemes (funds, LPs, joint venture arrangements, etc.). The Central Bank acknowledges that some of its requirements in relation to underlying masters are *'not practical because the unregulated scheme invests directly in other schemes'* and so it is willing to consider proposals on the basis of extensive diversification of investments. The derogation request must provide details of the extent of diversification.

Where the underlying unregulated master does invest in underlying schemes, the QIF feeder must demonstrate that it has thorough and rigorous controls and systems in place to monitor constantly the activities of the underlying schemes, their managers and risk assessment procedures.

Information must also be provided on the Irish QIF feeder's corporate governance and compliance monitoring structures including full details on the underlying scheme selection, monitoring and liquidation process. This should include:

- *Fund selection process* (e.g. initial pre-screening, strategy due diligence, risk analysis, business due diligence, investment recommendation and investment execution);
- *Monitoring process* (e.g. quantitative and qualitative analysis);
- *Liquidation process*; and
- *On-going management process* (e.g. reporting requirements, review meetings, etc).

As part of this process, it needs to be demonstrated that, on an ongoing basis, the manager of the unregulated master will:

- review the background, expertise and experience of the underlying managers;
- have appropriate controls and systems in place to monitor constantly the activities of the underlying schemes, their managers and risk assessment procedures;
- review the strategies being employed, including the amount of gearing inherent in these strategies and counterparty risk;
- monitor overall leverage of the unregulated scheme.

(v) *Prospectus Disclosure*

The feeder fund's prospectus must contain sufficient information relating to the underlying master fund to enable investors make an informed judgment of the investment proposed to them. The periodic reports of the underlying fund must be attached to the periodic reports of the feeder scheme. The feeder fund must make appropriate disclosures in its prospectus regarding the relationship between it and the underlying fund including comprehensive information relating to charges and expenses in respect of the underlying fund.

A copy of the prospectus / offering memorandum (“offering document”) for the unregulated scheme must be submitted to the Central Bank (an unregulated scheme which does not produce an offering document is not acceptable). The offering document must be reviewed by the QIF feeder scheme to ascertain that none of the arrangements surrounding the unregulated scheme will impact on the operations of the QIF, for example in relation to redemption frequency. Any relevant issues must be addressed in the derogation request submission.

Irish Master Feeder Structure for Multi-Jurisdictional Sales

Irish master-feeder structures (using a combination of Irish regulated master funds and a combination of Irish or non-Irish feeders) to suit investors are often employed where a fund sponsor:

- expects to generate significant investment from within and outside the U.S.;
- needs to separate distinct pools of investors into different legal structures for regulatory or tax reasons;
- wants to avail of economies of scale by feeding several funds into a single master;
- wants to offer global investors an investment vehicle in a form which is familiar to them, or domiciled in their home jurisdiction, but use Ireland as a centre for making the ultimate underlying investments (administration, custody, tax and regulatory reasons).

For global marketing, particularly involving U.S. investors, one way of structuring this type of fund offering is to use a single Irish “master” fund as a hub and then one or more “feeder” funds as this can optimize the tax treatment which U.S. tax-paying and U.S. tax exempt investors obtain from an investment in the structure whilst at the same time sheltering non-U.S. investors from U.S. tax risks and reporting requirements. With the dual aims of (i) providing U.S. taxable investors on the one hand and U.S. tax exempt and non-U.S. investors on the other hand, with an optimal fund structure, and (ii) creating a structure that is as cost and operationally efficient as possible, a hedge fund that is to be simultaneously offered inside and outside the U.S. is generally structured as a master-feeder.

This structure may take the following form;

- an Irish single or umbrella unit trust (the “Irish Master Fund”) authorised by the Central Bank as a regulated hedge fund. While other types of Irish fund can also be used, an Irish unit trust can elect to “check the box” (U.S. Form 8832) to be treated as a partnership for U.S. tax reporting purposes;
- an Irish single feeder fund investment company or unit trust (the “Irish Feeder Fund”) authorised by the Central Bank as a regulated feeder fund. This vehicle is typically used to separate the U.S. tax exempt and other Non-U.S. (global investors) from U.S. taxable investors at the Irish Master Fund level; and

- a Delaware or Cayman or other offshore feeder fund typically structured as a limited partnership or limited liability company (the “Non Irish Feeder Fund”). The Non-Irish Feeder Fund will be targeted at U.S. taxable investors and is often optional. From a tax and regulatory perspective, U.S. taxable investors could invest directly in the Irish Master Fund instead of investing indirectly through their investments in the Non-Irish Feeder Fund. It is the common experience, however, that marketing and accounting considerations dictate that U.S. taxable investors invest directly via these feeder funds (e.g. using a Delaware vehicle to act as an onshore conduit), even though they invest all or substantially all of their assets in the Irish Master Fund.
- the Irish Master Fund invests directly in the underlying assets availing of Ireland's exempt domestic taxation regime for payments or transfers to the Irish and Non-Irish Feeders. The sole investors in the Irish Master Fund will be the feeders and they may invest directly in a single pool at the Irish Master Fund level or in segregated sub-trusts, if the master is established as an umbrella fund (e.g. to divide strategies or leverage policies between different fund products). The Irish Master Fund can also offer multiple unit/share classes or series to the feeders, which in turn can offer mirror units/shares to their investors;
- the Irish Feeder Fund and Non-Irish Feeder Fund acquire units/shares in the Irish Master Fund which fluctuate in value in accordance with the performance of the assets at the Irish Maser Fund level. As Irish hedge funds can have several differing liquidity features (open ended, limited liquidity, closed-ended) the liquidity at the level of the feeder funds and the Irish Master Fund level can be matched;
- fees can be split between the level of the feeder funds and master fund to provide for differing management and performance fees, however double charging at the level of the feeder and the master is prohibited if the funds have a common manager (including affiliates of the manager). It is also possible to list the units/shares of the Irish Feeder Fund (and usually the Non-Irish Feeder Fund) if required. There generally is no need to list the units of the Irish Master Fund as the only investors in the Master Fund will be the feeders.

The Irish Feeder Fund could be a QIF, PIF or retail investor fund provided however that (a) if the Master Fund is a QIF, then the Irish Feeder Fund would also have to be a QIF and (b) if the Master Fund is a PIF, the Irish Feeder Fund could not be a retail fund.

Authorisation Process

The authorisation process for Irish funds has two main elements – the authorisation process for the fund itself and the authorisation process for its promoter and service providers.

QIF Fast Track

There is no prior filing with or review by the Central Bank for QIFs. Instead, there is a self certification regime (certification has to be given by the board of the fund / management company and by the Irish legal advisers). Once those certifications can be given, the fund documentation is simply negotiated between the promoter, the legal advisers and the other service providers and then executed and filed with the Central Bank. Once the documentation is filed by 3 p.m. on the day prior to the date for which authorisation is sought, the QIF will be authorised on the requested date without a prior review. A 'spot check' post authorisation review may then take place.

However, if any specific derogations from the Central Bank's requirements for QIFs are being sought for the particular product these have to be cleared in advance. In other words this is very much a *fast track process* but again assumes that promoter approval and any specific derogations have been obtained in advance.

Promoter and Service Providers Authorisation Process

For all Irish regulated funds (including QIFs), the principal service providers to the fund must be approved in advance. This requirement applies to each of the promoter, the management company (if any), the directors, the investment manager and the Irish administrator and custodian.

Promoter : The Central Bank regards the promoter of a fund as being the driving force behind the product. Promoters of an Irish regulated fund must submit an application seeking the Central Bank's approval to promote the fund which application must include, inter alia, details of shareholders, latest audited accounts and details of overseas regulatory status. The Central Bank must be satisfied as to the promoter's expertise, integrity and adequacy of financial resources (the promoter must have minimum shareholder's funds of €635,000 for as long as it acts as promoter to an Irish collective investment scheme).

The Central Bank will carry out a due diligence process including contacting the promoter's regulator in its home jurisdiction, asking the service providers to confirm their due diligence checks, etc. in order to ensure that the promoter is sufficiently reputable and experienced.

Management Company (Unit Trust/CCF only): Where an Irish management company is established (required for unit trusts and common contractual funds), the Central Bank must be satisfied as to the competence and probity of its management, that it has sufficient financial resources at its disposal to enable it to conduct its business effectively and meet its liabilities, that it will be in a position to comply with any conditions imposed by the Central Bank and that the effective control over its affairs and of the trustee or custodian will be exercised independently of one another. A minimum of two directors of the management company must be Irish resident.

A management company must have a minimum paid-up share capital equivalent to Euro 125,000 or one-quarter of its preceding years fixed overheads, whichever is the greater. The minimum capital requirement must be held as eligible assets in a form that is easily accessible and must be free from any liens or charges. A management company that is a member of a group must maintain its minimum capital requirements outside of the group and must be in a position to demonstrate its ongoing compliance with this requirement.

Adequate information on the expertise and the reputation of the proposed directors of the management company must be provided, the company secretary must be identified and details of the shareholders must be furnished (audited accounts, overseas regulatory status identified (if any)). Appointments to the office of director of the management company must be approved by the Central Bank. The management company is also required to consult the Central Bank before engaging in significant new activities and is not permitted to manage funds not regulated by the Central Bank.

Approval from the Central Bank is also required in respect of any proposed change in ownership or in significant shareholdings (10 per cent or more in the management company).

Directors: The Directors of the fund/management company are required to meet certain standards of competence and probity which requires them to submit a detailed questionnaire to the Central Bank seeking prior approval for that appointment.

Investment Manager/Sub-Investment Managers: Irish regulated funds must have an investment manager responsible for discretionary portfolio management. Such entities must be regulated entities in their home jurisdiction under MiFID or equivalent (i.e. regulated by the US SEC, CFTC, Hong Kong SFC etc). Where not authorised under MiFID, investment managers must demonstrate that they have net shareholders funds of at least Euro 125,000.

The Central Bank may (in very limited cases) accept unregulated entities, where the applicant can demonstrate appropriate expertise, fitness and probity.

The Central Bank does not require the appointment of sub-investment managers to be disclosed in the QIF's prospectus where the fees of the sub-investment manager are not charged directly to the QIF. However, the QIF's prospectus must disclose that the identity of such sub-investment managers will be available to investors upon request and will be disclosed in the periodic reports issued by the QIF.

Non-discretionary Investment Advisors: The appointment of non-discretionary investment advisors does not need to be pre-cleared by the Central Bank and no regulatory requirements apply in respect of the regulatory status or other qualities of such advisors. The QIF must confirm to the Central Bank at the time of appointment that the investment advisory agreement does not provide for the exercise of any discretionary investment management services by the advisor.

The executed investment advisory agreement must be submitted to the Central Bank at the time of the advisor's appointment. The QIF is not required to, but may, disclose the existence of the investment advisor in the QIF's prospectus provided that the fees of the investment advisor are not charged directly to the QIF.

Prime Brokers and Other Financing Counterparties: See "Prime Brokerage" below.

Administrator/Trustee/Custodian : All Irish investment funds must have an Irish based Administrator and an Irish based Custodian/Trustee. The Administrator is responsible for the calculation of NAV, the maintenance of the accounting books and records, the maintenance of the share register etc. and the Custodian/Trustee is responsible for safekeeping of the assets and for certain fiduciary/trustee type functions.

Before submitting a promoter approval documentation, one needs to have agreed with an Irish Administrator/Custodian/Trustee that they will act for a product who will want to see in detail what the product is, how it is structured, what it is investing in, how and when it will be valued, where it is investing and what liquidity it is providing etc.

Operational Issues

Some of the main operational issues for Irish hedge funds and FoHFs are outlined below.

Prospectus

An Irish fund must issue a prospectus, which must be dated, the essential features of which must be kept up to date. Investors must be offered a copy of the prospectus, free of charge, prior to subscribing for shares or units.

The overriding regulatory consideration is that the prospectus should contain sufficient information to enable investors to make an informed decision whether to invest in the fund. In particular, the investment objectives and policies of the fund must be clearly described in the prospectus with sufficient information to enable investors to be fully aware of the risks they are entering into. The description should include comprehensive information in relation to proposed investments, an indication of where these are traded and the purpose behind the investment. The prospectus must also contain quantitative parameters on the extent of leverage which will be engaged in.

A QIF which will not be subject to leverage limits should indicate the typical levels of leverage, or range of leverage, that may be employed, or else disclose that it is not possible to predict the range of leverage that will be employed.

Valuation and Pricing

Assets must be valued by a method clearly defined in the fund's constitutive document and disclosed in the prospectus. The Central Bank's Guidance Note 1/00 requires that assets be valued on the basis of market prices where available or, where unavailable, generally at probable realisation value calculated by a competent third party appointed by the fund with the objective of achieving fair value, the appointment of which is approved by the custodian/trustee.

Particular valuation rules apply to real estate funds and private equity funds normally follow EVCA or IVCA rules.

Valuation rules should be applied consistently throughout the life of the fund.

Dual pricing

Funds may provide for the calculation of a separate bid and offer price on its shares, i.e. dual pricing. The valuation procedures utilised in calculating both the bid and the offer price are required to reflect the nature of the fund's pricing of its shares and should be disclosed.

Financial Reporting

QIFs must produce annual audited financial statements which must be filed with the Central Bank within 4 months of the period end. Up until recently, QIFs also had to produce half-yearly unaudited financial statements and file them with the Central Bank within 2 months of the period end. The Central Bank has relatively recently disappplied this latter requirement in the case of QIFs (until legislation changes, QIFs structured as unit trusts cannot avail of this disapplication).

The annual audited financial statements must comprise a balance sheet, income statement, a portfolio statement and statement of changes in the composition of the portfolio during the period and any significant information which will enable investors to make an informed judgement on the development of the fund and its results. The annual financial statement must be audited by one or more persons empowered to audit accounts in accordance with the Irish Companies Acts and the auditor's report to shareholders, including any qualifications, must be reproduced in full in the annual financials.

Other Reporting

A QIF must submit a monthly report to the Central Bank, within ten days of its effective date, setting out its net asset value, net asset value per unit/shares and net subscription and redemptions in the fund units/shares during the month. This is normally dealt with by the Administrator. The Investment Manager should also file a copy of its own audited financial statements with the Central Bank annually.

Post-Authorisation Amendments

Following the launch of a fund, changes to its investment objective or material changes in an investment policy require investor approval (majority vote). Other changes in fund documentation for QIFs do not generally require prior regulatory approval but simply need to be filed with the Central Bank.

Regulatory Levies

The Central Bank imposes an annual industry funding levy on collective investment schemes. Rates (at time of writing) include an annual fee of Euro 2,000 whether an umbrella or a single structure fund. Umbrella funds also pay a contribution of Euro 450 per sub-fund on the first five sub-funds resulting in a maximum contribution for umbrella funds of Euro 4,250.

Available Legal Structures

QIFs are available as variable capital investment companies, unit trusts, investment limited partnerships (rarely used) and tax transparent common contractual funds. [*Note that neither natural persons (nor their nominees) can invest in common contractual funds without undermining their tax transparency*].

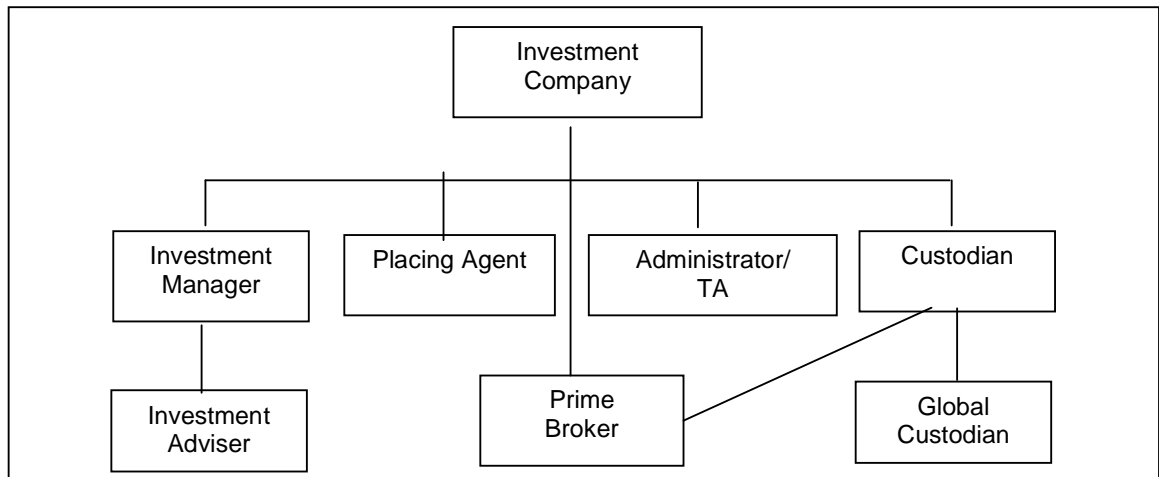
Choice of Legal Structure

The choice of legal structure for a regulated hedge fund or FoHF will usually depend on a number of issues, including:

- investor familiarity;
- investor capacity to invest (e.g. Japanese investors seem to be able to invest higher proportions of their portfolios in unit trusts);
- willingness of promoter to set up Irish management company (required for unit trust and common contractual fund but not for investment company);
- portfolio diversification (investment companies are subject to a statutory risk spreading requirement whereas unit trusts are not);
- borrowing/leverage proposals (available in all structures but legal arrangements often clearer in investment companies);
- reporting requirements (all regulated funds must prepare annual audited accounts and semi-annual unaudited accounts, save that QIF investment companies no longer required to produce semi-annual unaudited accounts. That requirement will be removed for QIF unit trusts shortly);
- operational flexibility (more with unit trusts than with investment companies - i.e. no AGM for unit trusts and easier to amend constitutional documentation for non-material issues).

Two main structures: Investment Company and Unit Trust

The most popular Irish regulated hedge fund structures are the investment company and the unit trust and we have expanded on these below:

Investment Company Structure

Investment companies are variable capital public limited liability corporate vehicles with their own legal personality. In addition to Part XIII of the Companies Act, 1990 and the Non-UCITS notices issued by the Central Bank, they are subject to Irish company law (with relevant exceptions) as it applies to public limited companies.

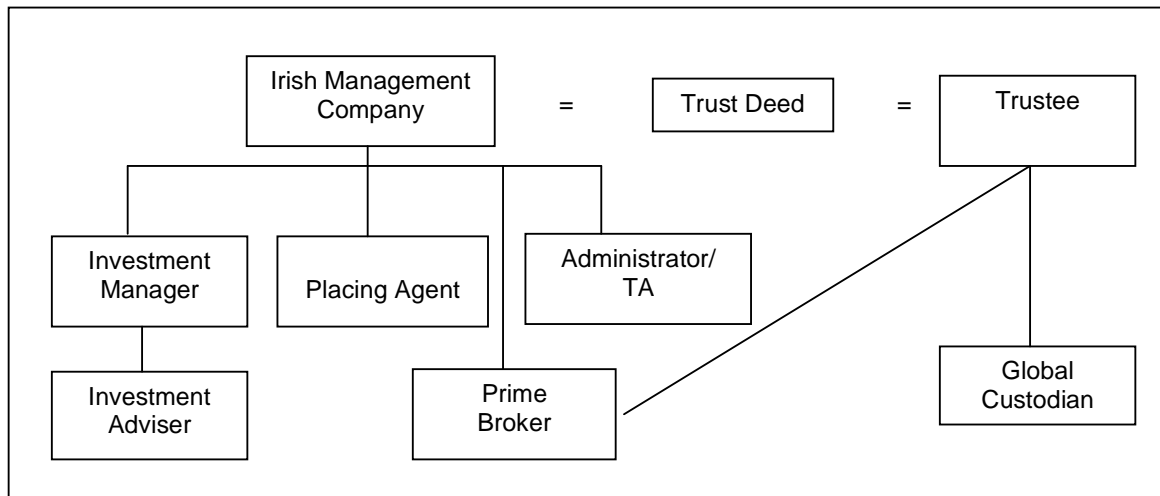
The constitutive document for an investment company is its Memorandum and Articles of Association and ultimate management authority resides with a board of directors, two of whom must be Irish resident. Investment companies issue shares to investors which shares do not represent a legal or beneficial interest in the investment companies assets, those assets being legally held by the custodian, beneficially by the investment company itself. Unlike unit trusts, investment companies are required to convene and hold an annual general meeting of shareholders and any changes to their Memorandum and Articles of Association require investor approval.

Investment companies enter into contracts themselves as corporate entities, principally with the Investment Manager, Administrator and Custodian.

Umbrella type investment companies benefit from statute based segregated liability provisions which provide for segregation of assets and liabilities between sub-funds within umbrella schemes.

It is also possible for one sub-fund within an umbrella corporate vehicle to invest in one or more sub-funds of the same umbrella provided that the investee sub-fund does not itself invest in other funds of the same umbrella.

Unit Trust Structure



Unit trusts are contractual arrangements created under a deed of trust (the “trust deed”) made between the Management Company (or Manager) and the Trustee (same entity as Custodian; just different terminology). Unit trusts do not have their own legal personality and contracts are entered into in respect of unit trusts by the Management Company and, in certain cases, by the Trustee.

Unit trusts are subject to the Units Trust Act, 1990 and the Non-UCITS notices issued by the Central Bank, with ultimate management authority resting with the Management Company which can act as management company for different types of Irish collective investment schemes (UCITS and Non-UCITS; investment companies, unit trusts and CCFs). The Management Company must itself be authorised separately to the unit trust’s own authorisation. Unit trusts issue units to investors and a unit represents an undivided beneficial interest in the assets of the unit trust. The assets are legally held by the Trustee.

Unit trusts are not required to hold annual investor meetings and, provided both the Management Company and Trustee certify that a change does not prejudice the interests of investors, the change can be made to the trust deed without having to obtain prior investor approval.

It is also possible for one sub-fund within an umbrella unit trust to invest in one or more sub-funds of the same umbrella.

Investment Limited Partnerships

Investment limited partnerships can be formed under the Investment Limited Partnerships Act, 1994. An investment limited partnership is a partnership of two or more persons having as its principal business the investment of its funds in property of all kinds and consisting of at least one general partner and at least one limited partnership. The limited partner is receives participating partnership interests which entitle it to a share in the performance of the partnership while the general partner acts in a role roughly equivalent of management company in a unit trust or investment company.

The main advantage of a limited partnership is that the partnership does not have an independent legal existence in the way that a company does. All of the assets and liabilities belong jointly to the individual partners in the proportions agreed in the partnership deed. Similarly the profits are owned by the partners. This structure can have particular tax benefits associated with it. Each partner is entitled to use any tax reliefs and allowances the partnership is entitled to as agreed between each partner, subject to any tax rules governing the allocation of the reliefs and allowances.

It should be noted that the structure, while very popular in traditional offshore hedge fund jurisdictions, has not been widely used in Ireland. The trend in the redomiciliation of Cayman other LPs to regulated jurisdictions may result in renewed interest in the structure.

Common Contractual Funds (CCF's)

The CCF was introduced in 2003 mainly to enable pension funds and trustees or custodians of pension funds to pool their investments (asset pooling) in a tax efficient manner. Originally devised as a UCITS structure limited to pension funds (or trustees or custodians of such pension funds), the CCF was further enhanced in 2005 by the Investment Funds, Companies and Miscellaneous Provisions Act, 2005, which provided for the establishment of a non-UCITS CCF and allowed for an expansion in the investor base (essentially to include all pension funds, institutional investors and corporate entities).

A CCF is constituted under contract law by means of a deed of constitution executed under seal by a management company. The deed provides for the safekeeping of assets of the CCF by a custodian who is also a party to the deed and specifies the fiduciary responsibilities of the Custodian which are equivalent to those of custodians of other UCITS

and Non-UCITS schemes. Importantly, the CCF is an unincorporated body and does not have legal personality. Because a CCF does not have legal personality, it may act only through the manager (or investment manager, if authority is delegated to an investment manager). Participants in the CCF hold their participation as co-owners and each participant holds an undivided co-ownership interest with other participants.

The central rationale for establishing a CCF is the capacity to provide participants with a tax transparent vehicle, where participants should be treated as investing directly in the pool of assets, and which benefits from all of the advantages of investing via a pooled arrangement.

In order to benefit from the above noted tax treatment, CCFs have to impose several restrictions on their structure, cannot impose redemption charges and must distribute all income on an annual basis. As a result, they are not widely used by hedge fund promoters how have looked to Irish based custodians to provide entity and virtual pooling solutions where needed.

Umbrellas, Sub-Funds and Classes

Whichever legal structure is chosen, Irish funds can be established as single stand-alone funds and as umbrella funds, and can offer different unit or share classes within a fund, the normal differentiating factors being target audience management/performance fees, minimum subscription/holding requirements, entry/exit fees and designated currencies.

As noted above, segregated liability between sub-funds within an umbrella applies under statute or trust law.

Hedged Currency Classes

Although one of the fundamental principles of the Irish regulatory regime is that assets/liabilities within a single fund cannot be allocated to individual classes within the fund, an exception in the case of hedged currency classes allows the gains/losses on the hedging contracts to be attributed to the relevant hedged classes.

Investment in U.S. "New Issues"

A further exception to the general principle is that, for QIFs [and PIFs], the gains/losses on "New Issues" may be allocated to dedicated "unrestricted classes".

Voting Rights

A fund's prospectus must describe the voting rights attaching to shares in the fund. In general, the Central Bank requires that investors will be provided with voting rights.

QIFs, however, may establish share classes with restricted voting rights where investment in the restricted class is at the discretion of the investor who also has an option to switch, without fee, to a voting class.

It is necessary to clarify in the prospectus how the QIF will ensure that investors' interests will be safeguarded in the event of a proposed change to investment objectives and policies or increases in management fees.

Liquidity Options

QIFs can be structured as open-ended, open-ended with limited liquidity, limited liquidity or closed-ended schemes and can utilise a variety of features to address liquidity and/or valuation issues including gates, deferred redemptions, holdbacks, in-kind redemptions and side pockets.

It is also possible to establish sub-funds with different liquidity profiles within a single segregated umbrella structure so as to take advantage of operational and other economies of scale.

Liquidity Categories

As noted, open-ended, open-ended with limited liquidity, limited liquidity or closed-ended QIFs can be established in Ireland. These terms are explained below. Note that the front cover of the fund's prospectus must have a disclosure identifying the category of scheme into which the fund falls.

- (i) *Open-Ended*: An open-ended fund is one which provides redemption facilities for investors (at their request) on at least a quarterly basis.
- (ii) *Open-Ended with Limited Liquidity*: An open-ended with limited liquidity fund is one which provides redemption facilities at least annually.
- (iii) *Limited Liquidity*: A limited liquidity fund is one which provides that, at some stage during the life of the fund, there will be an option for investors to request redemption.
- (iv) *Closed-Ended*: Closed-ended funds are funds which do not provide any capacity for investors to request redemption during the life of the fund.

A closed-ended fund is normally required to have a finite closed-ended period provided for in its constitutional documentation (exemptions have been granted for funds which provide meaningful liquidity via, for example, listing on active market). Closed-ended QIFs can have an initial duration of up to 15 years.

At the end of the closed-ended period, the fund is required to either:

- wind-up and apply for revocation of authorisation;

- redeem all outstanding units and apply for revocation of authorisation;
- convert into an open-ended scheme; or
- obtain investor approval (generally 75% of more of investors in favour) to extend the closed period for a further period.

Closed-ended funds may also have to comply with the EU Prospectus Directive as well as certain other EU Directives but QIFs can normally avail of exemptions unless they list or are admitted to trading on a Regulated Market within the EU.

Share Classes

Where a fund is established with separate share classes, all share classes must offer a common redemption frequency.

Gates

Redemption gates can be applied (once provided for in the fund documentation) limiting the number of share/units to be redeemed on a dealing day to 10% or, in the case of a quarterly dealing fund, 25% of the total number of shares/units in issue on that day. Gates must be applied on a pro rata basis and requests carried over from a prior dealing day as a result of the application of a gate must generally be complied with in priority to later requests.

Limited Liquidity Funds – Deferred Redemptions

In the case of limited liquidity funds, redemption requests will normally be accepted and processed in the usual manner but the fund may at its discretion refuse to redeem shares or units if the fund does not expect to be in a position to receive sufficient funds from the liquidation of underlying investments. Shares or units which are not redeemed by reason of such refusal should be treated as if a request for redemption had been made in respect of each subsequent redemption day until all shares or units to which the original request related have been redeemed.

In Kind Redemptions

A fund may, with the consent of individual investors, pay redemptions in kind by transferring to investors assets having a value (determined conclusively by the fund/manager in good faith and approved by the custodian/trustee) equal to the redemption price for the

shares/units redeemed as if the redemption proceeds were paid in cash, less any redemption charge and other expenses of the transfer. Importantly, however, the determination to provide redemption in kind can be made solely at the discretion of the fund/its manager where the investor has requested redemption of shares/units representing 5% or more of the NAV of the Fund. Where this occurs, the fund should, if requested by the investor, sell the assets on behalf of the investor with the cost of sale being charged to the investor.

Payment of Redemption Proceeds

For open-ended funds, payment of redemption proceeds should normally be made no later than 90 calendar days after the redemption notice deadline (95 days for fund of funds).

For limited liquidity funds, payment of redemption proceeds should normally be made by the redemption payment date specified in the prospectus but will be dependent upon circumstances relating to, inter alia, investments in underlying assets. The prospectus will normally provide that if the fund does not receive sufficient funds from the liquidation of underlying assets in order to satisfy redemption requests in a timely manner, then the related payments may be limited or temporarily suspended and the fund will pay redemption proceeds on the earliest practicable date following such funds being made available to the fund.

FoHF Holdbacks

A QIF or PIF FoHF may retain up to 10% of redemption proceeds where this reflects the redemption policy of the underlying funds in which the fund invests, until such time as the full redemption proceeds from the underlying funds are received.

Side-pockets

Side-pockets are permitted for QIFs where assets which are illiquid or hard to value can be allocated to a separate class (or classes) of share until they can be realised. This is achieved by allocating the relevant assets into a separate portfolio represented by the side-pocket shares and by effecting a mandatory pro-rata reduction in the number of shares held by investors and by creating for the benefit of such investors a corresponding pro-rata interest in the side-pocket shares.

Prime Brokerage

The use of prime brokers (PB) to Irish funds is well established, with all the leading international PBs having been approved to act for Irish funds. The Irish prime brokerage rules focus on the rating/financial resources of the PB, the extent to which assets of a fund can be rehypothecated by the PB, the nature of the relationship between the fund's Irish custodian and the PB as well as requirements as to enforceability of set-off /netting provisions of the prime brokerage agreement.

Prime Brokerage

In summary, the regulatory position in relation to PBs to Irish hedge funds is as follows:

- there is no regulatory limit imposed on the value of assets passed on an outright basis by a QIF to the PB by a re-hypothecation or otherwise;
- such an arrangement must incorporate a procedure to mark positions to market daily in order to monitor the use of assets on an ongoing basis and the PB must agree to return the same or equivalent assets to the QIF;
- the PB arrangement must incorporate a legally enforceable right of set-off enabling the QIF to set-off the value of assets used by the PB against the liabilities of the fund to the PB;
- where the PB holds assets of a fund otherwise than as provided above, it must be appointed as a sub-custodian by the custodian/trustee;
- the PB and/or its parent company must be regulated as a broker by a recognised regulatory authority; and it must have shareholders' funds in excess of €200 million (or its equivalent in another currency). In addition, the PB, or its parent company, must have a minimum credit rating of A1/P1.
- in addition to taking collateral consistent with the conditions above, the PB can also take a charge over the assets of the QIF held by the PB in its capacity as sub-custodian to the fund.

Other Financing Counterparties

A QIF may enter into transactions with counterparties, including counterparties to OTC financial derivative instruments, whereby cash or other assets belonging to the fund may be passed outside the custodial network of the custodian/trustee to an unlimited extent in order to support the fund's transactions; provided that:

- (a) any OTC counterparty has a minimum credit rating or an implied credit rating of A2/P2 as rated by Standard & Poor's/IBCA or Moody's or an equivalent rating provided by an internationally recognised rating agency. An implied credit rating arises where the Manager or the Investment Manager determines that a fund may transact with an unrated entity on the basis of the relationship between the counterparty and its rated parent, or where the counterparty has senior debt/long-term rating but no short-term rating;
- (b) if the net exposure of a QIF to a single counterparty, including a prime broker, exceeds 40% of the NAV, the counterparty's appointment must be in accordance with the following conditions:
 - (i) the counterparty must be regulated by a recognised regulatory authority and it, or its parent company, must have shareholders' funds in excess of Euro 200 million (or its equivalent in another currency) and a minimum credit rating of A1/P1;
 - (ii) the arrangement must incorporate a legally enforceable right of set-off for such fund;
 - (iii) the counterparty must agree to return the same or equivalent securities to such fund;
 - (iv) the arrangement must incorporate a procedure to mark positions to market daily; and
 - (v) the name of the counterparty must be disclosed in the fund's annual and half-yearly reports;

Currently, a QIF in the form of an investment company (as opposed to a unit trust, common contractual fund or limited partnership) is limited to this 40% figure because of the statutory obligation to spread its investment risk to which it is subject.

- (c) Counterparty risk exposure will be measured on an aggregate basis and will include, for example, exposures arising from investments in securities issued by the counterparty, amounts held on deposit and OTC derivative positions. It is possible

to reduce counterparty exposure using off-setting transactions and netting techniques.

Prospectus Disclosure

Relationships with prime brokers and other counterparties must be fully disclosed in the prospectus which should include a description of potential exposures arising from the relationship.

Single-Manager and Multi-Manager Funds

Any entity with discretionary asset management capacity over an Irish fund, whether the investment manager of the entire fund or a delegate of the investment manager appointed to manage an account for the fund (a "portfolio manager"), must be approved in advance by the Central Bank. There are, however, specific exemptions for certain "qualifying" non-UCITS multi-manager schemes.

Prior clearance of portfolio managers

Where prior approval is required, an application for prior approval must be completed and filed with the Central Bank. The Central Bank will only approve an entity which is authorised to carry out discretionary investment management under either the MiFID or under an equivalent regulatory regime (US SEC, CFTC, Hong Kong SFC etc.). The Central Bank will normally not accept the appointment of unregulated entities to provide discretionary asset management services in respect of Irish funds.

Multi-Manager Exemption

The Central Bank has issued a specific Guidance Note for non-UCITS multi-manager funds which provides for exemptions from the prior approval process, from the requirement to file annual audited accounts for portfolio managers and from the requirement for prospectus disclosure. These exemptions are available to "qualifying" non-UCITS multi-manager funds which meet the following criteria:

- the investment manager must demonstrate that it has relevant expertise in multi-manager type funds and have minimum assets under management of Euro 500 million;
- the assets of the fund should be allocated to a minimum of five portfolio managers and no more than 40% gross assets of the fund should be allocated to any one portfolio manager;
- the individual portfolio managers and the amount of assets allocated to each portfolio manager may change over time, and should be determined by the investment manager in its sole and absolute discretion;

- the maximum amount of leverage used by each portfolio manager and the terms under which each portfolio manager invests the assets of the fund must be agreed in advance with the investment manager and must not be in conflict with the leverage and trading policies of the fund;
- there must be no guarantee that any particular portfolio manager will be appointed, or will continue to be appointed, to the fund; and
- the investment management agreement must contain an undertaking to the fund that the investment manager will satisfy itself as to the expertise, integrity and adequacy of financial resources of any portfolio manager to the fund, prior to the appointment of that portfolio manager and further that the investment manager will not knowingly hire any portfolio manager who has been involved, or a related or associated party of whom has been involved, in any actions, suits or proceedings of a criminal, civil or disciplinary nature where this could be deemed material.

Prospectus Disclosure

The general Irish disclosure rule is that the details of the principal investment manager must be disclosed in the prospectus but that the identity and biographical information of portfolio managers does not need to be disclosed where their fees are paid by the principal investment manager. However, where such fees are paid out of the fund itself, such details are required to be disclosed.

Some investment managers are willing to make such disclosure but many others find it either cumbersome – regular updating of fund documentation – or strongly object to public disclosure of their chosen portfolio managers given both lack of capacity at many firms and the desire not to disclose strategy to competitors.

In the case of Irish "qualifying" multi-manager scheme, the following disclosure requirements apply:

- the prospectus should clearly describe the nature of the fund (i.e. that it is a multi-manager fund) and state that the prospectus and subsequent periodic reports will not contain disclosure in relation to the names of the portfolio managers which will be employed;

- the prospectus should fully describe potential conflicts of interest between portfolio manager and the investment manager and /or the fund and how these will be resolved;
- the periodic reports of the fund should disclose the maximum and minimum number of portfolio managers employed and the maximum percentage of the gross assets of the fund allocated to a single portfolio manager during the relevant reporting period; and
- where the fund becomes aware that a portfolio manager or a related or associated party of a portfolio manager has been involved in any actions, suits or proceedings of a criminal, civil or disciplinary nature which could be deemed material, this will be disclosed in the periodic reports of the fund, together with any consequent action the fund has taken or which it proposes to take.

Filing of portfolio management agreements

Each executed portfolio management agreement must be filed with the Central Bank. However, such agreements are not subject to prior scrutiny – the filing law firm must certify that the agreement contains certain specific provisions and does not offend others. Filing is effected on the date of execution.

Taxation of Irish Regulated Collective Investment Funds

All Irish regulated funds whether they are constituted as corporate entities or unit trusts are subject to the same taxation regime so long as they are designated as Investment Undertakings under Section 739B of the Taxes Consolidation Act, 1997 (as amended) (the “TCA”).

Irish Direct Tax & Withholding Tax

Investment Undertakings (“Funds”) are not subject to Irish taxation on any income or gains they may realise from their investments. In addition, no withholding tax arises on dividend or interest payments made by Irish companies to Funds. The exemption in respect of dividend withholding tax in the case of Funds is subject to a standard declaration being in place.

In addition, there are no Irish withholding taxes in respect of a distribution of payments in respect of units or any encashment, redemption, cancellation or transfer of units by the Fund in respect of:-

- (A) unitholders who are neither Irish resident nor ordinarily resident in Ireland provided either:
 - (i) they have provided the Fund with the appropriate relevant declaration of non-Irish residence; or
 - (ii) the Fund has availed of the Appropriate Equivalent Measures (“AEM”) regime as introduced by Finance Act 2010 which when applicable effectively removes the need for non-resident declarations (see further below under “*Taxation of non-Irish residents*”);
- (B) unitholders which fall within the category of exempt Irish investors (e.g. approved pension schemes, charities, other Funds, etc) who have also made an appropriate relevant declaration to the fund.

However when a distribution is made by the Fund to Irish resident unitholders (or an ordinarily Irish resident unitholder) who do not fall within any of the exempt Irish investor categories, or such a unitholder disposes of units and realises a gain, tax must be deducted by the Fund at a rate of 25% on distributions (where payments are made annually or at more frequent intervals) or 28% on any other distribution or gain arising to the unitholder.

Taxation of Irish residents

Irish resident individual investors pay no further tax on distributions made to them unless the units are denominated in a currency other than euro in which case they may be liable to tax on foreign currency gains.

Irish corporate unitholders who receive distributions from which tax has been deducted will not be subject to further Irish tax on the payments received. However where such units are held by the unitholder on a trading account in connection with a trade then that unitholder will be taxable on any income or gains (grossed up for any tax deducted) as part of that trade (thereby taxable at 12.5%) with a set off against corporation tax payable for any tax deducted by the Fund (i.e. set-off for 25% or 28% withholding tax). Such unitholders may also be liable to tax on foreign currency gains as outlined above.

Any corporate unitholders who receive a payment from a Fund from which tax has not been deducted will be taxable on that payment at 25% (except where the units are held on a trading account – see above). However, where the payment is in respect of the cancellation, redemption, repurchase or transfer of units or the ending of an 8 year period, such income shall be reduced by the amount of the consideration in money or money's worth given by the unitholders for the acquisition of the units. Again such unitholders may also be liable to tax on foreign currency gains.

Taxation of non-Irish residents

As above, there would be no withholding tax on distributions made to non-residents (provided they complete a non-Irish tax resident declaration) or alternatively the Fund has availed of the AEM regime. The AEM regime is subject to approval by the Irish Tax Authority (“ITA”) but in general should apply to all Funds which are not actively promoted in Ireland. For Funds that avail of this exemption, it essentially means that non-resident tax resident declarations would not be required in respect of non-Irish resident unitholders. For more on the AEM regime please see publication on our website entitled “*Funds - An Alternative to NRDs, Equivalent Measures*”.

8 Year Rule

Ireland introduced in 2006 legislation to counteract Irish investors being able to roll-up (indefinitely) their share of the underlying income and gains of a Fund for more than 8 years. Therefore, every time an Irish investor invests in a Fund, an 8 year clock starts running in

relation to that particular investment in the Fund and if that investment is not returned before the 8th anniversary of making (or acquiring) that investment (being shares/units) in the Fund, then certain Irish investors will be taxed as if they had made a redemption or disposal (at market value) of their investment (being shares/units) in the Fund and consequently will be taxed on any deemed gain at 28%. This 8 year rule does not apply to non-Irish resident investors.

Stamp Duty

No stamp duty is payable in Ireland on the issue, transfer, repurchase or redemption of units in a Fund. Furthermore, no stamp duty is payable by the Fund on the conveyance or transfer of stock or marketable securities provided that the stock or marketable securities in question have not been issued by a company registered in Ireland and provided that the conveyance or transfer does not relate to any immovable real estate situated in Ireland or any right over or interest in such real estate or to any stocks or marketable securities of a company (other than a company which is a fund) which is registered in Ireland. Where Irish securities or land is involved, Irish stamp duty will apply.

Where any subscription for or redemption of units is satisfied by the in specie transfer of securities, real estate or other types of assets, consideration should be given to whether Irish stamp duty may arise on the transfer of such assets.

VAT

There are wide ranging VAT exemptions with regard to the provision of services to Funds (e.g. administration, transfer agency, investment management, custodial, etc) and to the extent that a Fund suffers Irish VAT on certain services it receives (e.g. audit and legal fees) the Fund may recover this VAT based on its recovery rate. The recovery rate will be based on either (i) the extent that investments of the Fund are invested outside the EU or (ii) the extent that the investors in the Fund are located outside the EU. The ITA prefer to base the Fund's VAT recovery position by reference to where the investments of the Fund are invested, rather than where the investors in the Fund are located. Nevertheless, whichever basis is used, it must be applied consistently from one period to the next.

Certain services received from abroad (e.g. the service of non-Irish lawyers or accountants) will require a Fund to register and self account for VAT in Ireland. However, depending on the Fund's VAT recovery rate, the Fund may be able to recover some or all of this Irish VAT (although in respect of EU investments, no VAT recovery would be available). Once

registered for Irish VAT the normal VAT filing and recording keeping obligations under Irish VAT law will apply.

Compliance requirements

Funds have an obligation to register with the ITA so as to obtain a tax reference number as each Fund must file bi-annual tax returns. These tax returns should be accompanied by the payment of appropriate tax (if applicable) for the period in question. On the basis that there are no Irish resident or ordinarily resident unitholders (or such unitholders are exempt Irish investors) the appropriate tax should be nil.

Use of Trading Subsidiaries / SPVs

As noted above Irish regulated Funds are tax exempt and as such there is always some uncertainty as to whether they are able to access Ireland's double taxation treaties (similar treaty accessibility issues arise for non-Irish funds). If there is withholding tax applied at the level of the Irish Fund's investments, the Fund may not, for this reason, be able to avail of reduced rates. The resultant tax leakage at the level of the Fund's investments may be reduced through the establishment of an Irish intermediate trading vehicle which benefits from Ireland's structured finance tax regime and which, generally speaking, will have access to most of Ireland's double-taxation treaties (or similar vehicle in another jurisdiction).

There may be many other reasons why an Irish Fund may choose to invest through a trading conduit, normally structured as limited or unlimited liability companies. For example, restrictions on foreign ownership may result in the Fund being unable to invest in a particular market other than through a local company, in which case the Fund may choose to establish a wholly owned subsidiary in the relevant country.

Trading Subsidiaries

The primary regulatory requirement governing the use of a trading subsidiary that the QIF effectively "control" the subsidiary. This requires that the QIF's board forms a majority of the trading subsidiary's board and, generally speaking, in order to avoid substantial quantitative investment restrictions on the extent to which the QIF can invest in such entities, the QIF must be the sole owner of the subsidiary.

In addition, the Central Bank applies certain regulatory requirements to the operation of these arrangements on a look-through basis and so will require that the custodian of the QIF must be appointed to custody the assets of the entity in accordance with the custody rules applicable to the QIF, the administrator of the QIF must value the assets of the entity in accordance with the rules applicable to the QIF.

Irish SPVs

Ireland is a leading jurisdiction in which to establish special purpose vehicles for structured financing transactions. The main reason for this has been the attractive taxation regime, commonly known as 'Section 110', in reference to the Irish legislative provision that provides a special tax regime for structured finance transactions involving Irish "qualifying" companies.

A qualifying company means a company:

- (a) which is resident in Ireland;
- (b) which (i) acquires “qualifying assets” from a person, (ii) as a result of an arrangement with another person holds or manages qualifying assets or (iii) has entered into a legally enforceable arrangement with another person which arrangement itself constitutes a qualifying asset;
- (c) where the company carries on in Ireland a business of holding, managing or both the holding and management of qualifying assets;
- (d) which, apart from activities ancillary to that business, carries on no other activities;
- (e) in relation to which company (i) the market value of all qualifying assets held or managed, or (ii) the market value of all qualifying assets in respect of which the company has entered into legally enforceable arrangements, is not less than €10 million on the day on which the qualifying assets are first acquired, first held, or an arrangement referred to in paragraph (b)(iii) above is first entered into by the company;
- (f) which has notified in writing the ITA in a form prescribed by them that it is or intends to be a company to which paragraphs (a) to (e) above apply and has supplied such other particulars related to the company as may be specified on the prescribed form and
- (g) which has not entered into any transaction or arrangement other than by way of a bargain at arm’s length. There is one exception to this requirement that all transactions be conducted by way of a bargain made at arm’s length and that is profit participating loans or loans of a similar nature, and this exception is subject to certain conditions.

Section 110 companies are normally established as private limited or unlimited companies with nominal share capital. The Irish Fund finances the Section 110 company in exchange for profit participating debt (i.e. a note or bond linked to the performance of the Section 110’s portfolio).

The Section 110 company is a taxable entity which, at current rates, pays tax at 25% on its profits, however, provided it satisfies various conditions, it can utilise various techniques to

strip profit out on its underlying investments and the Section 110 company can reduce or eliminate the tax it is required to pay, depending on what is desired. The Section 110 company can invest in a wide range of qualifying assets though it must be invested to a minimum value of Euro 10,000,000 (or its foreign currency equivalent) on the first day on which it purchases such a qualifying asset (i.e. first day only test).

Irish Stock Exchange Listing

The Irish Stock Exchange (“ISE”) is a leading international exchange for the listing of investment funds, having developed a specific investment funds listing regime tailored to provide a streamlined and progressive listing regime for a wide variety of international fund structures including limited companies, unit trusts and segregated portfolio companies from a variety of domiciles.

Combining a comprehensive set of listing rules, a commitment to aggressive timings on processing listing applications, a low cost structure and a flexible and proactive listing process, the listing regime is highly transparent and user friendly, contributing to and supporting the funds industry both domestically and internationally.

The ISE commits to turnaround times of a maximum of 5 working days on the initial draft followed by a 2 day turnaround on subsequent drafts and has a dedicated team which is trained to handle the particular requirements of the funds market.

A listing on the ISE offers a number of advantages including:

- access to a wider investor base by allowing promoters to market the fund to institutional investors who may require a listing on a recognised stock exchange in order to invest; and in countries where the relevant authorities require or provide exemptions for investment in listed securities, e.g. French funds of funds;
- a quoted market price, enabling securities to be marked to market;
- tax advantages in specific jurisdictions, e.g. Japan and Canada;
- cost efficiencies by publication of NAVs via the ISE website e.g. UCITS.

Irish funds authorised as QIFs may derogate from all ISE investment restrictions, save for legal and management control and limits on investment in commodities and real property. In addition, the ISE automatically accepts the suitability of the service providers to a fund authorised by the Central Bank. Equally important is the fact that the ISE will disapply its control requirement for feeder funds authorised by the Central Bank.

The main difference in approach taken by the Central Bank and the ISE is apparent in the lack of uniformity in their position on financial information and free transferability. This is explained by the ISE remit for investor protection, which considers that once a fund has commenced to trade, financial information becomes a material element of the decision to

invest, and that a listed security must provide opportunity for investors to transfer their shares.

Dillon Eustace Asset Management Group

The Dillon Eustace Asset Management and Investment Funds team - the largest investment funds team in Ireland (35 lawyers) - advises international and domestic asset managers, banks, insurers, pension funds, supranational organisations, prime brokers and other counterparties, fund administrators and custodians, securities lending agents and others in relation to all aspects of the asset management and investment funds industries.

Our team represents the largest number of Irish domiciled funds (Lipper Fitzrovia 2009) as well as funds domiciled in Cayman, BVI, Jersey and other centres, as well as working closely with our Alliance partner, Luxembourg law firm Arendt & Medernach, which is the leading investment funds practice in the other main European funds domicile.

Active industry body participation includes Committee I, International Bar Association, AIMA, recent past membership of the Council of the Irish Funds Industry Association ("IFIA") and current membership of various IFIA committees and several other representative bodies.

Across all product types - from UCITS III to the full spectrum of alternative products such as hedge funds, FoHFs, ETFs, real estate and private equity funds - the team advises on product design, authorisation and launch, prospectus and contractual documentation negotiation, interaction with regulators and exchanges, funds listing and tax issues, bringing to bear in-depth knowledge and expertise, product innovation and a "can do" attitude, most recently evidenced with various UCITS III asset classes, the first non-Italian hedge fund authorised for sale into Italy, negotiating significant changes to the custody rules for Irish real estate funds and some unique hedge fund and FoHF products.

The team is recognised internationally as one of the most innovative and dynamic groups of lawyers in this practice area, most recently being awarded "Best European Law Firm 2008" by Hedge Fund Journal and "Best UCITS Advisory Firm 2010", HFM Week European Hedge Fund Services Awards.

Other recent references to the team include the Legal 500 (*"Exceptional" Dillon Eustace is an investment fund powerhouse ... the firm has been very active on submissions to regulators on product design and, most recently, on valuations of OTC derivatives, master-feeder structures and real estate fund rule changes*) and Chambers 2008 (*"Clients fell over themselves to praise this funds practice ... it is a clearly established leader in the field with a strong reputation in both the local and international marketplace. The "young, helpful, keen and creative" team offers a "friendly and no-nonsense approach" combined with "flexibility, productivity and clear expertise"*).

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