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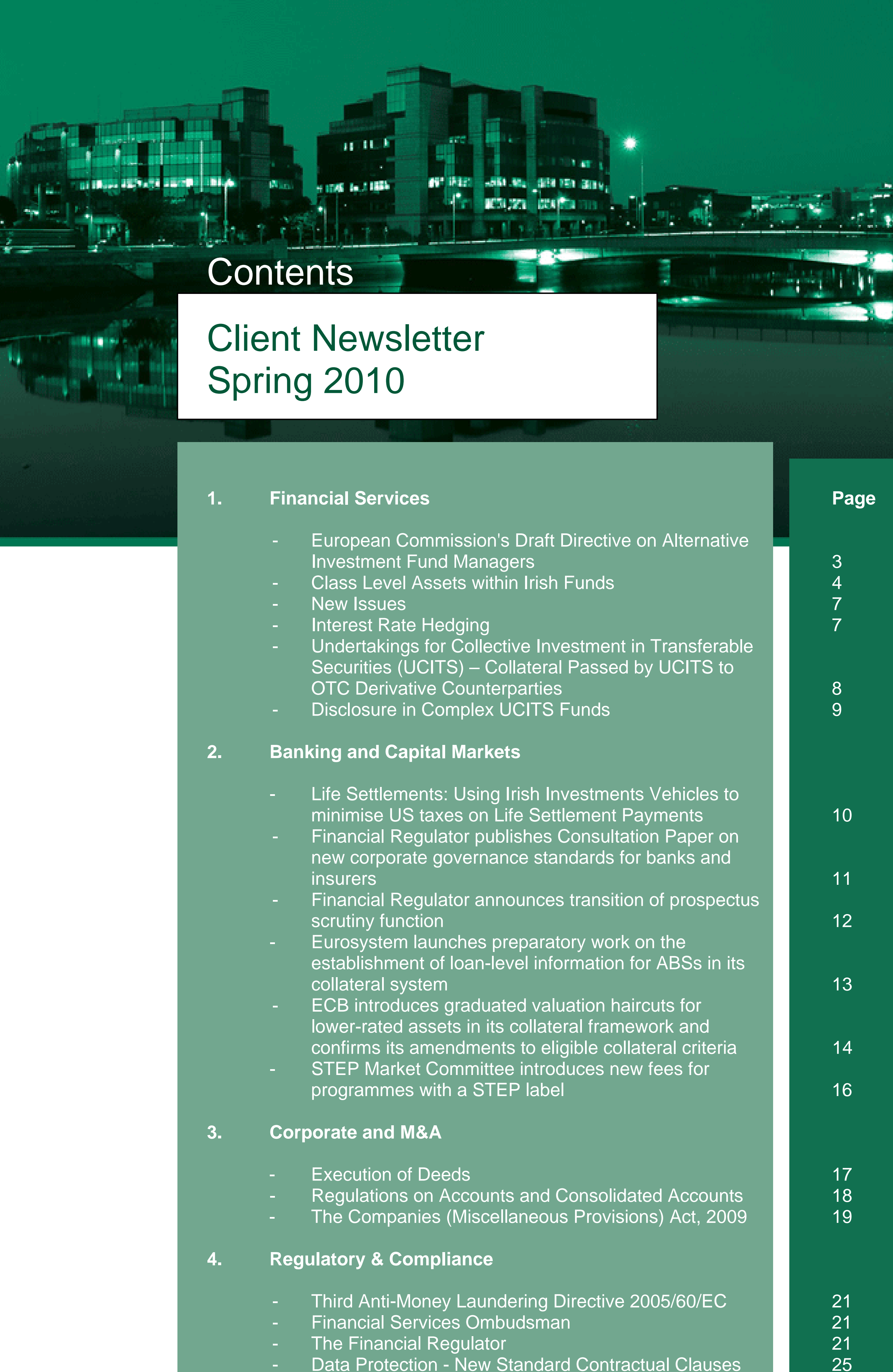

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FINANCIAL SERVICES

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- **European Commission's Draft Directive on Alternative Investment Fund Managers**
- **Class level assets within Irish funds**
- **New Issues**
- **Interest Rate Hedging**
- **Undertakings for Collective Investment in Transferable Securities (UCITS) – collateral passed by UCITS to OTC derivative counterparties**
- **Disclosure in Complex UCITS Funds**

UPDATE ON THE EUROPEAN COMMISSION'S DRAFT DIRECTIVE ON ALTERNATIVE INVESTMENT FUND MANAGERS

The EU Parliamentary committee for economic and monetary affairs has delayed its vote on the Alternative Investment Fund Managers Directive (the "AIFM Directive") for a third time. The vote, due to take place on May 10 was delayed so amendments proposed by the EU Parliament's legal affairs committee can be taken into account.

The Spanish EU Presidency published three new EU Council compromise texts for the proposed AIFM Directive in March, 2010. The Spanish presidency reinstated Article 35 which had been removed by the Swedish Presidency. It stipulates that non-EU managers and funds may only be able to access the EU market if there is a cooperation agreement in place between the jurisdiction where they are based and the EU jurisdiction they wish to market in. Potentially this could mean that the EU market could be effectively closed to non-EU funds and managers.

Two further amendments to the AIFM Directive were proposed by the EU Parliament's legal affairs committee on 28 April, 2010. These amendments will allow national private placement regimes to continue operating under reasonable conditions. The EU Council's group of finance ministers is due to vote on the AIFM Directive on May 18, having also delayed its vote from March due to continued disagreement over key points.

For detailed information on AIFM, please refer to your usual contact in Dillon Eustace.

CLASS LEVEL ASSETS WITHIN IRISH FUNDS

The Irish Financial Regulator has issued a Policy Update (February 9, 2010) in relation to class level assets within Irish funds clarifying the circumstances in which:

- financial derivative instruments may be used at share class level to provide for standard class level distinctions (currency and interest rate hedging, different distribution policies and fee structures) but, more importantly, to provide different levels of participation in the performance of the underlying portfolio;
- investment in New Issues can be carried out at share class level; and
- interest rate hedging can be carried out at share class level.

Background

For many years Irish funds have been permitted to issue multiple share classes in respect of a single portfolio of assets, with the differentiating features between the different classes usually being currency hedging at class level and different class level distribution policies, management fees and front end/exit fees.

The core principles underpinning the Financial Regulator's approach to multiple classes in respect of a single portfolio of assets (a "Fund") are that:

- each Fund must consist of a single common pool of assets;
- assets may not be allocated to individual share classes; and
- the capital gains/losses and income arising from that pool of assets must be distributed and/or must accrue equally to each shareholder, relative to their participation in the Fund.

These principles are themselves founded on a general "equality of treatment" principle and legitimate concerns that to allow allocation of assets to individual classes could result in "cherry picking" of assets and other potential abuses.

Over the years some exceptions or variations have been permitted, most notably hedged currency share classes where the costs of and gains/losses on the hedging contract are allocated solely to the hedged class. Similar exceptions have allowed interest rate hedging

at class level where derivatives have been used to provide different interest rate exposures on different classes in respect of, for example, a diversified bond portfolio.

More recently, allocation of assets to side pockets has been allowed for non-UCITS as a measure to deal with portfolio illiquidity, subject to quite specific rules set down by the Financial Regulator.

Following a number of industry submissions, the Financial Regulator has now formalised a series of welcome changes to its approach which will facilitate the engineering of different returns on different classes and a more suitable approach to investing in New Issues. The opportunities offered by this Policy Update are explained below.

Financial Derivative Instruments used at Share Class Level

The Financial Regulator notes in its Policy Update that it will permit the use of financial derivative instruments at share class level where their purpose is to effect currency and interest rate hedging (subject to the principles set out in Guidance Note 3/99) or different distribution policies or fee structures at share class level. This is really a statement of current practice.

However, the Policy Update also provides that the Financial Regulator will consider proposals where financial derivative instruments may be used at share class level to enable a different level of participation in the performance of the underlying portfolio or different levels of capital protection, subject to the following conditions:

- the financial derivative instrument for each share class must be based on the same underlying portfolio or index;

- the transactions cannot result in a leveraged return per share class (i.e. the participation rate can be up to but not exceeding 100% of the relevant share class' performance of the underlying portfolio);

- the issue of segregated liability between share classes must be addressed.

With regard to point (c) above, the Financial Regulator will require: (i) a legal opinion that the OTC counterparty's recourse to the Fund is limited to the relevant share class' participation in the assets of the Fund; and (ii) confirmation from the board of the Fund/management company that it has reviewed and is satisfied that the proposal will, as a result of the agreement between the Fund and the OTC counterparty, not result in any prejudice for investors in one class over another. The board must also confirm that there will be no cross liability between share classes.

In practice, amendment of the Fund's constitutional document may be required as may contractual agreement between the parties that the recourse of the OTC counterparty be limited to the assets [attributed to] the relevant share class.

Professional and Qualifying Investor Funds

In the case of professional and qualifying investor funds, the Financial Regulator will also consider proposals for use of financial derivative instruments at share class level with different features, for example to provide an additional add-on exposure to that generated from the underlying portfolio, or to generate a leveraged return at share class level or where the underlying of the derivatives are different versions of the same underlying, e.g. two classes with different swap instruments based on sub-indices derived from the same initial index.

This may be of significant interest to many investors and asset managers, the key being the capacity to ring-fence the class level liabilities.

Other arrangements similar to these examples will be considered by the Financial Regulator on a case-by-case basis, subject to demonstrating segregated liability between share classes in the manner described above.

General Conditions

Key requirements for utilising this opportunity include that:

- the Fund's constitutional document makes specific provision for the creation of share classes and contains clear provisions for the charging of any resultant gains/losses on the transaction to the relevant share class;

- the prospectus contains a clear description of the strategies being pursued at share class level and the effect this will have on investors in each share class;

- the use of financial derivative instruments at share class level creates positive benefits for investors and does not prejudice the interests of holders in other share classes.

NEW ISSUES

Another regulatory hurdle which certain Funds have faced is how to deal with Rule 5130 of the U.S. Financial Industry Regulatory Authority, Inc. (“FINRA”), which imposes restrictions on the participation by certain persons involved in the securities industry (“Restricted Persons”) in equity securities issued in initial public offerings. In summary, the Rule prohibits the sale of equity securities issued in initial public offerings through FINRA member firms (so called, “New Issues”) to accounts in which Restricted Persons have a significant beneficial interest (a 10% *de minimis* exemption applies).

FINRA Rule 5130 defines “Restricted Persons” as including FINRA members or other broker dealer personnel (officers, directors, general partners etc.), immediate family members thereof, finders or persons acting in a fiduciary capacity to the managing underwriter of a New Issue, portfolio managers, or persons owning a broker dealer.

The Irish Financial Regulator has issued a Policy Update (February 9, 2010) which provides that the Financial Regulator will now permit professional and qualifying investor funds to establish a separate class within a Fund where any gains/losses on investment in “New Issues” can be allocated for the benefit of investors not deemed to be Restricted Persons in accordance with Rule 5130 of FINRA. The constitutional documents and prospectus must clearly provide for these arrangements.

This is a welcome development as in the past an Irish Fund either had to have two subfunds (one for Restricted and one for Unrestricted), not accept Restricted Persons or avoid New Issues entirely.

INTEREST RATE HEDGING

The Irish Financial Regulator has issued a Policy Update (February 9, 2010) which clarifies that Financial Regulator will permit interest rate hedging at share class level where the benefits and costs of such hedging may be accrued and attributed solely to investors in a hedged share class.

This is not an entirely new development as the Financial Regulator previously allowed interest rate hedging within UCITS where one class of shares offered an unhedged exposure to a long bond asset class and a second class provided investors with the same opportunity but sought to hedge (80% - 100%) against interest rate risk thereby allowing investors to limit downside asset risk through the use of derivatives. In that example, the allocation of gains or costs involved with the derivatives (including relevant unwinding costs) were charged to the second class only.

Such arrangements must be effected in accordance with the principles set out in Guidance Note 3/99, namely:

- clear disclosure of the exchange rate hedging strategy, the risks associated therewith and the implications of the strategy to be set out in the prospectus;
- unambiguous valuation and allocation provisions to be set out in the constitutional document of the Fund;
- an indication of how the hedging transactions have been utilised to be included in the periodic reports of the Fund; and
- the valuation systems operated by the Fund or its delegate must be capable of processing and identifying the relevant hedge transaction at share class level.

UNDERTAKINGS FOR COLLECTIVE INVESTMENT IN TRANSFERABLE SECURITIES (UCITS) – COLLATERAL PASSED BY UCITS TO OTC DERIVATIVE COUNTERPARTIES

Regulation 18 of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2003 ("the Regulations") provides that the assets of a unit trust and the assets of a common contractual fund shall be entrusted to a trustee for safe-keeping. Regulation 37 makes the same provision in relation to the assets of an investment company.

Regulation 45(g) of the Regulations permits UCITS to invest in financial derivative instruments, including OTC derivatives. This note addresses the passing of collateral by a UCITS to an OTC derivative counterparty.

The Committee of European Securities Regulators ("CESR") issued advice on Level 2 measures related to the UCITS management company passport to the European Commission in October 2009. This advice addressed, *inter alia*, matters related to OTC derivatives, including the passing of collateral by a UCITS to an OTC counterparty or broker in respect of financial derivative instruments.

The advice noted that market practice may require collateral or margin to be passed by the UCITS to an OTC counterparty or broker in respect of OTC financial derivative instruments. As such these arrangements do not offend Regulations 18 and 37 of the Regulations.

The CESR advice also noted that:

- collateral passed must be taken into account in calculating risk exposure to the OTC counterparty as referred to in Article 52(1) of the UCITS Directive;

- collateral passed may be taken into account on a net basis only where there is a legally enforceable netting arrangement in place.

CESR work in relation to risk measurement, including the calculation of counterparty risk for UCITS, is ongoing with the intention to provide detailed Level 3 guidelines in these areas. The UCITS Notices and related Guidance Notes issued by the Financial Regulator will be amended in due course to reflect the provisions of Directive 2009/65/EC, the implementing measures required under that Directive and any guidelines issued by CESR.

DISCLOSURE IN COMPLEX UCITS FUNDS

The Financial Regulator is proposing changes to Guidance Note 3/07 "Structured Products and Complex Trading Strategies – Prospectus Disclosure Requirements" in 2010, whereby the following disclosures should be provided upfront in a prospectus:

- The underlying exposure. This should give an indication of the underlying asset class or trading strategies. It should also state whether the exposure is leveraged and will result in a long/short exposure. An example would be "*the fund has a direct and/or indirect leveraged exposure to {asset class x} and/or to the following trading strategies".*

- The expected risk-return profile (high level) which is normally expressed in terms of volatility or a volatility range.

- The investment opportunity. This will normally follow along the lines of "*the investment strategy supporting this is as follows...".* There was some discussion as to whether and where this should be disclosed. It should be disclosed where it is not obvious to a reader what the investment rationale is. Asset managers will generally express this in terms of some sort of "alpha" and how they think they can extract it from the exposures and strategies previously disclosed above.

BANKING AND CAPITAL MARKETS

In this issue:-

- **Life Settlements: Using Irish Investments Vehicles to minimise US taxes on Life Settlement Payments**
- **Financial Regulator publishes Consultation Paper on new corporate governance standards for banks and insurers**
- **Financial Regulator announces transition of prospectus scrutiny function**
- **Eurosystem launches preparatory work on the establishment of loan-level information for ABSs in its collateral system**
- **ECB introduces graduated valuation haircuts for lower-rated assets in its collateral framework and confirms its amendments to eligible collateral criteria**
- **STEP Market Committee introduces new fees for programmes with a STEP label**

LIFE SETTLEMENTS: USING IRISH INVESTMENT VEHICLES TO MINIMISE US TAXES ON LIFE SETTLEMENT PAYMENTS

We continue to see life settlements (in particular, relating to life policies insured on US citizens residing in the US) as an increasingly popular asset class. As a result of a US ruling issued by the Internal Revenue Service (Revenue Ruling 2009-14) on 1 May, 2009, there now exists potentially negative US tax consequences for non-US investors who acquire life policies and receive death benefits from a US insurance company on the death of a US citizen residing in the US. As a direct consequence, we have seen Ireland increasingly being examined and used as a jurisdiction to locate the offshore investment vehicle to acquire such life policies so as to avail of the benefits of the Ireland/US Double Taxation Convention to avoid the potential negative US tax issues arising from the above ruling.

Offshore investors have successfully used either Irish regulated funds or Irish special purpose vehicles in an attempt to minimize such US withholding taxes and the type of vehicle depends on a combination of different factors.

For further information, please see our publication “Life Settlements: Using Irish investment vehicles to minimise US taxes on life settlement payments” on our website or contact any member of our Banking & Capital Markets team.

FINANCIAL REGULTOR ISSUES CONSULTATION PAPER ON NEW CORPORATE GOVERNANCE STANDARDS PROPOSED FOR BANKS AND INSURERS

On 27 April, the Central Bank and Financial Regulator announced the commencement of a public consultation on new corporate governance standards for all credit institutions and insurers licensed or authorised by the Financial Regulator including Irish licensed and authorised subsidiaries of international financial services groups.

Consultation Paper CP 41 on "Corporate Governance Requirements for Credit Institutions and Insurance Undertakings" sets out minimum requirements as to how banks and insurance companies should organise the governance of their institutions including membership of their boards of directors, the role of the Chairman and the operation of various board committees.

The consultation paper sets out the minimum standards and expectations that will apply to the boards of directors of banks and insurers. These include:

- a minimum of five directors on a board of directors;
- requirements regarding the role and number of the independent non-executive directors;
- limits on the number of directorships which directors may hold to ensure they can comply with the expected demands of board membership of a credit institution or insurance company;
- clear separation of the roles of Chairman and CEO;
- a prohibition on an individual who has been a CEO, director or senior manager during the previous five years from becoming Chairman of that institution;
- criteria for director independence and consideration of conflicts of interest;
- a requirement that board membership is reviewed at a minimum every three years;
- a requirement that boards set the risk appetite for the institution and monitor adherence to this on an ongoing basis;
- minimum requirements for board committees;

- the establishment of a remuneration committee comprising a majority of independent non executive directors; and

- a requirement for an annual confirmation of compliance to be submitted to the Central Bank.

The consultation paper is part of a wider strategy to update the domestic regulatory framework applying to banks and insurers. It has been announced that corporate governance frameworks for other industry sectors are also planned. The Financial Regulator has invited funds industry representatives to work on an appropriate corporate governance code for the funds industry and corporate governance for credit unions will be dealt with as part of the forthcoming Strategic Review of the Credit Union Sector. In addition, the consultation paper specifically seeks views on the extension of these proposals to investment firms.

The Financial Regulator proposes to issue further requirements, including remuneration requirements and a revised fitness and probity framework, in due course. In addition, the Financial Regulator has said that it may also consider the need for additional requirements in respect of internal governance and risk management as international initiatives in these areas are published.

Failure to comply with the requirements may be subject to sanction under the Administrative Sanctions Framework. The Financial Regulator has stated that it is in intended that the enhancement of corporate governance, together with more intrusive supervision and a credible threat of enforcement, will contribute to the improvement of the resilience of the Irish financial sector.

Interested parties are asked to comment on the proposals by 30 June, 2010 and it is expected that the new corporate governance standards will be published in Autumn, 2010.

FINANCIAL REGULATOR ANNOUNCES TRANSITION OF PROSPECTUS SCRUTINY FUNCTION

On 21 April, in line with EU requirements, the Financial Regulator announced the commencement of a joint project with the Irish Stock Exchange (ISE) to unwind the delegation of prospectus scrutiny tasks which have been carried out by the ISE on behalf of the Financial Regulator under a delegation arrangement since 2005. Under EU law, the role of prospectus scrutiny must be returned to the Financial Regulator by 31 December, 2011.

Prospectus scrutiny involves the review of prospectus documents for equity, debt and closed-ended funds. It is an important function because of the need to ensure that prospectuses are compliant with relevant legislative provisions.

It is hoped that the successful management of the project will ensure a smooth and seamless transition of this function from the ISE to the Financial Regulator by the end of 2011. A joint steering committee, comprised of senior management representatives from both the Financial Regulator and the ISE, has been established to oversee the process to ensure that it the review process remains efficient and market friendly. A Stakeholder Consultative Group has also been established to ensure that relevant market participants are involved in this strategically important project.

EUROSYSTEM LAUNCHES PREPARATORY WORK ON THE ESTABLISHMENT OF LOAN-LEVEL INFORMATION REQUIREMENTS FOR ABSs IN ITS COLLATERAL FRAMEWORK

The Governing Council of the European Central Bank (ECB) has decided that work should begin on the establishment of loan-by-loan information requirements for asset-backed securities (ABSs) in the Eurosystem collateral framework. Having analysed the positive feedback received in the public consultation on the matter, the Governing Council decided that the ECB and the 16 national central banks of the euro area would proceed with the preparatory work for the establishment of loan-level information requirements.

On 23 December, 2009, the ECB launched a public consultation on the establishment of loan-by-loan information requirements for ABSs. The consultation ended on 26 February, 2010 and over 50 responses were received from a broad range of market participants. Market participants showed significant support for the initiative and confirmed that the Eurosystem would not face any major obstacles in introducing loan-level data requirements in its collateral framework. In view of this positive conclusion of the public consultation, on 22 April the Governing Council of the ECB agreed that the Eurosystem could proceed with its preparatory work for the establishment of loan-level information requirements. This preparatory period is expected to last approximately six months. It will be dedicated to further developing the ABS loan-level data requirements, as well as the technical implementation aspects that were mentioned in the public consultation, in particular:

- the gradual phasing-in of loan-level data requirements;

- the risk control scheme applicable to ABSs for which loan-level data are temporarily not submitted;
- the design of the data-handling infrastructure;
- the final definition of the RMBS loan-level data template, taking into account the detailed technical comments received; and
- the possible future introduction of loan-level templates for other asset classes. This further technical preparatory work will be conducted by the Eurosystem in collaboration with market participants. Technical working groups composed of relevant market participants and Eurosystem experts will be created to finalise the different loan-level templates and tackle technical issues related to the initiative.

It is envisaged that the Governing Council will assess the results of this preparatory work after Summer 2010 and subsequently decide when to announce the loan-level data requirements.

Subject to the approval of the Governing Council, market participants would have a 12-month adaptation period before having to submit loan-level data.

The preparatory work will begin immediately and it has been reported that it should be completed by September 2010. It is expected that this will address the loan-level information requirements, as well as the technical implementation aspects covered by the initial public consultation. Subject to the approval of the Governing Council, market participants would have 12 months before the obligation to submit loan-level ABS information comes into force.

ECB INTRODUCES GRADUATED VALUATION HAIRCUTS FOR LOWER-RATED ASSETS IN ITS COLLATERAL FRAMEWORK AND CONFIRMS ITS AMENDMENTS TO ELIGIBLE COLLATERAL CRITERIA

The Governing Council of the European Central Bank (ECB) has decided to keep the minimum credit threshold for marketable and non-marketable assets in the Eurosystem collateral framework at investment-grade level (i.e. BBB-/Baa3) beyond the end of 2010 except in the case of asset-backed securities (ABSs).

In addition, the Governing Council has decided to apply, as of 1 January 2011, a schedule of graduated valuation haircuts to the assets rated in the BBB+ to BBB- range (or equivalent).

The schedule applies to credit quality step 3 of the Eurosystem's harmonised rating scale (available on the ECB's website), in which the long-term rating of assets is BBB+/BBB/BBB- by Fitch or Standard & Poor's, Baa1/Baa2/Baa3 by Moody's or BBBH/BBB by DBRS.

This graduated haircut schedule will replace the uniform haircut add-on of 5% that is currently applied to these assets. It has been confirmed that the haircut schedule will be based on the following parameters:

- the new haircuts will be duly graduated according to differences across maturities, liquidity categories and the credit quality of the assets concerned. The lowest haircuts will apply to the most liquid assets with the shortest maturities and the highest haircuts will apply to the least liquid assets with the longest maturities;

- the new haircuts will be at least as high as the haircut currently applied (which is a flat 5% add-on for the assets concerned over the haircut that would apply to similar assets with a higher credit quality);

- no changes will be made to the current haircut schedule foreseen for central government debt instruments and possible debt instruments issued by central banks that are rated in the above-mentioned range; and

- the new haircuts will not imply an undue decrease in the collateral available to counterparties.

It is expected that the specific schedule of haircuts will be published by the ECB in July, 2010.

Furthermore, the Governing Council confirmed that the following instruments **will no longer be eligible** as collateral as from 1 January, 2011:

- marketable debt instruments denominated in currencies other than the Euro, i.e. the US Dollar, the Pound Sterling and the Japanese Yen, and issued in the Euro area;

- debt instruments issued by credit institutions which are traded on the accepted non-regulated markets (including the STEP market, the OTC Market for Bank of England Euro Bills and other prescribed OTC markets for various treasury bills and commercial paper); and

- subordinated debt instruments when they are protected by an acceptable guarantee.

STEP MARKET COMMITTEE INTRODUCES FEES FOR ISSUERS WITH PROGRAMMES WHICH HAVE OR WILL APPLY FOR A STEP LABEL

The STEP Market Committee has announced that issuers wishing to apply for, or to renew, a STEP label under the STEP Market Convention for their short term programmes will now be required to pay fixed fees to the STEP Secretariat which is intended to be used to cover administrative costs of the STEP Secretariat.

The fees will be EUR 5000 for new programmes and EUR 2000 per annum for existing programmes which have applied for a STEP label.

The STEP Committee has confirmed that the collection of the above contributions will start as of 1 June 2010 under the following conditions:

- New programmes will be exempt from contributing until 31 December 2010;
- Existing programmes will be requested to contribute to EUR 1000 for the remainder of 2010.

CORPORATE AND M&A

In this issue:-

- **Execution of Deeds**
- **Regulations on Accounts and Consolidated Accounts**
- **The Companies (Miscellaneous Provisions) Bill, 2009**

EXECUTION OF DEEDS

Almost all of the provisions of the Land and Conveyancing Law Reform Act came into force on 1 December, 2009. Although the Act is primarily concerned with changes to land law and conveyancing practice, there are some provisions of general application - such as the provisions related to the execution of deeds; and not only those deeds which may form part of a property transaction.

The provisions of the new Act apply to any deed executed after December 1, 2009, if

- In the case of an individual, it is a deed subject to Irish law; and

- In the case of Irish incorporated company or a body corporate anywhere else in the world, whether or not the deed is subject to Irish law.

Section 64 provides that any instrument executed as a deed after 1 December 2009, shall be considered as a deed, provided that the name given to such an instrument indicates that it is to be considered as a deed (for example because it includes the word "Deed"), *or* it is otherwise made clear on the face of the document by the parties to it that they intended it to be a deed by expressly stating that it is signed or executed as a deed.

In relation to execution of a deed by an individual, there is no longer any need for any kind of seal to be affixed. However, it is now an execution requirement that the individual signs in the presence of a witness, who attests the individual's signature. Previously, the witnessing of an individual's signature on a deed would have been considered good practice from an evidentiary point of view; now it is actually an execution requirement for execution of a deed by an individual.

In relation to the execution of a deed by a body corporate, Section 64 provides that

- in the case of an Irish incorporated company, it should be executed under seal in accordance with the Articles of Association of the company;

- in the case of an Irish body corporate other than a company, it should be executed in accordance with the legal requirements governing such a body; (thus for example, IDA Ireland, and for which the relevant governing legislation contains provision for execution of instruments)

- in the case of body corporate incorporated outside of Ireland; it should be executed in accordance with the legal requirements for the execution of the relevant instrument in the jurisdiction in which the foreign company is incorporated.

Neither Section 40 of the Companies Act 1963 (which relates to the execution of a deed outside of Ireland by a Irish incorporated company) nor the Powers of Attorney Act 1996 have been expressly amended by the Act.

REGULATIONS ON ACCOUNTS AND CONSOLIDATED ACCOUNTS

In November, 2009, the European Communities (Directive 2006/46/EC) Regulations (S.I. 450 of 2009), implementing Directive 2006/46/EC on Company Reporting in Ireland, were signed into law. On the 25 February 2010, an amending regulation to S.I. 450 of 2009 namely S.I. 83 of 2010 ("the Regulations") was published bringing clarity to the effective date of the Regulations.

The key changes are as follows:

- Irish incorporated companies (excluding investment companies) whose securities are admitted to trading on a regulated market or on a multilateral trading facility will be required to prepare and include a Corporate Governance Statement in the annual (directors') report for financial year's ending on/after 18 November 2009 (the Regulations);

- However, the requirement to include a description of the main features of the internal control and risk management systems of the company in relation to the financial reporting process and the auditor's opinion on same shall only apply for financial year's beginning on/after 18 November 2009 (the Regulations).

- Listed investment companies (i.e. listed fund companies), who are not already subject to annual reporting obligations in relation to a governance code by virtue of

that listing, will have to produce a **Corporate Governance Statement** for financial year's beginning on/after 18 November 2009 (the Regulations).

- Disclosure requirements for "off balance sheet arrangements" and "related party transactions" will apply to listed and unlisted companies in respect of financial years ending on/after 18 November 2009.

- Amendment to existing fair value rules whereby Regulation 3 extends the right of both public and private companies, which prepare annual accounts under the Companies Acts to use fair value accounting for a variety financial instruments in accordance with IAS 39 in both their individual and consolidated accounts.

It should be noted that a person who contravenes these Regulations is guilty of an offence and is liable on summary conviction to a fine of €5,000 or three months imprisonment or both and on indictment to a fine of €50,000 or imprisonment for a term not exceeding three years or both.

THE COMPANIES (MISCELLANEOUS PROVISIONS) ACT, 2009

On the 23 December, 2009, the Companies (Miscellaneous Provisions) Act, 2009 (the "Act") was signed into law introducing a number of important changes to Irish company law.

Sections 1, 2 and 3 (a) – (h) and Section 4 of the Act have commenced relating to:

- The use of US GAAP by certain companies on a temporary basis therefore reducing the burden on those companies listed on the US Securities and Exchanges Commission, which want to relocate their head office to Ireland;

- The creation of a new type of purchase called an "overseas market purchase" to facilitate international companies re-domiciling to Ireland, which are not listed on the Irish Stock Exchange and that wish to avail of the market purchase regime when undertaking share buy-back programmes;

- The continuity of membership by directors of committees of enquiry established by the Irish Auditing and Accounting Supervisory Authority (IAASA) ensuring membership doesn't change during an enquiry, which could endanger fair procedure and process; and

- The limit of potential costs to the Exchequer of certain types of investigations into the affairs of the company, as the High Court may now require the applicant (e.g. such a

director) calling for an investigation to give unlimited security for payment of costs of the investigation. Previously the security was limited to an amount up to IR£250,000.

Section 3(i) to (j) and Section 5 relating to migrating funds have not yet been commenced as the Financial Regulator is currently liaising with Cayman, Bermuda, Gibraltar and the Channel Islands to agree reciprocal arrangements. This is likely to take another six months. When these sections are commenced, the Act will introduce a mechanism whereby certain collective investment undertakings can migrate their registered offices into and out of Ireland without firstly having to wind up in their current jurisdiction thus attracting investment funds business from third countries who are seeking to relocate to a well regulated jurisdiction.

In addition, the Act amended the Companies Act 1990 to extend the definition of "recognised stock exchange" to include exchanges outside the State, as well as individual markets outside the State. This provision was dependent on the Minister prescribing exchanges. The Tánaiste has signed the Companies (Recognised Stock Exchanges) Regulations 2010 (SI 100 of 2010) prescribing the London Stock Exchange, the New York Stock Exchange and the NASDAQ as "recognised stock exchanges", to permit Irish public companies to make overseas market purchases of their own shares on a recognised stock exchange.

A new notification requirement was also introduced for overseas market purchases in the Act. The company is required to publicise its purchase of own shares on the company website for not less than 28 days, beginning on the day following the purchase. Companies are only required to publish the highest and the lowest prices paid, and the date of the purchase.

The Department of Enterprise, Trade and Employment has indicated that additional exchanges may be recognised at a future date.

REGULATORY & COMPLIANCE

In this issue:-

- **Third Anti-Money Laundering Directive – 2005/60/EC**
- **Financial Services Ombudsman**
- **The Financial Regulator**
- **Data Protection - New Standard Contractual Clauses**

THIRD ANTI-MONEY LAUNDERING DIRECTIVE

The Criminal Justice (Money Laundering & Terrorist Financing) Act, 2010 ("the Act") was signed into law by the President on the 5 May, 2010. The Act gives effect to Directive 2005/60/EC on the "Prevention of the use of the Financial System for the Purpose of Money Laundering and Terrorist Financing" (the "Third Anti-Money Laundering Directive") in Ireland. A period of up to two weeks may elapse before the Act is uploaded to the Oireachtas site. The draft guidance notes (core and sectoral) are in the process of being updated following implementation of the Act.

FINANCIAL SERVICES OMBUDSMAN

On the 15 February, 2010, it was announced that Bill Prasifka was appointed as the new Financial Services Ombudsman and will take up office by the end of March 2010. Mr Prasifka succeeds Joe Meade who retired on 3 January, 2010. Previously, Mr Prasifka has worked as the Chairman of the Competition Authority and the Irish Commissioner for Aviation Regulation.

THE FINANCIAL REGULATOR

- Chief Executive – On the 4 January, 2010, Matthew Elderfield took up the position as the new Chief Executive of the Financial Regulator. The roles of Chief Executive and Consumer Director will be combined. Matthew Elderfield will become the Head of Financial Regulation in the new restructured Central Bank, once legislation passes through the Oireachtas confirming the restructuring.

On the 12 January, 2010, it was announced that Jonathan McMahon has been appointed as Assistant Director General with responsibility for Financial Institutions Supervision within the Central Bank, which will include oversight of the supervision of banks and insurance companies.

James O'Brien has been appointed Registrar of Credit Unions in the new Central Bank of Ireland. Mr. O'Brien, previously the Deputy Registrar of Credit Unions will be responsible for regulation and supervision of the credit union sector in Ireland. Mr. O'Brien will succeed current Acting Registrar Matthew Elderfield.

Mary O'Dea takes up the post of Assistant Director General, Financial Operations within the Central Bank.

- Weaknesses in Sales Processes for Older Customers - The Financial Regulator, in February, published its findings following a four part examination conducted over 2009 of selected credit institutions, life insurance firms and investment and stockbroking firms in relation to the suitability of investment products sold to older customers.

  The issues identified during the examination included the following-

  - Firms should have a practical definition of an older customer with the Financial Regulator suggesting 60 as the appropriate benchmark;
  - Firms are required to gather and record sufficient information including income and asset and liability detail from the customer to enable it to provide a suitable recommendation to the customer;
  - Older customers should be offered the option of having a third party present at a sales meeting;
  - Firms should advise older customers of the need for an emergency fund to cover medical or other long term care expenses; and
  - Firms must prepare specific statements of suitability tailored to the consumer as distinct to issuing generic versions.

  The compliance issues identified during the inspection are already subject to separate engagement by the Financial Regulator with the individual firms concerned, however all firms are required to consider the issues identified in the findings and ensure that the appropriate amendments are made to procedures accordingly.

- General Charging Issues – On the 8 February, Matthew Elderfield, as the Head of Financial Regulation, announced that the Financial Regulator is conducting a review of its approach to how overcharging is dealt with under the Consumer Protection

Code following recent cases where financial institutions continue to experience control failures that result in customers being overcharged. The Financial Regulator in conducting its review will focus on the timeliness of resolving overcharging in firms and the grounds for enforcement against such failures.

- Settlement Agreement – Following an initial themed inspection into the sale of Friends First ISTC Bonds and a subsequent inspection of the firm, the Financial Regulator has entered into a Settlement Agreement with effect from 17 February 2010 with Jim Mannion & Co (Insurances) Ltd, Strokestown, Co. Roscommon. The firm was found to have failed to inform one customer about the investment risks and guarantee limitations associated with the ISTC Creative Bond. In relation to the sale of other products, additional breaches were found relating to the failure to record certain customer information, failure to provide the customer with the firm's terms of business and failure to provide a statement of suitability.
  The Financial Regulator reprimanded the firm and required it to pay a fine of €5,000. The firm has confirmed that it has adopted new procedures and controls to become compliant and prevent future non-compliance.

- Cash Funds – On the 22 February, 2010, the Financial Regulator issued a letter to insurance firms requiring the submission of information relating to investment products which are marketed as being invested in cash or partially invested in cash. The Financial Regulator has requested insurance firms to identify the following information in their submission, which was due to be returned on 20 March, 2010 namely:

  - The amount of each fund;
  - Whether the fund has a "no fall in value" assurance; and
  - Any difference between market value and face value.

  The Financial Regulator states that where such funds invest in variable instruments such as floating rate notes there may be issues "in regard to policyholders' reasonable expectations".

- Address to Leinster Society of Chartered Accountants on 11 March 2010 - Mr Elderfield discussed the need to overhaul our approach to financial regulation using a balanced and measured approach. He advised that he intended to implement a framework of assertive risk based regulation underpinned by a credible threat of enforcement whereby the riskiest firms manage themselves better and that firms and management are held more accountable for their actions.

- Frequently Asked Questions on the Prospectus Directive - On the 12 March, 2010 the Financial Regulator published a list of the questions most frequently asked of the

Financial Regulator regarding the Prospectus Directive 2003/71/EC. Queries regarding the Frequently Asked Questions should be addressed to markets@financialregulator.ie.

- Updated XML Reporting Schema for Life Insurance Companies – On the 26 March, 2010 the Financial Regulator issued an updated version of the XML Schema for Life Insurance Reporting. This is available on the Financial Regulator's website under the Reporting Requirements page in the Life Insurance section.

- Address to the Irish Insurance Federation on 10 May 2010– Mr. Elderfield indicated that Solvency II implementation is a very high priority for the Financial Regulator and that it is on track for implementation of the Directive. He also indicated that the second priority on the Financial Regulator's agenda is developing and implementing a system of assertive risk-based supervision underpinned by the credible threat of enforcement.

- Administrators appointed to Quinn Insurance – On the 30 March, 2010, the High Court appointed two joint provisional administrators to Quinn Insurance Limited. The application was made under the Insurance Act, 1983 by lawyers acting on behalf of the Financial Regulator. The court was advised that the Financial Regulator has taken this action in the interest of the firm's policyholders.

  Following their appointment, the administrators will run the general insurance business as a going concern under different management in the interest of policyholders. The Financial Regulator has an onsite presence in the firm to oversee its actions and to work with the new management. At the same time the Financial Regulator has commenced an investigation into certain matters within Quinn Insurance Limited that have very recently come to light.

  In addition, the Financial Regulator separately directed Quinn Insurance Limited ("QIL) on the 30 March 2010 to cease writing new business in the UK. However, on the 21 April 2010, the Financial Regulator modified the direction issued to QIL (under administration) on 30 March 2010 to permit the company to write motor insurance cover for provisional driver licence holders in the United Kingdom (including Northern Ireland). The Financial Regulator consulted closely with the United Kingdom's Financial Services Authority prior to making its decision. The Financial Regulator continues to work closely with the administrators of QIL in relation to their obligations to restore the company to a sound commercial and financial footing.

  Quinn's life insurance business, which is a separate entity remains unaffected

DATA PROTECTION – NEW STANDARD CONTRACTUAL CLAUSES

The European Commission has approved new standard contractual clauses on the transfer of data to data processors established in third countries. The new clauses will come into force from 15 May, 2010.

For further details please contact David Nolan in Dillon Eustace.

The link to the new clauses is set out below for convenience.

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:039:0005:0018:EN:PDF

LITIGATION AND DISPUTE RESOLUTION

In this issue:-

- **Madoff Claims – Latest Developments**
- **Arbitration Act 2010**

MADOFF CLAIMS – LATEST DEVELOPMENTS

The Commercial Court in Dublin is currently dealing with around 50 cases arising from the role played by the convicted fraudster Bernard Madoff in respect of two Irish investment funds, Thema International Fund plc and AA (Alternative Advantage) plc. Dillon Eustace was the first Irish firm to initiate proceedings on behalf of an investor in one of these funds and currently represents the largest number of investors in litigation in the Commercial Court whose investments were affected by Mr. Madoff's activities.

HSBC (as custodian of each of the affected funds) brought a Motion to stay the proceedings brought by one of Dillon Eustace's clients last year, saying that investor claims should not be allowed to proceed until after the outcome of the cases being brought by the affected funds themselves. In his judgement dated 16 October, 2009 Mr. Justice Clarke ruled that HSBC were not entitled to succeed with their Motion, on the basis that the streamlined procedures and case management capabilities of the Commercial Court in Dublin were more than capable of dealing with the issues in the investor cases together with the actions initiated by the funds themselves and any other related proceedings. He said:

"*All proceedings in which an allegation is made against Thema or HSBC (whether involving only those defendants or other defendants and whether either or both of those parties is a defendant, third party, or otherwise joined) should be linked for the purposes of case management and trial with a view that the management of all such proceedings should be conducted together by a single judge.*"

The pleadings have now virtually closed in all of these related proceedings; however, one particular issue is to be determined by the Commercial Court before any of these cases go to trial.

Mr. Justice Clarke has ruled that the following question will have to be determined in advance because of the particular nature of one investor's claim, in summary:

a. Does a custodian have an obligation to account to a fund or its investors arising from

the UCITS Directive / Regulations?

b. Leaving aside the UCITS regime, is the relationship between HSBC and the Thema investors that of trustee and beneficiary in equity giving rise to a fiduciary relationship and, in turn, a duty to account?

The Court has recently announced that a hearing of this preliminary issue will take place on 18 May of this year and further updates will be published by Dillon Eustace as the matter develops. The determination of these questions is likely to be of note to those involved in similar litigation in other jurisdictions as well as those involved in the funds industry in Ireland and the decision of the court will be eagerly anticipated, both in Ireland and internationally

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ARBITRATION ACT 2010

On 8 March, 2010, the President of Ireland signed the Arbitration Act 2010 (the "Act") into law and all of the provisions of the Act will come into effect on 8 June, 2010.

The legislation is intended to update and streamline existing arbitration law in Ireland and to create a clear legal framework consistent with best practice in the international arbitration arena. The Act repeals all pre-existing Arbitration legislation and applies the United National Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration to all arbitrations which take place in Ireland.

The Irish Courts have repeatedly vindicated the independence of the arbitral process and the Act will further enhance that position. Under the Act, only in very limited circumstances will a party be able to have recourse to the Courts. The Act provides that a decision of the High Court is final thus avoiding the prospect of cases ending up with costly and lengthy Supreme Court appeals.

INSURANCE LAW

In this issue:-

- **Solvency II Framework Directive – 2009/138/EC**
- **Deloitte's External Study on the Impact Assessment of Solvency II**
- **Insurance Block Exemption**

SOLVENCY II FRAMEWORK DIRECTIVE - 2009/138/EC

On the 17 December, 2009, the definitive text of the Solvency II Directive (2009/138/EC) was published in the Official Journal. The Council of the European Union ("the Council") adopted the Directive on 10 November, 2009 and it was then signed by both the Council and the European Parliament on 25 November, 2009.

The Directive aims to strengthen the supervision and prudential regulation of insurance and reinsurance companies, particularly through the imposition of new solvency and governance requirements. It also establishes a new framework for EU regulation through the recasting of 13 insurance directives into a single text.

The Directive comes into force 20 days after its publication in the Official Journal, however a number of the provisions (including the repeal of existing insurance directives set out in Article 310) only apply from 1 November, 2012. Member States will have to implement the Directive by 31 October, 2012.

On the 29 January, 2010, the Financial Regulator published a document updating the industry on the response to its survey in August, 2009. In August, 2009 the Financial Regulator wrote to all Irish authorised insurance and reinsurance undertakings requesting the submission of certain information in relation to the use of internal models under Solvency II. The information was requested from 60 Life undertakings, 130 Non Life Insurance undertakings and 120 Reinsurance undertakings. Of the 310 institutions, 253 indicated that they intended using the Standard Model and 57 indicated that they intended to use an internal model. Of the 57 intending to use an internal model, only 16 will be using an internally-developed model, which will require to be approved by the Financial Regulator. The other 41 firms will be importing models developed at group level and authorised by regulators in other EU states.

Firms intending to use internal models are required to complete and return the second Questionnaire to the Financial Regulator by 31 March, 2010.

On the 4 February, 2010, the Financial Regulator published a letter addressed to the Society of Actuaries in Ireland providing feedback from its reviews of Financial Condition Reports and Statements of Actuarial Opinion. The Financial Regulator notes that in very many cases reports were not comprehensive enough. Actuaries should be documenting all considerations in their reports. The aim is to enable another actuary (in particular one working for the Financial Regulator) to understand the work undertaken. The Financial Regulator acknowledges that reports may be written for Directors who do not have actuarial experience, but notes that in the future and specifically with Solvency II in mind, greater technical knowledge will be demanded from Directors than has been the case in the past. This is an explicit signal from the Financial Regulator that it has high corporate governance expectations under Solvency II. While most work on Solvency II to date has concentrated on the valuation models and techniques, Solvency II contains a sizeable body of corporate governance requirements which have not yet been as widely considered by firms.
The Financial Regulator notes that few actuaries gave much attention to Solvency II in their reports and have emphasised that it is very important that Boards receive advice on the expected impact of Solvency II.

DELOITTE'S EXTERNAL STUDY ON THE IMPACT ASSESSMENT OF SOLVENCY II

On the 20 January, 2010, the Financial Regulator published on its website the consultation paper being undertaken by Deloitte on the potential impact of Solvency II technical (Level 2) measures. The European Commission appointed Deloitte to conduct this study, which will look at the impact of the proposed move from Solvency I to Solvency II on insurance balance sheets and business behaviour, on insurance products and markets and social and economic impacts.

The consultation paper sets out the preliminary conclusions of the likely impact of the move to Solvency II and the impact of the various policy options which are under consideration. Respondents are asked to comment (no later than the 19 February, 2010) on these preliminary conclusions by providing business examples and highlighting possible exceptions to the general conclusions. The objective of this consultation is to ensure the maximum range of input is obtained from the industry. The information being gathered by Deloitte is additional to and independent of the consultation work being carried out by Committee of European Insurance and Occupational Pensions Supervisors' (CEIOPS) in relation to the implementation of Solvency II. The European Commission will produce and

publish the Main Impact Assessment Report for the Solvency II level 2 measures based on contributions from Deloitte and other parties including CEIOPS.

Solvency II Level 2 Implementing Measures

In late 2009, CEIOPS established a Task Force to lead further work on the issue of the inclusion of a liquidity premium in the risk-free rate for discounting technical provisions as an additional input for Level 2 implementing measures. Having considered industry submissions, the Task Force issued its report on 1 March, 2010, which deals with the issue of liquidity premium under the following headings:

- Methods of calculation of a liquidity premium for assets and liabilities;
- Recognition of a liquidity premium in the standard formula for the Solvency Capital Requirement (SCR);
- Split between interest rate risk and spread risk in the standard formula;
- Changes to the spread risk model to permit a liquidity premium;
- Adjustments to spread risk/other market risk correlation assumptions; and
- Overall impact of a liquidity premium on solvency of insurers.

The Comité Européen des Assurances (CEA) has published a set of "key messages" on Solvency II Level 2 implementing measures. Whilst fully supporting the Solvency II project, the CEA has criticised the advice given by CEIOPS to the European Commission on the inclusion of a liquidity premium (discussed above).

The CEA considers that CEIOPS' advice is in contradiction with the objectives underpinning the Solvency II Framework Directive in a number of respects - particularly in suggesting an increase of financial requirements beyond the level stated in the Directive.

CEA feels this will create serious obstacles to the sound functioning of insurance business and have unavoidable negative effects on consumers, without delivering significant incremental benefit in terms of policyholder protection.

INSURANCE BLOCK EXEMPTION

After a detailed review of the functioning of the current Block Exemption Regulation (BER) adopted in 2003 and which expires on the 31 March, 2010, the Commission has adopted on the 24 March, 2010 a new Regulation (Commission Regulation (EU) 267of 2010) that block

exempts certain types of agreements in the insurance sector from the EU's general prohibition of practices restrictive of competition.

The new BER, which will come into force on the 1st of April 2010, renews two of the four categories of agreements currently exempted, namely joint compilations, tables and studies, and co(re)insurance pools, with some amendments. Certain information exchange can be justified in order to allow insurers to accurately assess risks. Pooling is also important in order to ensure that all risks can be covered. These two types of agreements justify a block exemption. Other types of cooperation may also be legal but it will be for insurers to self-assess that they comply with the general competition rules.

The new regulation will be valid until 31 March, 2017.

TAX

In this issue:-

- **Finance Act 2010**

FINANCE ACT, 2010

Introduction

The Minister for Finance made reference in his Budget in December, 2009 to the importance of the financial services industry and his intention to introduce changes to enhance the competitive position of the Irish Financial Services industry. As a result a number of specific and general measures have been introduced in the Finance Act 2010 (the "**Act**") to support the theme of encouraging the continued and further use of Ireland for a broad range of financial services.

Key Highlights

Specific Financial Services Industry Incentives

- A series of changes to encourage the continued use of Ireland as a domicile for collective investment funds and a location for the provision of management services to UCITS funds domiciled in any EU jurisdiction (see "Investment Management Package" of measures below).

- The extension of Ireland's favourable financial services tax regime to cover Islamic financing.

- Favourable changes to the taxation treatment of operating leases.

General Incentives also benefiting the Financial Services Industry

- Traders/dealers in shares, banks, and insurance/reinsurance companies etc (who normally are taxable at the 12.5% tax rate) will be exempt from tax on certain foreign dividends.

- For corporates, the extension of the circumstances of when the 12.5% tax rate applies to foreign dividends (as opposed to the 25% tax rate).

- The introduction of a self-assessment system to make it simplier for non-Irish tax residents to receive Irish dividends free of Irish withholding tax.

- Improvements in the double tax credit relief available to companies with foreign branches.

- Extension of the tax measures introduced in 2008 to assist companies in Ireland to attract non-Irish domiciled individuals to work in Ireland.

Investment Management Package of Measures

UCITS IV

The UCITS IV Directive is designed to facilitate the further development of the cross border funds market in the EU; however tax has been identified as one of the main barriers to the successful implementation of the UCITS IV Directive. In this regard the Act introduces a series of measures to help funds that are seeking to benefit from the implementation of UCITS IV Directive.

Amongst other things the UCITS IV Directive provides that UCITS management companies located in one EU jurisdiction may manage UCITS funds domiciled in another EU jurisdiction. There are concerns in various EU member states that the appointment of a management company could bring a foreign UCITS within the charge to tax in the management company's home jurisdiction. The Act provides that in the case of an Irish management company managing a non-Irish UCITS, which is not otherwise Irish tax resident, the non-Irish UCITS will not be taxable in Ireland as a result of appointing an Irish UCITS management company (i.e. the management company will not bring the profits of the foreign UCITS within the charge to Irish tax) and such funds will be treated as foreign funds for the purposes of Irish unit-holders with comparable tax rates to investments in Irish regulated funds.

Stamp Duty

The Act provides for relief from stamp duty arising on the transfer of funds assets under fund mergers and reorganisations thereby providing for the effective reorganisation of funds into a Master/Feeder structure (which are now permitted under UCITS IV). However it should be noted these provisions are not restricted to UCITS and therefore this should increase Ireland's attractiveness as a jurisdiction of choice for the amalgamation of non-UCITS.

The Act also removes a potential technical exposure to Irish stamp duty arising on the transfer of assets between different sub-funds within the same unit trust. These provisions are effective from the passing of the Act.

Non-Irish Resident Declarations

Prior to the passing of the Act Irish regulated funds were required to deduct exit tax when making a payment to an investor unless the funds were in possession of a declaration by the investor to the effect that the investor was either not resident or ordinarily resident in Ireland for tax purposes or is an exempt Irish investor. These rules were considered to be a disproportionate burden on the funds industry because the vast majority of Irish domiciled funds in the international funds sector are distributed solely to non-Irish residents and existing procedures under the European Anti-Money Laundering legislation already highlight any investor holding an Irish passport or address. Consequently the Act contains provisions that permit non-resident investors to invest in an Irish fund without the need to make a declaration of non-residence. In order to do so the funds must obtain approval from the Irish Tax Authorities. Typically, the approval will apply to funds that are marketed exclusively outside of Ireland. This provision is effective from the passing of the Act.

Irish Management Company – Extension of Category of Exempt Irish Investors

The Act amends the definition of an Irish fund management company to exclude references to IFSC and Shannon financial services operations (i.e. a technical amendment to update the definition of a “qualifying management company”). The purpose of this is to remove the uncertainty that existed with regard to the status of such entities as exempt Irish investor’s as a result of defunct terminology in the current definition. Exempt Irish investors may receive a return of their investment in Irish funds free of Irish withholding tax, so the extension of the withholding tax exemption for certain categories of Irish investors is welcomed. This provision is effective from the passing of the Act.

Removal of technical exposure to capital acquisitions tax for non-Irish investors in foreign funds administered in Ireland

The Act removes a technical exposure to Irish gift and inheritance tax (capital acquisitions tax) in respect of non-Irish domiciled funds that are administered in Ireland (where the share register is maintained here). This provision is effective from the passing of the Act.

Islamic Finance

The Act extends the tax treatment (both direct and indirect taxes) applicable to conventional finance transactions to Shari compliant financial products which are the same in substance as conventional finance products. The amendments took effect from 1 January 2010. The

ability to structured Shari compliant financial compliant products in a tax efficient manner is welcomed, although as Shari law is complex it is not quite clear yet whether the new provisions cover all potential scenarios. That is expected to become clearer over the coming weeks and months.

Operating Leases

Prior to the Act only lessors under finance leases could elect to be taxed in accordance with their accounting results, rather than to calculate their profits in accordance with the capital allowances/tax depreciation regime. This was necessary as otherwise lessors would be confined to claiming capital allowances/tax depreciation over 8 years on assets which had a shorter economic life ("short life assets"). The Act extends this beneficial taxation treatment to operating leases if certain conditions are met. Essentially the extension of the favourable tax treatment of operating leases is extended to new lessors of operating leases and/or existing lessors in respect of the increased value of all short life assets let on an operating lease above a base threshold amount calculated on the 2009 results of the lessor (and/or lessor's group). This provision applies to accounting periods ended on or after 1 January, 2010.

An anti-avoidance measure has been introduced to prevent both lessors and lessees claiming capital allowances/tax depreciation on the same leased asset. This provision applies from the date of the passing of the Act.

Foreign Dividends

Foreign dividends are currently taxed (unless the recipient is a charity, pension fund etc) at either 12.5% or 25%. For traders/dealers in shares, foreign dividends are currently taxed at 12.5%. In addition, foreign dividends are typically taxed at 12.5% for banks and insurance/reinsurance companies (unless the foreign shareholding is held "outside" of the bank or insurance/reinsurance's companies normal trading activities, when it is then taxed at 25% unless in the case of a life insurance company such foreign dividends are part of policyholder profits when they are then exempt from tax). The Act provides for an exemption from tax for such traders/dealers, banks, insurance and reinsurance companies in respect of foreign dividends (forming part of their trading activities) where they hold less than 5% of the shares of the foreign company paying the dividend. So in certain cases the rate of tax will be reduced from 12.5% to 0%.

In addition, currently foreign dividends which are taxable normally at 25% (so corporates and traders/dealers, banks, insurance and reinsurance companies acting in a non-trading capacity) are in certain circumstances taxed at 12.5%. The 12.5% rate in such cases is currently confined to foreign dividends paid out of trading profits of companies located in a country with which Ireland has a double tax treaty and/or is located in an EU member state.

The 12.5% rate in such circumstances will be extended to dividends of companies located in non-treaty/non-EU location where the company paying the dividend is quoted on a recognised stock exchange in another EU member state or a tax treaty country (or is owned directly or indirectly by such a company). On the same theme the rules for identifying the underlying profits (whether trading or non-trading profits) have been simplified which should make it easier to identify those foreign dividends qualifying for the 12.5% tax rate.

The above provisions apply to foreign dividends received on or after 1 January, 2010.

Irish Dividend Withholding Tax

Ireland currently operates an extensive exemption from Irish dividend withholding tax (“DWT”). However, the administrative procedures to claim this exemption can be onerous. Therefore, the introduction of a self assessment system whereby the recipients of the dividends self-certify whether they satisfy one of the many exemptions from Irish DWT is most welcome. This change applies to dividends paid after the passing of the Act.

Double Tax Relief for Companies with Foreign Branches

Irish tax resident companies are taxed on their foreign branch profits. Foreign taxes paid by the company on those branch profits can be credited against Irish tax payable on those profits. In addition, Ireland operates a pooling mechanism whereby excess foreign taxes relating to one branch can be used to offset Irish tax payable on profits from other branches. However, the current rules do not currently permit excess foreign taxes arising on foreign branch profits not utilized in a current accounting period to be carried forward indefinitely and offset against tax on future branch profits. That will now be permissible and the new provisions apply in respect of accounting periods ended on or after 1 January, 2010.

Incentives to attract non-Irish domiciled individuals to work in Ireland

In 2009 a special assignment relief was introduced aimed at encouraging key overseas talent to come to Ireland. Its application was very limited as it only applied to employees coming to Ireland from countries outside the EEA (i.e. the EU member states and Iceland, Norway, Liechtenstein) and which had a double tax treaty with Ireland. With effect from 1 January 2010 the relief has also been extended to foreign employees from the European Economic Area. In addition the minimum time which the employee must remain working in Ireland has been reduced from 3 years to 1 year.

The relief basically provides that the maximum earnings on which Irish tax will be paid by such an employee will be (i) the higher of actual earnings and benefits received in or remitted to Ireland or (ii) the first €100,000 plus 50% of earnings and benefits in excess of €100,000.

Transfer Pricing Rules

Introduction

The Act also introduces a new Part 35A into the Taxes Consolidation Act 1997 ("**TCA 97**") which provides for the introduction of **limited** transfer pricing ("**TP**") measures.

The principle of arm's length pricing, which is central to the concept of TP, has been part of Irish tax law for many years despite the absence of specific TP measures (with the exception of manufacturing relief). For example the "*wholly and exclusively*" test contained in Section 81 TCA 97 would operate to deny a tax deduction for an amount of a payment between connected parties in excess of the arm's length amount. In addition tax law as interpreted by the courts has permitted an upward adjustment to profits to reflect the arm's length price in certain cases.

The official line is that the new TP measures are designed to align Ireland with best international practice by formally adopting the OECD Transfer Pricing Guidelines, while at the same time removing the uncertainty regarding the application of internationally accepted transfer pricing standards in Ireland. The new measures are also in accordance with the Irish Tax Authorities long standing and stated approach of addressing TP issues in accordance with OECD guidelines.

When applicable, the effect of the new measures will (in certain cases) increase understated receipts and reduce overstated expenses of companies and branches in Ireland. The sole aim of the measures is to increase profits which have been understated in Ireland (although most international groups have not to date used Ireland in a manner to minimize profits arising in Ireland – indeed quite the opposite!). Reading between the lines, the introduction of these TP measures is not to raise revenues for the Irish Tax Authorities but for Ireland to be able to run with the herd at an OECD level and not to be in the vulnerable position of standing by itself with no TP rules.

In addition, there are some important exclusions from the new TP measures and a generous grandfathering rule which are explained below.

The New Measures

The new TP rules apply to any *arrangement* involving the supply and acquisition of goods, services, money or intangible assets, where at the time of the supply and acquisition, the person making the supply and the person making the acquisition are *associated* and the profits or gains or losses arising are within the charge to tax as trading or professional activities in the case of either **or** both the supplier and acquirer.

For the purpose of the above, persons are associated if **(i)** one person is directly or indirectly participating in the management, control or capital of the other **or** **(ii)** a person is directly or indirectly participating in the management, control or capital of each of the two persons. The term *arrangement* is defined widely to mean any agreement or arrangement of any kind (whether or not it is or is intended to be, legally enforceable).

When applicable, the effect of the new measures will be to increase understated receipts and reduce overstated expenses. This will be achieved by the imposition of the "*arms length amount*" which is defined to be the amount of the consideration that independent parties would have agreed in relation to the arrangement had those independent parties entered into that arrangement. The TP measures, which fall within the scope of the normal self assessment regime applicable in Ireland, cover both domestic and cross border transactions.

It is specifically provided for that the TP measures are to be interpreted, for the purpose of computing profits or gains or losses, in accordance with *Article 9(1) of the OECD Model Tax Convention*, regardless of whether such double taxation relief arrangements actually apply. This is designed to ensure, as far as practicable, consistency between the Irish TP measures and the OECD measures. However it should be noted that this is subject to the provisions of any relevant double taxation treaty taking precedence.

Scope of the Provisions (and more importantly what is excluded!)

An important point to note is that non-trading activities do not fall within the scope of the TP measures. Accordingly, interest free loan structures (in a non-trading context) will continue to be possible. Likewise, the new TP measures will not apply to lease and royalty agreements which are not taxed under Case I or II as trading profits. In addition, special purpose companies which qualify for the favourable tax treatment set out in Section 110 TCA 97 (commonly referred to as "Section 110" companies) will not be subject to the TP legislation (as notwithstanding the fact that the profits and gains of such qualifying companies are computed in accordance with trading principles, they remain chargeable to corporation tax at the passive 25% rate under Case III of Schedule D). Income from real estate will also be excluded from the new TP measures

Small or medium - sized enterprises will be exempt from the TP measures. For the purpose of this exemption a person will be regarded as a "*small or medium-sized enterprise*" if they fall within the definition of "***micro, small and medium-sized enterprises***" as outlined in the Annex to Commission Recommendations of 6 May 2003 concerning the definition of micro,

small and medium-sized enterprises[1]. This will essentially exclude an enterprise which employs fewer than 250 persons and which has an annual turnover not exceeding Euro 50 million **and/or** an annual balance sheet total not exceeding Euro 43 million. These figures will be assessed, where appropriate, on a worldwide group wide basis.

Relevant Dates (including generous grandfathering provisions)

The TP measures are due to come into effect on 1 January, 2011 in relation to any arrangements (as defined above), the terms of which are agreed on or after 1 July, 2010. At this stage it is unclear whether amending an existing agreed arrangement in the future (i.e. on or after 1 July, 2010) where the material terms remain unchanged would impact upon the above grandfathering provision and make the agreement potentially subject to the new TP measures.

The grandfathering provisions present considerable tax planning opportunities for persons who will be subject to the new TP measures, where the terms of future arrangements and existing arrangements may be agreed in advance of 1 July, 2010. **The grandfathering provisions are obviously generous in that they are applicable for an indefinite period of time.**

Record Keeping

Under the TP measures a taxpayer is required to retain such records "*as may reasonably be required*" for the purpose of establishing that the pricing arrangements are in accordance with the arm's length principle. The documentation need not be prepared or kept in Ireland, where it exists elsewhere. This may be particularly relevant for multinational groups already operating in compliance with other TP regimes, where the Irish record keeping obligations will require existing information systems to incorporate the Irish TP measures. Any documentation is however required to be prepared on a timely basis and must be made available to the Irish Tax Authority on request. Therefore, the approach adopted in relation to the documentation requirements is a practical one and should hopefully limit the compliance burden of those companies falling within the new TP measures.

Some Immediate Considerations

- Companies currently doing business in Ireland should undertake a careful review of all existing arrangements in place in order to determine whether the TP measures will apply to them.

- Of particular relevance would be future arrangements the terms of which may be agreed in advance of 1 July, 2010 and which accordingly may benefit from the

[1] OJ No. L124, 20.05.2003, p.36

grandfathering provisions. As noted above, such arrangements should not come within the scope of the TP measures to the extent that the agreed terms are not amended on or after 1 July, 2010.

- In addition to the above, existing arrangements should be carefully reviewed and appropriately documented in advance of 1 July, 2010. The wide definition of *arrangement* to include any agreement or arrangement not (or not intended to be) legally enforceable needs to be borne in mind.

- Companies that will be subject to the new TP measures need to consider how existing information systems are to be adopted to cater for the TP measures.

In addition to the above other tax considerations such as Value Added Tax may be relevant and need to be considered.

Others

In 2009 Ireland introduced a 1% levy on various insurance products sold to Irish persons. The levy has been amended to exclude pension and reinsurance business. This levy does not apply to insurance companies selling products to non-Irish investors.

LISTINGS

In this issue:-

- **Dormant classes listed on the ISE**
- **Re-domiciling of Listed offshore funds to a Listed Irish vehicle**
- **Funds listings update**
- **Debt Listings update**

DORMANT CLASSES LISTED ON THE ISE

General

The ISE has made a welcome change to its policy in respect of classes which are required to delist as a result of having no shares in issue, usually as a result of redemptions by investors. The ISE will now allow the relisting of such classes in a simplified process within a 12 month timeframe, without the need for a new listing application. The same SEDOL code may be used provided that there has been no change in the investment objective, description, domicile or currency relating to the class.

Until this point, such classes were required to delist, or have the classes seeded by the Investment Manager to maintain the listing, pending re-investment by new investors. The simplified relisting process will avoid the difficulties of seeding or having to make a new listing application with associated costs.

Conditions for delisting the dormant class

An announcement seeking delisting of the dormant class must be submitted to the ISE. On delisting the Directors confirm to the ISE that there are no outstanding financial obligations pertaining to the class.

Other classes of the fund/cell/sub-fund remain listed on the ISE.

Financial and other information relating to the fund/cell/sub-fund to which the dormant class relates will continue to be provided to the ISE in accordance with ISE requirements.

Conditions for relisting the dormant class

Application is made to relist the dormant class within 12 months of the delisting date. The fund, via the listing sponsor will confirm allotment of the shares in the class to the ISE.

The Directors of the fund confirm that financial and other information pertaining to the fund/cell/sub-fund to which the relisting class relates has been provided to the ISE in accordance with ISE requirements. An announcement will be published to the effect that the class has been relisted and that announcement will contain, if applicable, any previously unfiled information specific to the particular class. An application form for relisting (Schedule 3A) is filed with the ISE.

Financial and other information relating to the fund/cell/sub-fund to which the dormant class relates will continue to be provided to the ISE in accordance with ISE requirements.

RE-DOMICILING LISTED OFFSHORE FUNDS TO A LISTED VEHICLE

The ISE have moved with the Irish financial services community to simplify the process for the re-domicile of offshore funds to Ireland. The ISE has confirmed that following process for the re-domiciling of a listed fund to Ireland. It is important that the re-domiciliation will not normally result in the interruption of that funds listing.

Details of the re-domiciliation should be announced to the market as a material change in the general character of nature of the operation of the fund under Listing Rule 8.14(a).

Shareholder approval will not ordinarily be required pursuant to the listing rules. However, each fund should consider whether in its own particular circumstances a re-domiciliation could materially adversely affect the interests of shareholders as a whole or a significant proportion thereof under Listing Rule 8.16. A fund should also consider any requirements to seek shareholder approval pursuant to the funds own constitutive documents.

Irish ISIN codes can be issued by the ISE with no additional charge.

The annual listing fee will be adjusted to the EU issuer fee in the year following re-domiciliation.

FUND LISTING UPDATE

January, 2010

Lyxor launched a new fund, Lyxor/ Ecofin Global Utilities Hedge Fund Limited, which listed on the 15 January, 2010.The investment objective of the Fund is to seek to achieve capital growth by taking long and short positions primarily in global equity securities and their derivatives.

GAM listed two existing BVI funds in December: GAM Trading II Inc and GAM Multi-Emerging Markets Inc.

GAM Trading II Inc seeks to achieve long term capital appreciation from investments in financial and commodity markets through the allocation of its assets to one or more collective investment vehicles or separate portfolios to be managed by Trading Advisers which will employ a variety of investment techniques and strategies.

GAM Multi–Emerging Markets II Inc aims to achieve long term capital appreciation with a diversification of risk. This is sought by deploying the Company's assets principally in a number of emerging securities markets worldwide and by allocating its assets to one or more collective investment vehicles or separate portfolios to be managed by portfolio managers which will employ a variety of investment techniques and strategies

Nippon Growth (UCITS) Fund, a sub-fund of E.I Sturdza Funds Plc, launched JPY Class B Shares on the 15 January, 2010. The sub-fund aims to achieve it investment objective of achieving long-term capital growth through active sector allocation and stock selection resulting from changes in economic conditions.

Lyxor launched a fund in Lyxor/ Caxton Pyrander Equity Growth Fund Limited, which listed on the 25 January, 2010. The investment objective of the Fund is to achieve superior long term investment returns over various market cycles while maximising risk-adjusted returns relative to the broad market.

February, 2010

Lyxor also launched Lyxor/FrontPoint Brookville Credit Opportunities Fund Limited, a multi-class investment company, which listed on the 1 February, 2010. The fund's investment objective is to generate attractive risk-adjusted absolute returns with low correlation to the broad equity and fixed income markets.

GAM Star Global Rates, a sub fund of GAM Star Fund Plc, listed GBP class income shares on the 20 January, 2010. The subfunds investment objective is to achieve absolute returns with limited volatility.

Conquest Macro Fund Ltd, a fund domiciled in the Bahamas, listed Class 1X Non-Voting, Redeemable Participating Shares on the 10 February, 2010. The fund aims to achieve superior long term capital growth by investing in a diversified global portfolio across a variety of investment markets.

March, 2010

Lyxor launched a range of classes in a number of their existing funds.

GAM Star Global Rates, a sub fund of GAM Star Fund Plc, listed EUR class accumulation shares on the 5 March, 2010. The subfunds investment objective is to achieve absolute returns with limited volatility.

Crown Global Secondaries II Plc, a closed ended investment company, listed Class L shares on the 8 March, 2010.

RCM Global Equity High Alpha, a sub fund of RCM Global Series Fund Plc, listed EUR class shares on the 19 March, 2010. The subfunds investment objective is to achieve capital growth principally through investment in global equity markets.

Tokio Marine Japanese Equity Leaders Fund, a subfund of Tokio Marine Funds Plc, listed Class C and D shares on the 25 March, 2010. The investment objective of the subfund is to achieve long term excess return over the Index, using a combination of fundamental financial analysis and ESG (environmental, social, governance) and R (risk management) factor analysis.

Baring MENA Fund, a subfund of Baring Investment Fund Plc listed Class A Shares/A Euro Shares/A Sterling Shares & X Shares on the 29 March, 2010. The objective of the subfund is to achieve long-term capital growth in the value of assets by investing in the Middle East and North Africa (“MENA”).

April, 2010

A number of subfunds of GAM Star Funds plc, which are set out below, listed A CHF Class Accumulation Shares on the 6 April:

GAM Star Discretionary FX

GAM Star Global Rates

GAM Star Global Selector

Genesis ASEAN Opportunities Fund listed Class A Shares Series on the 6 April. This fund is a subfund of Genesis Emerging Markets Opportunities Plc. The subfunds investment objective is to achieve long-term capital growth on invested capital.

Kinetics Fund Inc listed a new series, Class A Series 0410, on the 6 April, 2010. The fund's objective is to obtain above average investment returns, with muted volatility, by investing in and shorting of a portfolio of securities across a broad array of industries not limited by market capitalisation considerations.

DEBT LISTING UPDATE

January, 2010

Irish Life & Permanent plc updated its Euro-Commercial Paper program on the 7 January, 2010. This was in response to changes been made by the Irish Governments to the bank guarantee scheme.

February, 2010

NewStar Commercial Loan Trust 2009-1, a Delaware based statutory trust, listed U.S. $148,500,000 Class A Floating Rate Notes Due 2018 and U.S. $42,000,000 Class B Floating Rate Notes Due 2018 on the 29 January, 2010. This deal was arranged by Wells Fargo Securities.

April, 2010

Irish Life & Permanent plc updated its guaranteed Euro-Commercial Paper program on the 30 April, 2010, whilst simultaneously listing a new Non Guaranteed Euro-Commercial Paper program.

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