

Newsletter
Summer 2008

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Changes to the Irish Qualifying Investor Fund Regime

Introduction

Following a process of consultation between the Irish Financial Regulator and the Irish Funds Industry Association ("IFIA"), a number of important positive changes have now been introduced to the regime for the authorisation and regulation of Qualifying Investor Funds ("QIFs").

QIFs - Background

A QIF is a non-UCITS product regulated in Ireland by the Financial Regulator which can be structured as an investment company, unit trust, investment limited partnership or common contractual fund (single portfolio or umbrella with segregated liability). QIFs have a minimum subscription requirement per investor of €250,000 (or equivalent) and can be sold only to qualifying investor individuals with a minimum net worth of €1.25 million (excluding principal private residence/ contents) or institutions who own or invest on a discretionary basis at least €25 million (or are themselves owned by qualifying investors).

The Financial Regulator will authorise a QIF for marketing to investors one business day after the submission of formal approval documents. The approval documents are submitted on a self-certification basis and promoters and their legal advisors must confirm they meet legal and regulatory criteria.

QIFs structures give promoters the opportunity to use Irish regulated investment vehicles for a complete range of different fund types depending on the requirements of their targeted investors. The absence of investment and borrowing restrictions and immediate authorisation process means that QIFs are the vehicles which are most frequently used in the alternative investment space - hedge funds, fund of hedge funds, venture capital/private equity, real estate funds, etc - and are a mainstay of the non-UCITS Irish domiciled product offering.

These latest changes to the regime and revised regulatory provisions relating to QIFs are further evidence of the ongoing steps being made by the Irish investment funds industry to provide a dynamic environment for regulated funds.

It is anticipated that these changes, which are summarised below, will enhance Ireland's appeal as a domicile for a broad range of investment funds.

Summary of Changes

Investment in Collective Investment Schemes – Increased Limits and Changes to Disclosure Requirements

A QIF fund of funds is now permitted to invest up to 50% of its net assets in any one unregulated collective investment scheme. This represents an increase from the previous 40% limit contained in Guidance Note 1/01. Consequently, a QIF which is a fund of funds may invest up to 100% in unregulated collective investment schemes subject to a limit of up to 50% of its net assets in any one unregulated collective investment scheme.

Additionally, a QIF will only be considered to be a feeder fund (and therefore subject to the prospectus disclosure requirements outlined in Non-UCITS Notice 22, paragraphs 2 and 3) if it has as its principal objective the investment in another single fund.

The net effect of this is that a QIF will be permitted to invest above 50% in a regulated collective investment scheme and, provided

investment in such scheme is not its principal investment objective, it will be able to do so without being required to: (i) give details on the underlying fund in its prospectus; (ii) attach the underlying fund's accounts to the fund's accounts; (iii) disclose in the prospectus details of the relationship between the fund and the underlying fund; or (iv) give details of fees and expenses the fund will incur as a result of its investment in the underlying fund. Investment in such underlying fund will remain subject to the requirements outlined in Non-UCITS Notice 22, paragraphs 4 and 5 that the manager of the underlying fund waives any subscription charge for the fund's investment and that the manager of the fund repays to the fund any commission received by it due to the fund's investment in the underlying fund.

Feeder Funds – Unregulated Underlying Funds – Criteria and Fast-Track Procedure

The Financial Regulator generally prohibits Irish authorised funds from feeding into unregulated funds. However, it has provided for a regime whereby a derogation may be granted from that general prohibition for QIFs in very limited circumstances.

Where a QIF fund of funds aims to invest more than 50% in one unregulated collective investment scheme such a derogation will be required.

Section D of Annex 1 of Guidance Note 1/01 outlines the criteria for obtaining this derogation. This focuses on, inter alia, the size, track record and assets under management

of the promoter, includes a requirement that the Irish feeder fund and unregulated master fund are managed within the same group and requires that the underlying unregulated fund complies with certain rules similar to those that apply to QIFs (for example independent custody and requiring an annual audit). Section D has been revised to give further guidance on the criteria for acceptable promoters of such feeder funds and the criteria for suitable underlying unregulated funds. This incorporates guidance previously contained in a letter from the Financial Regulator to the funds industry representatives of 2 June 2006.

Regarding promoters, revised Section D now discloses that the promoter group should have capital in excess of €100 million, assets under management at least in the region of €4 billion and have carried out asset management activity for a minimum of ten years. Regarding the underlying funds, Section D now outlines that the prime broker/ financing counterparty arrangements of the underlying unregulated fund must meet the corresponding requirements imposed on Irish funds. Section D also outlines additional requirements that must also be met where the underlying unregulated fund is a fund of funds.

Section D has also been revised to set out further details on the Derogation Request Procedure. This also incorporates guidance previously contained in the letter to the funds industry.

A QIF which has previously obtained a derogation, and is seeking a further derogation on the same basis, will now be able to avail of a fast-track procedure. Under this procedure a formal derogation request is made by the manager or investment manager of the QIF (confirming that the derogation is sought on the same basis as a previously granted derogation). If the derogation relates to a fund other than the fund involved in the original derogation, this fund's offering document must be submitted to the Financial Regulator as part of the derogation request. A response will be received from the Financial Regulator in five working days (provided no issues are identified as a concern on review of the offering document).

Risk Spreading for Investment Companies

Section 253(2)(a) of the Companies Act, 1990 (as amended) requires QIFs structured as investment companies to spread investment risk. Guidance Note 1/07 now outlines that the Financial Regulator does not impose diversification limits to apply this principle and that it is the responsibility of the directors of each investment company to ensure this obligation is met.

Interim Financials

QIFs structured as investment companies or investment limited partnerships will no longer be required to publish and file semi-annual accounts with the Financial Regulator. This has been reflected in an updated version of Non-UCITS Notice 24 (amending Non-UCITS Notice 11).

It should be noted that some existing funds' constitutional documents may impose an obligation to prepare and file semi-annual accounts with the Financial Regulator. Such funds will be required to continue to meet this obligation until their constitutional documents are amended.

This requirement shall continue to apply to unit trusts and common contractual funds due to specific legislative requirements to this effect. It is expected the disapplication of these legislative requirements will be sought in due course. It is also expected that a similar derogation will be sought from the Irish Stock Exchange requirements in this respect.

Limited Liquidity Funds

A limited liquidity fund is a fund that offers voluntary redemption facilities on a less than quarterly basis. Previously, a QIF that was considered to be a limited liquidity fund was required to indicate on the cover of its prospectus that it was a limited liquidity fund. The requirement to make this disclosure on the cover of the prospectus will no longer apply. Guidance Note 1/07 has been amended to reflect this.

The Financial Regulator will now permit a QIF to disclose, on the cover of its prospectus, that it is "open-ended with limited liquidity" if it offers voluntary redemption facilities less than quarterly but at least annually.

The limited nature of redemption facilities must be clearly disclosed in the QIF's prospectus.

Share Class Prospectuses

A QIF will now be permitted to issue a separate prospectus in relation to a share class within a QIF or a sub-fund thereof provided that the existence of other share classes is clearly outlined to investors. The directors of the QIF or the management company or the QIF's legal advisers must confirm to the Financial Regulator that the share class prospectus is consistent with the other prospectus(es) of the QIF (except regarding share class specific information). The prospectus cover must state whether the prospectus relates to the fund as a whole, a sub-fund or a class.

Issue of Debt Securities by a QIF

The Financial Regulator will not permit a QIF to raise capital from the public through the issue of debt securities but will permit a QIF to issue notes on a private basis to a lending institution to facilitate financing arrangements, provided details of such issue are clearly disclosed in the QIF's prospectus. This is provided for in Guidance Note 1/07.

Warehousing

A clarifying amendment has been made to Guidance Note 1/07 to provide that assets acquired under a warehousing arrangement may be acquired at market value or cost price (if lower than the current market value). Details of any proposal to acquire assets pursuant to a warehousing arrangement, including details of fees payable, must be fully disclosed.

Naming Requirements – Distributor

Guidance Note 1/07 has been amended to remove the requirement that any exclusive distributor whose name is used, in conjunction with the name of the promoter, in the title of a QIF, or sub-fund thereof, must be wholly owned by the promoter or its parent.

Conversion of a Professional Investor Fund (“PIF”) to a QIF

While not specifically included in the changes to the Notices and Guidance Notes, the Financial Regulator has recently indicated that a PIF will now be permitted to convert to QIF status once it has met the following requirements:

- i) the conversion is approved by not less than 75% of the votes cast in person or by proxy at the general meeting, and the votes in favour represent more than half the total number of shares;
- ii) all shareholders participating in the conversion process must meet qualifying investor criteria and make QIF shareholder status confirmations to the fund prior to the conversion taking place;
- iii) all shareholders who do not make QIF shareholder status confirmations to the fund, will have their shares redeemed prior to the conversion taking place (this will include shareholders who vote against the conversion and non-responding shareholders).

Revised Financial Regulator Documentation

Guidance Note 1/01, Guidance Note 1/07, Non-UCITS Notice 24 and the QIF Application Form have been revised to reflect the changes discussed above, as appropriate, and the updated documents will shortly be available on the Financial Regulator’s website.

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UCITS IV - Further Efficiencies in the Single Market for Investment Funds

Introduction

On the 16 July, 2008, the European Commission published a draft Directive (the “draft UCITS IV Directive”) outlining its proposals to improve the efficiency of the European Union’s €7,900 billion asset management industry. The draft UCITS IV Directive had originally been scheduled for publication no later than 30 April, 2008. However that deadline was missed as a result of disagreements between certain Member States in respect of one of the key proposals, namely the proposal whereby a corporate or contractual fund domiciled in one member state could be managed by a UCITS management company located in another Member State without having to establish significant administrative functions in that jurisdiction (generally referred to as the “management company passport”). The delay in publication had led to fears amongst stakeholders that the UCITS IV project would be abandoned altogether.

The UCITS IV proposals are intended to move towards the elimination of the barriers that exist for fund management firms doing business in multiple markets across the European Union. The draft UCITS IV Directive now covers the following key proposals (the management company proposal having been dropped for the purpose of the draft):

- ▣ Master Feeder Structures

- ▣ Fund Mergers
- ▣ Fund Notification Procedure
- ▣ Key Information Document
- ▣ Supervisory Cooperation

The European Commission has issued a mandate to the Committee of European Securities Regulators (“CESR”) inviting CESR to advise the Commission by 1 November 2008 on the structure and principles which could guide potential future amendments to the UCITS IV Directive which may be needed to give effect to the UCITS management company passport under conditions that are consistent with high level of investor protection. Following that advice, it is expected that the Commission will produce a further draft of the Directive with a view towards implementation in mid 2011.

Master Feeder Structures (Chapter VII, Articles 53-61)

For the purpose of enabling UCITS funds to have greater economies of scale and lower operational costs, UCITS IV will enable one or more feeder funds to pool their assets in a single master fund. The master and each of the feeders must each be established as UCITS funds. Each feeder fund is also required to invest at least 85% of their assets into the master fund. In addition:

- ▣ The master fund may not be itself a feeder fund nor may it invest in the units of another feeder fund.

- ▣ The competent authority of the feeder fund must approve the investment policy of the feeder fund. The master fund must provide a declaration to the effect that it does not hold any units of a feeder fund as part of the approval process. If the master fund and the feeder fund are established in different jurisdictions, the feeder fund must also demonstrate that it is a UCITS fund and that it is not itself a feeder fund.
- ▣ Member States must ensure that a master fund will only allow a feeder fund to feed into the master fund if the competent authority of the feeder fund has approved the investment. The master fund must notify its own home Member State of any feeder fund feeding into it and that competent authority must in turn notify the competent authorities in the Member States of the relevant feeder funds. If the approval of the feeder fund to feed into the master fund is granted or withdrawn, the competent authority of the feeder fund must immediately inform the competent authority of the master fund of same.
- ▣ The feeder fund and the master fund may have different custodians or auditors but if this is the case, the custodian/ auditor of the feeder fund must enter into an information sharing agreement with the custodian/auditor of the master fund. The custodian of the master fund must immediately inform the custodian of the feeder fund if it identifies any irregularities in its dealings.
- ▣ The master fund and the feeder fund must enter into a legally binding agreement. Such an agreement must cover: (a) the main characteristics of the investment policy of the master fund; (b) the rules which govern the possible modification of the investment objective and policy of the master fund; and (c) the rights and duties of the feeder fund and of the master fund and of their respective management companies.
- ▣ The feeder fund must ensure that its investment into the master fund does not affect its ability to re-purchase or redeem its units/shares.
- ▣ The master fund may not impose subscription or redemption fees on the feeder fund. Where by virtue of an investment by a feeder fund into a master fund, commissions are received by the feeder fund, the management company or any other person acting on behalf of the feeder fund, such commissions must be paid into the assets of the feeder fund.
- ▣ If the master fund liquidates, divides or merges with another fund, the feeder fund is required to be liquidated unless certain conditions are met (e.g. it continues to be a feeder fund, or the feeder fund converts into a non-feeder). No divisions or merger of a master fund shall become effective unless the master fund provides the feeder fund and the feeder fund's competent authority with certain information at least 60 days before the effective date.

Fund Mergers (Chapter VI, Articles 34-42)

In comparison with US funds, European funds tend to be very small in size. As a result, the cost of operating European funds is generally higher. In order to facilitate consolidation and foster economies of scale, UCITS IV proposes that two UCITS funds, irrespective of their legal form, located either in the same or in different member states should be able to merge by way of amalgamation (which is generally used in common law jurisdictions) or by way of creation of a new fund (which is more common in civil law countries) subject to certain conditions which would be imposed for investor protection. In addition:

- ▣ The competent authority in the Member State of the merging entity is required to authorise the merger.
- ▣ In order to reach its decision (which must be reached within 30 days of the application) it must receive the following documentation: the prospectus, key information document, draft terms of the merger (which must contain certain specified items of information), circular to unitholders and a certificate as set out below.
- ▣ The custodians of both the merging and receiving entity must provide a certificate confirming that they have verified compliance of the terms of the draft merger with the UCITS Directive and the constitutive documents of the funds.
- ▣ In granting such an approval, the competent authority of the merging UCITS is required to consider the potential impact of the proposed merger on unit-holders of both the merging and the receiving UCITS.
- ▣ The competent authority shall be required to consult with the competent authorities of the receiving UCITS.
- ▣ If the impact is considered to be substantial, then the competent authority of the merging entity shall inform the competent authority of the receiving UCITS which shall then be required to give appropriate and accurate information on the proposed merger to unitholders of the receiving UCITS. This shall be issued once the approval of the merger is complete).
- ▣ The receiving UCITS must have notified the relevant competent authorities of its intention to market its units/shares in the jurisdictions in which the investors in the merging fund are based.
- ▣ An independent auditor (which may include the auditors of the merging UCITS or the receiving UCITS) must validate the following: (a) the criteria adopted for valuation of the assets and, where applicable, the liabilities on the planned effective date of the merger; (b) the calculation method of the exchange ratio.

- ▣ If the national laws of Member States require approval by the unit-holders of mergers between UCITS, Member States shall ensure that such approval does not require more than 75% of the votes actually cast by unit-holders present or represented at the general meeting of unit-holders.
- ▣ The information to be provided to investors shall be provided not less than 30 days before the date of the general meeting (if relevant) or 30 days before the date of the merger.
- ▣ The laws of Member States shall provide that unit-holders of both the merging UCITS and the receiving UCITS have the right to request the re-purchase or redemption of their units or, where possible, to convert them into units in another UCITS with similar investment policies, without charge from the date of notification until the date of the merger.
- ▣ No costs or expenses of this process shall be borne directly or indirectly by the funds.
- ▣ The entry into effect of the merger shall be made public in the manner prescribed in the proposals.

Fund Notification Procedure (Chapter IX, Articles 86 -91)

It has long been recognised that the fund passport and notification procedure provided for in the current UCITS Directive has not worked as smoothly and efficiently as

intended. Administrative and regulatory requirements in host EU member states have led to time delays and additional costs. In 2006, CESR issued guidelines to simplify the notification procedure. However, these are constrained by the two month notification period provided for in the current UCITS Directive and are not legally binding. Consequently, the effectiveness of these guidelines has been limited. One of UCITS IV Directive's aims is to reduce delays in EU cross border marketing. Under the UCITS IV proposals, the procedure would be completely changed and would substantially reduce both the cost of the notification procedure and the length of time which it takes to get to market in another EU Member State.

The UCITS IV proposals provide as follows:

- ▣ The UCITS should submit a notification letter to its competent authority in its home Member State including information on arrangements made for marketing of units enclosing its fund rules or its instruments of incorporation, its full and simplified prospectuses, key investor information and, where appropriate, its latest annual report and any subsequent half-yearly report, as translated as set out below.
- ▣ The documents must be translated into the official language, or one of the official languages, of the UCITS host Member State or into a language approved by the competent authorities of the UCITS host Member State or (save for the key investor information) into a language

customary in the sphere of international finance, at the choice of the UCITS.

- ▣ The home regulator will be responsible for verifying the completeness of the information and transmitting it to the host regulator in the relevant member state no later than one month afterwards. The competent authorities of the UCITS home Member State shall immediately notify the UCITS about the transmission. The UCITS may start marketing its units in the UCITS host Member State as of the date of this notification.
- ▣ The competent authority of the host Member State is prohibited from requesting any additional information.
- ▣ Member States must ensure that the notification letter and the attestation are provided in a language customary in the sphere of international finance.
- ▣ Competent authorities must ensure that the electronic transmission and filing of the documents is accepted.
- ▣ UCITS funds will be obliged to directly inform the host authorities of any amendments to their marketing arrangements.
- ▣ Control of compliance of the marketing arrangements with the rules applicable in a host Member State will take place on an on-going basis, but only after the UCITS has placed its units on the market of a host Member State. The Directive also

seeks to enhance transparency regarding local marketing rules (an obligation is imposed on Member States to publish on their websites all applicable marketing rules). UCITS remain obliged to provide to investors in the host Member State such information and/or documents shall be provided to investors in the way prescribed by the laws, regulations and/or administrative provisions of that State.

Key Information Document (Chapter IX Articles 64-89)

The simplified prospectus is meant to provide investors with concise and understandable information about the investment policy, risk and fund charges. However, it is felt that some Member States have also added their own requirements which have resulted in a document that is lengthy and not sufficiently user friendly. The aim of the key investor document proposed in UCITS IV is to provide for a document that will contain the key relevant information to investors. It is not envisaged that this would be significantly different from the current Irish requirements for the simplified prospectus as Ireland did not impose additional local requirements. In addition:

- ▣ The key investor information must be delivered (in a durable medium or by means of a website) to investors either directly or through their tied agent, key investor information on such UCITS in good time before their proposed subscription of units in such UCITS.

- ▣ The key investor information must include appropriate product information about the essential characteristics of the UCITS concerned so that they are reasonably able to understand the nature and the risks of the investment product that is being offered to them and, consequently, to take investment decisions on an informed basis.
- ▣ The key investor information must include at least: (a) a short description of its investment objectives and investment policy; (b) a past performance presentation; (c) details of the costs and associated charges; (d) a description of the risk/reward profile of the investment, including appropriate guidance on and warnings of the risks associated with investments in the relevant UCITS; and (e) details of where and how to obtain additional information.
- ▣ Member States cannot require amendments to the key investor information (except a translation in accordance with the requirements set out above under the sub-heading “Fund Passport”).
- ▣ Member States shall ensure that a person does not incur civil liability solely on the basis of the key investor information, including any translation thereof, unless it is misleading, inaccurate or inconsistent with the relevant parts of the prospectus. Key investor information shall contain a clear warning in this respect.
- ▣ The essential elements of key investor information shall be kept up to date.

Supervisory Cooperation

It is generally accepted that cooperation between regulators at CESR level has added to consistency of interpretation and implementation of the UCITS Directive throughout Member States. The need to increase cooperation between regulators is augmented by the proposed UCITS IV changes. It is therefore proposed to develop existing mechanisms relating to the exchange of information and in certain circumstances allow regulators, in the exercise of their responsibilities under the Directive, to carry out on the spot verification of information on the territory of another Member State or have them carried out by the relevant authority in the other Member State (the extent to which this would be required would depend on the actual provisions of the UCITS IV Directive should it be implemented).

(This article first appeared in the August 2008 edition of the Finance Magazine)

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UCITS III and Eligible Investments - Further Clarification from the Financial Regulator

By way of a policy note dated the 7 August 2008, the Financial Regulator has clarified the following points of relevance to UCITS III Funds:

- ▣ **Non-European subsidiaries:** The Financial Regulator will permit UCITS to establish wholly owned non-EU based subsidiaries provided that the directors of the UCITS confirm that the establishment of the subsidiary complies with the UCITS Directive and, in particular, Article 25(e). In addition the arrangement must comply with the conditions imposed by the Financial Regulator in relation to the operation and control of the subsidiary by the UCITS.

- ▣ **Investment in unlisted securities:** Article 19(2) of the UCITS Directive provides that: "a UCITS may invest no more than 10% of its assets in transferable securities and money market instruments other than those referred to in paragraph 1...". The Financial Regulator has clarified that it interprets this Article as permitting a UCITS to invest up to 10% of net assets in aggregate in unlisted securities and unlisted unregulated open-ended investment funds, including hedge funds, provided that the investment complies with the eligibility criteria for UCITS.

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Amendments to UCITS, Non-UCITS and Guidance Notes

The amended application forms will be available shortly on the Financial Regulator's website.

Amendments to UCITS, Non-UCITS Notices and Guidance Notes

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Following consultation with industry participants, the Financial Regulator in April 2008:

- ▣ revised the UCITS Notices with regard to eligible assets for investment by UCITS;
- ▣ revised Guidance Notes 2/03, 3/03 1/05 and 2/07 with regard to eligible assets for investment by UCITS; and
- ▣ revised Notices UCITS 12 and NU 16 with regard to techniques and instruments, including repurchase/reverse repurchase agreements and stock lending, for the purposes of efficient portfolio management.

The revised Notices and Guidance Notes are available on the Financial Regulator's website: www.financialregulator.ie.

Revised UCITS & Non-UCITS Application Forms

The Application Forms have been amended to reflect amendments to the UCITS and non-UCITS Notices which were issued by the Financial Regulator in April 2008. The numbering/references have also been amended on the Application Forms and the Guidelines have been amended to reflect the current position regarding the use of entity names in the title of a fund.

Directive 2007/36 of the European Parliament and of the Council of 11 July 2007 [Shareholders' Rights]

The European Commission has published Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies (the "Directive") which aims to strengthen shareholders' rights in particular through:

- ▣ the extension of rules on transparency;
- ▣ additional provisions on proxy voting rights;
- ▣ the possibility of participating in general meetings via electronic means; and
- ▣ provisions in respect of cross-border voting rights.

The provisions of the Directive apply to rights attaching to voting shares in relation to general meetings. They affect companies having their registered office within the EU and whose shares are admitted to trading on a 'regulated market'.

The Directive sets out provisions for the equal treatment of shareholders in respect of general meetings and the information that is required to be provided to shareholders in advance of any such general meeting. In particular shareholders are given a right to put items on the agenda of the general meeting and to table draft resolutions. The Directive also sets out requirements

for adequate participation and voting by shareholders in general meetings and their participation in such meetings by electronic means and gives shareholders a right to ask questions. Furthermore, the Directive clarifies the requirements with regard to proxy voting and for voting by correspondence.

Member States are required to transpose the provisions of the Directive no later than 3 August 2009.

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Third Anti-Money Laundering Directive Update

As set out in the Autumn 2007 Newsletter, EU Directive 2005/60/EC on the "Prevention of the use of the Financial System for the Purpose of Money Laundering and Terrorist Financing" (the "Directive") entered into force on the 15 December, 2005. This Directive replaces and repeals the existing Money Laundering Directive 91/308/EEC, which was amended by Directive 2001/97/EC.

The Directive is designed to consolidate the existing regime and introduce new anti-money laundering and counter-terrorist financing requirements across the European Union and it was due to be implemented by all EU Member States by 15 December 2007. However, more than half of the European Union's Member States (including France, Ireland and Germany) failed to transpose the Directive into national laws by that deadline and on the 5 June 2008 the European Commission issued infringement procedures against 15 Member States, including Ireland, for failure to implement the Third Anti Money Laundering Directive into national law.

Whilst a consultation process was initiated in Ireland by the Department of Justice, Equality and Law Reform on the 12 February 2008 in relation to the transposition process, and an initial draft of the Criminal Justice (Money Laundering) Bill 2008 was circulated at that time, a further draft of the proposed legislation remains outstanding. In light of the infringement proceedings issued by the European Commission, it is expected that draft legislation might be available once the

Irish Government returns in September 2008. Notwithstanding the delay in the transposing legislation, new draft Guidance Notes have been circulated to the Department of Justice, Department of Finance, Financial Regulator, Garda Síochána, Revenue Commissioners and the Data Protection Commissioner for consultation purposes. The draft Guidance Notes include core and sectoral specific guidance. The core guidance will be relevant in generic areas, whereas the sectoral guidance notes will reflect the characteristics and particular circumstances of the various industry sectors. The Irish Funds Industry Association, through the Industry Transfer Agency Committee with assistance from the compliance community, is due to conclude an industry practice paper giving detailed practical guidance with regard to the application of the Directive to the Funds Industry. Once this paper has been concluded, there is an expectation that it will be included in the Investment Funds Sectoral Guidance Notes.

Some of the key implications of the Directive can be summarised as follows:

- trust and company service providers (who must be authorised), all natural or legal persons trading in goods or providing services for cash payment of €15,000 or more, and casinos have been added to the list of designated bodies;
- the concept of "Know Your Client" is being replaced with the concept of initial and ongoing "Customer Due Diligence", which will be simplified in some circumstances and enhanced in others

in a move towards a risk-based approach to anti-money laundering and terrorist financing obligations;

- ▣ the introduction of an obligation to identify politically exposed persons (known as 'PEPs'); and
- ▣ the inclusion of an obligation to take reasonable measures to understand the beneficial ownership and control structure of the client.

For now, until the legislation is passed, the Criminal Justice Act, 1994 (as amended) continues to apply.

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EMPLOYMENT LAW

The Enforcer – Coming soon to a workplace NERA you

In March of this year the Government introduced The Employment Law Compliance Bill 2008 (“the Bill”). The purpose of this article is to set out briefly the most important provisions of the Bill. It is possible that the Act which is ultimately passed may differ from the Bill but for the purposes of this article it is assumed that the Bill will be enacted in its entirety.

The Bill has very far-reaching consequences for employers and employers have been alarmed at the increased possibility of individuals and companies facing criminal prosecution resulting in heavy penalties, costs and publicity.

The first purpose of the Bill is to establish the National Employment Rights Authority (“NERA”) whose objective will be to promote, encourage and secure compliance with employment legislation by means of the appointment of authorised officers and increased penalties for breaches of employment legislation.

The Director of NERA will be responsible for the enforcement of almost all employment legislation through the inspection and examination of employment records and the carrying out of investigations and the prosecution of offences. In addition, NERA will have a role in promoting awareness amongst both employers and employees of their

rights and obligations under employment legislation.

The Director will have power to enter into co-operation agreements with official agencies including the Garda Síochána, the Revenue Commissioners, the Director of Corporate Enforcement, the Health and Safety Authority, the Competition Authority and the Pensions Board as well as employment law enforcement agencies of other countries. This will include the exchange of information which may be required and the co-ordination of any actions which may be contemplated by NERA and any other official agency.

The Director will also have power to introduce codes of practice aimed at providing practical guidance to employers.

NERA will be able to acquire, use and disclose to various bodies an employee’s PPS number, an employer’s registration number, the particulars of a valid passport or an employee’s identification number under immigration legislation.

Official agencies will be able to disclose information to NERA which may relate to the commission of an offence under employment legislation and in turn NERA may disclose information to the Garda Síochána, the Revenue Commissioners, the Director of Corporate Enforcement, the Health and Safety Authority, the Competition Authority or any other person charged with a detection, investigation or prosecution of offences if that information relates to the commission of an offence which is not an offence under employment legislation. Accordingly, if information comes into the hands of NERA

it is at liberty to disclose that information to other investigating authorities. The Freedom of Information Act and the Data Protection Act will not apply to records held or created by NERA.

There will be a new obligation on every employer to display in a prominent position in the workplace a notice in a form, manner and language or languages that is reasonably likely to be understood by the employees. The notice will have to set out entitlements under employment legislation, complaints procedures and the contact details of the Director of NERA both for the purpose of making general enquiries regarding employment law and communicating information to the Director in circumstances where a person believes that an offence under employment legislation has been or is being committed or that any other provision of employment legislation is not being complied with. The Bill provides protection to a person making such a disclosure unless it is proved that they did not act reasonably and in good faith.

Where an employer fails to display the appropriate notice they will be guilty of an offence. The information which the employer is obliged to contain in its notices will be available from the NERA website.

Employees and employers will be required to try, as far as possible, to resolve disputes at workplace level and either party may request information about employment law from NERA who must try to provide the information to the extent practicable. The enforcement of employment legislation will be effected by means of authorised offices who will have wide ranging powers in order to monitor and

enforce compliance. Authorised officers will have powers of inspection, examination or investigation and subject to certain rules and procedures, will be entitled to enter premises where necessary to inspect the premises or any books, records or other documents relating directly or indirectly to employees. Authorised officers will have powers of search and inspection and seizure of documents or the taking of copies. Authorised officers may require individuals to provide assistance and furnish information which they reasonably require to carry out their duties. Where necessary, an authorised officer may obtain a search warrant from the District Court. The Director may require an employer to give evidence on oath or to produce documents and if the person fails to do so without reasonable excuse they will be guilty of an offence. The Bill sets out a number of offences relating to failure to co-operate fully with NERA or its authorised officers.

Statutory employment records will have to be kept for 3 years up to termination and for a further 2 years after termination. The Director may request information of an employer regarding any employee who had been in their employment at any time during the previous 3 years and this information must be provided. The employer may also be required to produce any books or records relating to such an employee. This obligation is also placed on an examiner, administrator, receiver or liquidator.

The Director or an authorised officer may serve a compliance notice on an employer if it is believed that the employer has failed to pay any sum due under employment legislation.

The employer will have the opportunity to object to and appeal any such compliance notice.

The Director may apply to the High Court for an Order requiring an employer to comply with any provision of employment legislation. This application may have similar effect to an interim injunction application.

There will be a new statutory protection for any person who reports their concern of an offence under employment law having been committed or employment legislation not being complied with provided they do so reasonably and in good faith.

If an employer penalises an employee who seeks to invoke their employment rights then the employer is guilty of an offence.

Employers will be required to provide employees within 14 days of the termination of their employment with a statement setting out the duration and nature of their employment and a general description of the work involved and the employer must return to the employee any personal documents or other property and failure to do so is an offence.

Where an offence is committed by a company and is proved to have been committed with the consent, connivance or approval of or to be attributable to any neglect on the part of a director, manager, secretary or other officer then that person as well as the company is guilty of an offence and is liable to be prosecuted.

There will be a large number of offences and in the event of a summary conviction there may be a fine not exceeding €5,000 and / or imprisonment for up to 12 months. Where the conviction is on indictment, the penalty may be a fine of up to €250,000 and / or a term of imprisonment not exceeding 3 years.

Where a party is convicted of an offence under employment legislation then they will be ordered to pay the costs of the Director unless there are special and substantial reasons for not doing so. These costs will include the Court costs as well as the underlying investigation and detection costs and may be very significant. In addition, names of those convicted may be published by NERA.

As can be seen from the areas mentioned above, if the Bill is enacted in its present form, it will have the potential to criminalise employers and possibly individuals within companies, with the consequence of severe penalties, costs and adverse publicity. As the ODCE has done in the field of company law compliance, so NERA will aim to do in the area of employment law. Employers would be well advised to use the interval between now and the full implementation of the Bill to review their compliance with employment legislation to ensure that their systems are adequate.

For further information, please contact any member of our Employment Law Department who will happy to assist with any of your queries.

This article first appeared in the July 2008 edition of the Finance Magazine.

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PROPERTY LAW

Building Energy Rating Certificates

Section 7 of the European Communities Energy Performance of Buildings Directive requires that when a building is constructed, sold or rented a Building Energy Rating (BER) certificate must be provided for inspection by the prospective purchaser or tenant.




A BER for a dwelling is calculated using the dwelling energy assessment procedure (DEAP). The DEAP is the national methodology adopted for calculating the energy rating of new homes. BER calculations take into account many factors, including the type of building fabric, ventilation, space and water heating and lighting. These values coupled with measurements taken from drawings of the property culminate in the achievement of a BER certificate.

Sustainable Energy Ireland (SEI) is the government agency responsible for promoting and assisting the development of sustainable energy. New dwellings for which planning permission has been sought and granted since January 2007 are required to have an official BER certificate. The BER is expressed in terms of performance bands with "A" being the most and "G" being the least energy efficient. The BER allows prospective buyers and tenants to factor energy performances and costs into their comparison of different properties. This information forms the basis of a BER certificate.



A valuation report must accompany the BER which is valid for up to ten years unless there is a material change in the building such as an extension being added on.

The BER certificate must be furnished to the purchaser or tenant before sale or letting and on demand to the building control authority in whose functional area the building is situated.

The regulations require a BER for

-  New dwellings that have applied for and have been granted planning permission on or after 1 January 2007;
-  New non-residential buildings that have applied for and been granted planning permission on or after 1 July 2008; and
-  Existing buildings when let or sold on or after 1 January 2009.

It should be noted however that these provisions do not apply to:

-  New dwellings for which planning permission is sought on or before 31st December 2006 and that are substantially completed by 30 June 2008; or
-  New non-residential buildings for which planning permission is sought on or before 30 June 2008 and that are substantially completed by 30 June 2010 (except where such a building is offered for a second or subsequent sale/letting).

Any failure to comply with the regulations has serious consequences for any party involved in the conveyancing process. An offence has been committed if:

- ▣ SI 666/2006 is contravened (this relates to selling or letting a building without a BER certificate);
- ▣ a person purports to be a BER assessor for a class(es) of building to which they have not achieved the relevant qualification or registration;
- ▣ a false or misleading statement is made regarding the energy efficiency of a building; or
- ▣ a BER certificate is altered or defaced.

The penalty for all of the above offences on summary conviction is a fine not exceeding €5,000.

A purchaser or tenant should look for a provisional BER certificate if they are buying or renting a building on the basis of plans and specifications. This form of certificate lapses on completion of the building or after 24 months, whichever is the sooner. On completion of construction a full BER certificate and relevant advisory report is required to be presented to the purchaser or tenant prior to taking occupancy of the building. This full BER certificate is purchased by the seller or landlord of the property.

The BER is now an essential element in the conveyancing process and since January 2007 a conveyance cannot close without it.

For further information, please contact any member of our Property Department who will be happy to assist with any of your queries.

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DISPUTE RESOLUTION

Credit Crunch - the Impending Litigation Wave

When a client hears from a corporate or financial services partner the words: "You need to talk to a litigation partner", shivers usually are sent up their spines. For a long number of years that sense of unease was caused by the client getting involved in a process which they felt was foreign to them, took up too much time, was governed by, in their mind, arcane rules and was financially onerous. It was perceived to be a roller coaster ride that one could not get off until the end.

The ten years up until August 2007 witnessed unprecedented economic growth and accumulation of wealth in Ireland. This growth has brought an increased confidence in Irish business and financial institutions. The curve was forever upwards. In that period, the need to call on litigation partners in law firms lessened. Entrepreneurs were too busy moving on to the next deal and profit to worry about breaches of agreements and disputes. These problems were bought off. To stand and fight only stalled the process of doubling and trebling your money. It was always onwards and upwards.

Then suddenly the markets wobbled. Market turmoil in August 2007 led to changes in funding terms and costs. People began to talk of lack of liquidity, subprime contamination, rating reviews for lenders, banks not lending

to each other and, suddenly, we had the "credit crunch". Allied to this, slowing in economic growth and higher inflation, both domestically and internationally, has led to a less optimistic view of the future. Now everyone is scrutinising their contracts, their financial instruments and their business relationships. So could the litigators be back?

There is no doubt that litigation is the great countercyclical discipline in law firms. History has shown that where large losses are suffered, litigation usually follows. In boom times no one wants to sue but in poorer times litigation not just becomes an option but perhaps an essential. We have already seen the effects of the "credit crunch" in the Courts. Last August Structured Credit Corporation went into examinership with substantial debts incurred in a very short time space and caused by market volatility. In February of this year *International Securities Trading Corporation* was the victim of similar market difficulties and subsequently went into examinership. Whilst no litigation as such has arisen out of these two examinerships yet, they did keep litigators and insolvency practitioners busy. There certainly weren't enough seats in the High Court to accommodate every lawyer, and roll calls by judges were not unusual. Unfortunately, the downturn in the economy will lead to more similar situations and not just in the burgeoning financial sector.

Indeed, the number of cases currently being processed through the Commercial Court is indicative of the current state of the market. Recent figures released by the Courts Services show that in 2004 when the Commercial Court

was set up 45 cases were entered into the Commercial Court List. This rose to 106 cases in 2005, 113 in 2006 and 196 cases in 2007. The Commercial Court has been an innovation ensuring a speedy and well managed forum for dealing with disputes. Anecdotal evidence from litigation practitioners indicates increased activity which inevitably will manifest itself in an even busier Commercial Court over the coming months and years. So where are the areas for potential?

Valuations in funds will always be an area of concern and a potential target for disgruntled investors. From experience, a significant volume of litigation revolves around valuations. As alternative investments funds, hedge funds and other derivative based trading techniques have become increasingly popular, so too has the complexity and risk profile of assets. The more complex the financial structure the greater potential for lack of transparency masking riskier assets.

The growth of the financial services industry and regulatory requirements for Irish resident directors, has lead to an industry in directorships. The increasing regulation of companies has brought into sharp focus the importance of the duties and responsibilities owed by directors to their company and in essence places even more burdens on directors to carry out their duties to the highest possible standards. If losses occur, investors and their advisers will seek to ascertain how the interests of shareholders could have been protected more securely. Valuations, supervision of delegates and risk management are areas for potential litigation

for directors. Liquidators and Receivers will certainly scrutinise director performance. This leaves directors vulnerable. Directors can be held personally liable and no doubt will ultimately be the subject of claims for contribution as defendants seek to spread the pain.

The increasing number and readiness of activist shareholders has resulted in significantly greater investor scrutiny. No longer are these activists merely rogue shareholders with small share holdings turning up once a year at the annual general meeting to embarrass the board about some trifling issue. They are now composed groups of institutional shareholders banding together. Groups of this nature have already been active in class actions suits in the United States of America and Europe. Indeed, the case against Royal Dutch Shell in Holland is illustrative of this trend in Europe. Activist shareholders may target the decisions made relating to mergers and acquisitions in particular. In a buoyant market certain views may have been taken to get the deal done. In a stagnant market when deals look less attractive, questions will be asked by powerful investors. Joint ventures are always a boon for litigation as the joint venture partners begin to realise that they were never really a good fit in any event.

Of course the professional advisers are always prey to attack in a turning market. Allegations of poor advice, failure to explain risks and conflict of interest will be the crux of such investor driven litigation. Some of these claims will be unfounded and usually arise out of a professional adviser's decision

to sue for outstanding fees. However there may be situations where a client will have a legitimate cause for complaint. Professional advisers, with personal liability and insurance backing, are always a mark for damages and an easy target for litigation.

One final issue from a litigation stand point is worth considering. The financial landscape in Dublin has changed immeasurably in the past fifteen years with the arrival of all the major global financial players used to the hurly burly of other more litigious jurisdictions, especially the United States. Dublin is no longer the home of a few domestic financial heavyweights. In recent good times relationships have not been really tested. The arrival of less certain times in terms of economic growth may put strains on business relations and it is difficult to predict how the various parties will react. A hedge fund manager sitting in his office in New York who has lost a considerable sum of money will not care about cosy business relationships that have gone on for years. He will want someone to blame, and sue if he has a case.

In London at the moment law firms gearing up for litigation arising from their "credit crunch" are marketing themselves as being prepared to act against the major banks. Needless to say these firms would not act for those banks in normal course but they are substantial legal outfits. The banks are concerned about this development and are now considering allowing law firms, who would be normal ports of call for their banking work, to act against them in litigation. In other words waiving conflict of interest issues on the basis of the devil you know.

So like death and taxes, another certainty can be added: when a credit crunch arrives litigation increases. So when you hear the words mentioned in the first few lines of this article, you may be getting back on that roller coaster.

For further information, please contact any member of our Dispute Resolution Department who will happy to assist with any of your queries.

This article first appeared in the April 2008 edition of the Finance Magazine.

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CORPORATE LAW

Audit Committees - Implications of the Eighth Directive on Statutory Audits of Annual Accounts and Consolidated Accounts

Background

The transposition of the Eighth Directive in relation to statutory audits of annual accounts and consolidated accounts into Irish law will present further challenges to Irish firms seeking to identify their obligations as regards the establishment and responsibilities of an audit committee.

Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts (the "Eighth Directive") was due to be transposed into Irish law on 29 June 2008. However the Government Department responsible for drafting the regulations are still in the process of finalising these and expect to implement the regulations into Irish law towards the end of September 2008. Difficulties arise by virtue of the fact that both the Eighth Directive and the Companies (Auditing and Accounting) Act 2003 (the "2003 Act") contain overlapping, and to some extent, different requirements in relation to audit committees.

In general, the provisions of the Eighth Directive relating to audit committees are consistent with those in the 2003 Act but

with some notable differences specifically in relation to audit committee compositional requirements. Furthermore, the Eighth Directive is more principles based and less prescriptive in its approach to setting audit committee requirements. A summary of the notable differences between the Eighth Directive and the 2003 Act in this regard are set out below:

Requirement for an Audit Committee

Section 42 of the 2003 Act requires that all Irish-registered public limited companies ("PLCs"), whether listed or not, establish and adequately resource an audit committee, except for PLCs wholly owned by another Irish PLC. Private companies limited by shares exceeding a €25 million balance sheet total and a €50 million turnover threshold in both of the last two financial years also fall within ambit of Section 42 of the 2003 Act as do 'relevant undertakings' (e.g. large Irish-registered unlimited companies/partnerships, and unlimited holding companies/partnerships and all of their subsidiaries, subject to certain qualifying conditions, including the above balance-sheet total and turnover criteria). In addition, Section 42 provides that qualifying private companies and relevant undertakings must either establish an audit committee with all or some of the defined responsibilities. If they decide not to establish an audit committee they must give the reasons for such decision in their annual directors' report.

The Eighth Directive provides that entities which are of 'public interest' are required to have an audit committee with specified functions. Article 2.13 of the Eighth Directive

defines 'public interest entities' as including: (a) entities which have issued transferable securities admitted to trading on a regulated market governed by a Member State, (b) certain credit institutions, and (c) certain insurance undertakings. An exemption is provided for in respect of public interest entities that are small or medium sized companies as per criteria set out in the Eighth Directive.

Furthermore, under Article 41.5 of the Eighth Directive, Member States can choose not to apply the compositional requirements for audit committees specified in Article 41.1 to 41.3 (outlined below), to entities which already have an established body performing equivalent functions as specified in the Eighth Directive and any other functions specified in current national provisions.

The Eighth Directive permits Member States to exempt certain classes of public interest entity from the obligation to have an audit committee. These entities are: (a) certain securitisation vehicles, subject to a 'comply or explain' regime; (b) certain supervised collective investment undertakings which spread risk and do not seek control of issuers; and (c) certain credit institutions not listed on an EU regulated market which have only issued debt securities totalling below €100 million and have not issued a prospectus.

Audit Committee Composition

Section 42 (6) of the 2003 Act provides that the audit committee must consist of two or more directors, other than the chairperson of the board provided that they have not been employees of the company/undertaking or one

of its subsidiaries in the preceding three years, unless one director of the board meets all of the criteria and that director may form a single member audit committee or hold the casting vote on a two member audit committee. The appointment of audit committee members is entirely within the remit of the board concerned and members are to be such as the board deems appropriate.

Where none of the current directors meet the specified criteria, the board may appoint an external suitably qualified person, to serve on the audit committee. Section 42 of the 2003 Act states that failure to establish an audit committee if required is an offence.

In contrast Articles 41.1 and 41.3 of the Eighth Directive set out specific and concise compositional requirements for audit committees. Member States are given a choice between non-executive members of the board or other members appointed by the company's members in a general meeting. In addition, at least one member of the audit committee must be independent and have competence in accounting and/or auditing. These provisions are consistent with current best practice with respect to audit committee composition as provided for in the Combined Code and ODCE Guidance.

Requirements for independence and competence in accounting and/or auditing contained in the Eighth Directive, which are not provided for in the 2003 Act, are of paramount importance if audit committees are to add any value to the management of the companies within which they operate.

Audit Committee Responsibilities

Article 41.2 of the Eighth Directive sets out four specific functional requirements for audit committees. These are as follows: the requirement to: (a) monitor financial reporting process; (b) monitor effectiveness of the company's internal control, internal audit, and risk management systems; (c) monitor the statutory audit of the annual and consolidated accounts; and (d) review and monitor the independence of the statutory auditor or audit firm, and in particular the provision of additional non-audit services to the audited entity. These requirements are "without prejudice" to the responsibilities of the members of the board as a whole.

Section 42 (2) of the 2003 Act prescribes fourteen duties which every qualifying PLC must discharge which are in general consistent with the Directive's requirements, albeit more detailed. There are some differences in language and emphasis.

Audit Committee Terms of Reference

Section 42 of the 2003 Act provides that the audit committee's terms of reference and any amendments thereto must be prepared, approved and reviewed annually by the board. These terms of reference must be submitted for shareholders' information at the Annual General Meeting. Furthermore the terms of reference must, at a minimum, specify how the audit committee will discharge its responsibilities, as well as providing for a programme of separate and joint meetings with management, the external auditor

and the internal auditor of the company or undertaking concerned.

Other: Ministerial Regulations?

The Eighth Directive permits Member States to exempt certain entities (as previously outlined) and the Minister may by regulation exempt certain companies and other classes of undertakings if he is of the opinion that the regulation makes it unnecessary or inappropriate to apply the audit committee requirements to them as provided for in Section 42 of the 2003 Act. However no such regulations have yet been made.

The Minister may prescribe additional functions to be discharged by the audit committees and supplementary rules governing the operation of those committees as provided under Section 48(1)(m) of the 2003 Act (i.e. the role/qualification of audit committee members may require amendments in light of the provisions contained in the Eighth Directive).

For further information, please contact any member of our Corporate Department who will happy to assist with any of your queries.

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EU AND REGULATORY AFFAIRS

The 2008 EU Product Marketing Regime

Introduction

On the 23 June 2008, Europe's lawmakers adopted a revised legislative framework to improve trade in goods between the twenty seven EU Member States. This initiative will reduce outstanding barriers to inter-state trade in goods while, at the same time, enhancing product safety and competitiveness for European consumers in the internal market.

The new regime adopted by the European Council and Parliament will enter into force in 2010 and is welcomed insofar as it will provide for more efficient regulation to protect European consumers, while creating a more level playing field for Europe's market operators.

The purpose of this article is to examine the new legislative framework by reference to the broader legal context within which the new marketing rules have been enacted.

Overview of the new EU legislative framework

Currently, Community rules governing the free movement of products contain many inconsistencies which undermine the effective regulation of cross border product movement.

Products are often covered by more than one EU directive and problems have arisen where common elements, such as definitions and conformity procedures, are treated differently in various Community laws. There is a negative knock-on effect for market operators who face the challenge of complying with several legal requirements when importing and exporting products. Effective free movement of goods is ensured only through the elimination of such inconsistencies from the existing legal framework.

The 2008 legislative regime, built upon three complementing legal instruments, addresses these inconsistencies and will become the cornerstone of the EU's future strategy for internal market policy. Regulation 3613/08 lays down fresh procedures relating to the application of national technical rules to products lawfully marketed in another EU Member State. Regulation 3614/08 sets out the accreditation and market surveillance requirements relating to the marketing of goods in EU Member States while Decision 3615/08 provides for the establishment of a common framework for the marketing of products within the EU's internal market.

Regulation 3614/08 and Decision 3615/08 both update and strengthen the so-called "new approach" system put in place by the Community institutions in 1985. The 1985 'new approach' recognized that the application by Member States of different technical standards significantly fettered inter-state trade in goods. It sought to enable the European Commission to mandate the drawing up of common technical specifications by European

standardisation organisations charged with ensuring compliance with the harmonised level of safety required for products. Regulation 3614/08 further builds upon this approach and establishes an improved Community wide market surveillance regime, requiring that products circulating in the EU respect the highest levels of public interest protection. Decision 3615/08 provides for an improved framework for future technical harmonisation while making allowance for sectoral adaptation and reinforcing the CE marking system and the conformity of the products. Regulation 3613/08 further facilitates the free movement of certain goods by removing obstacles encountered in the implementation of the “mutual recognition” principle in the non-harmonised area of goods.

The 2008 EU legislative framework for goods in context

Decision 3615/08 and Regulations 3613/08 and 3614/08 mark an historical milestone in the progressive development of the EU’s internal market, and must be appreciated in their proper legal context.

At present, no true internal market exists in the European Union. Goods may not travel unfettered from one end of the EU to the other. Instead, Member States are entitled to request that products produced in another State should be adapted to their national rules where necessary to protect, for example, human health or the environment.

Article 14(2) of the EC Treaty provides for the progressive establishment of an internal

market comprising an area without internal barriers within which the free movement of goods is ensured. Articles 28 and 29 of the EC Treaty outlaw the imposition by national governments of quantitative restrictions and measures having equivalent effect to quantitative restrictions on goods moving within the internal market. The prohibition laid down in Articles 28 and 29, however, is not absolute. The EC Treaty envisages that Member States may impose quantitative restrictions and measures having equivalent effect where justified under Article 30 of the Treaty or in accordance with Community law.

In theory, Member States may only refuse products from another Member State in exceptional cases. In practice, however, market operators still face significant technical barriers in Member States where they seek to sell their products. Member States still require imported goods to be adapted to their national technical rules on designation, form, size, weight, composition, presentation, labelling and packaging resulting in burdensome administrative controls, tests and delays.

Where Member States lawfully rely on national rules to restrict products entering onto their territories from other Member States, the objectives of internal market are undermined. Community institutions may only address such obstacles by positive harmonising legislation. Harmonising legislation aims to reduce or eliminate obstacles to trade through the progressive adoption of harmonised measures and standards. Where harmonised measures are adopted at Community level, Member States can no longer seek to justify

national obstacles through reliance on Article 30 as their legal right to rely on national rules has been pre-empted by the harmonising Community legislation. In consequence, Member States must comply with the pre-emptive requirements of the Community legislation and cease unilateral reliance on domestic rules and standards.

In this regard, the 2008 EU product marketing regime must be seen as effective pre-emptive Community harmonising legislation.

The legislative nature of the 2008 EU marketing legislation

It should be underlined that the EU's Council and Parliament have opted to put in place its new 2008 regime for goods by way of regulation and decision pursuant to Article 249 of the EC Treaty.

Article 249 of the EC Treaty enables Community institutions to enact legislation pursuant to regulation, directive, decision, recommendation or opinion. A regulation is binding in its entirety and directly applicable in all EU Member States. A decision, meanwhile, is binding in its entirety and directly applicable upon all those to whom it is addressed.

Regulations 3613/08 and 3614/08 and Decision 3615/08 will become directly applicable across all EU Member States on the date of their entry into force. No further transposition will be required by the various Member States. Between now and the date of their entry into force, Member States will be obliged to take all necessary steps to ensure full compliance with the new rules. Market operators should position

themselves to exploit the new regulatory environment.

The 2008 legislative instruments examined

The 2008 EU product marketing regime makes a series of improvements to the existing legislative framework for cross-border trade in goods.

Regulation 3613/08 lays down procedures relating to the application of certain technical rules to products lawfully marketed in another Member State. It will address obstacles encountered in the implementation of the EU's mutual recognition principle in the non-harmonised area of goods. The mutual recognition principle reflects that where goods are not subject to full Community harmonisation, an EU Member State of destination may not forbid on its territory the sale of products lawfully marketed in another EU Member State.

Regulation 3613/08 sets out the procedures to be followed by national authorities when seeking to impose national technical rules restrictive of free trade in goods. Member States will be prohibited from relying unilaterally on local rules to deny access to products emanating from another Member State. The burden of proving the validity/invalidity of a national rule will be shifted from the market operator to the national authority seeking to restrict the entry of a product onto its territory. The national authority must prove non-adherence with the Community regime before being able to restrict the entry of the product onto its territory.

Regulation 3613/08 further provides for the establishment of product contact points in all Member States, aimed at reducing regulatory risk for enterprises. The main task of a product contact point in the Member State of destination is to provide information on the technical rules applicable to the imported product, the contact details of the competent authorities and the remedies available under the laws of that Member State in the event of a dispute between the market operator and the competent authorities.

Regulation 3614/08 sets out the requirements for accreditation and market surveillance of products entering the internal market. This Regulation continues the decentralised competence assessment and monitoring of 'notified bodies' of the earlier legislative framework, but introduces a more robust legal framework for accreditation at EU level using the existing organisation of the European Cooperation for Accreditation (the EA) as a foundation for its revising approach. The EA is vested with public legal recognition with authority to provide accreditation services to all notified bodies in the various Member States. EU Member States will be obliged to use accreditation as a basis of notification.

Under the current Community framework, market surveillance legislation is not implemented in a consistent or co-ordinated fashion in the EU. Large numbers of non-compliant and potentially dangerous products reach the internal market each year. As a result, cross-border co-operation is essential to identify and pursue dangerous products as well as unlawful manufacturers or importers.

Regulation 3614/08 establishes a harmonised level of market surveillance throughout the EU using a common legal framework which allows flexibility while taking account of national conditions. The Regulation clarifies the legal obligations with which market operators must comply and foresees the extension of existing co-operation mechanisms between Member States.

Decision 3615/08 lays down common principles intended to apply across all EU sector legislation for goods in order to provide a coherent basis for revision of that legislation. The Decision provides common definitions and sets out general obligations for market operators. It lays down a range of conformity assessment procedures to which national legislatures may have recourse. Importantly, the Decision also lays down new rules for CE marking. The CE marking on a product indicates that all regulatory requirements have been fulfilled. It is now made clear that manufacturers, by affixing the CE marking, assume full responsibility for the compliance of their product with all applicable Community and national legal requirements. The CE marking may now be registered as a Community collective Community trademark which will give national authorities the right to institute legal proceedings against any manufacturer who misuse the CE marking, thereby contributing to the greater credibility of the CE mark.

Conclusions

The EU's 2008 product marketing legislation presents national authorities with the challenge of ensuring full compliance with the regime before the commencement date. For market operators, the regime should hopefully present an opportunity to compete within the internal market on a more level playing field in an environment of greater legal certainty where the rights of consumers are better protected.

For further information, please contact any member of our EU and Regulatory Affairs Department who will be happy to assist with any of your queries.

This article first appeared in the Q3 2008 edition of Export Ireland, published by Business & Finance.

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▣ LISTINGS

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- ▣ ***Debt Listing***
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Changes to the Listing Conditions applicable to Super Sophisticated Investor Funds and Closed-Ended Investment Funds

Introduction

This is a summary of the changes introduced by the Irish Stock Exchange (“ISE”) in relation to: (a) the conditions and disclosures applicable to investment funds and in particular investment funds which are marketed to highly sophisticated investors; and (b) the revised guidelines applicable to closed-ended investment funds. It is hoped that these developments will be welcomed by both domestic and international fund managers and promoters and it will assist the ISE to retain its leading position as a location in the world for the listing of investment funds.

Policy Note 1/08 - Super Sophisticated Investor Funds

The ISE has introduced the concept of a new product called a Super Sophisticated Investor Fund (“SSF”). Policy Note 1/08 (the “Policy Note”) introduces a listing regime with minimal listing conditions for SSFs but with higher standards applied to the investor.

Definition of a SSF

The minimum investment level is set at US\$500,000. In addition, an SSF will only be available to an investor:

- ▣ which invests at least US\$500,000; and
- ▣ which warrants, at the time of making the investment that: (i) its ordinary business or professional activity includes the buying and selling of investments, whether as principal or agent; or (ii) in the case of a natural person, their individual net worth, or joint net worth with that person’s spouse, exceeds US\$2.5 million; or (iii) it is an institution with a minimum amount of assets under discretionary management of US\$5 million; and
- ▣ which warrants expressly to the applicant that they: (i) have the knowledge expertise and experience in financial matters to evaluate the risks of investing in the applicant; (ii) are aware of the risks inherent in investing in the securities and the method by which the assets of the applicant are held/or traded; and (iii) can bear the risk of loss of their entire investment.

The minimum investment requirement does not apply to the investment manager or any of its directors, employees or connected persons (or, in the case of an investment manager which is a limited partnership, its members with an executive function).

Passivity

The requirement that an applicant must be a passive investor has been removed in order to facilitate the listing of private equity type funds. This change will not allow trading companies to list under the investment fund rules as the definition of a fund will remain and a minimum investment of \$500,000 applies.

Regulation of Investment Manager

The ISE proposes to introduce a condition which requires the investment manager of a SSF to be regulated or registered with an appropriate authority in any EEA state or any of the following countries:

- Australia
- Canada
- Hong Kong
- Japan
- Singapore
- Switzerland
- United States

If the investment manager is not registered with or regulated by one of these authorities it must be supervised or regulated in a manner acceptable to the ISE.

Other Conditions

The majority of the standard listing conditions have been removed for SSFs including the investment restrictions (such as the requirements that no more than 40% of gross assets could be invested in another fund/discretionary account, the requirement that no more than 20% of gross assets could be invested in/lent to a single counterparty, no more than 10% gross assets could be invested in real property/commodities etc). Instead the new rules for SSFs require the fund to demonstrate a spread of investment risk and a spread of counterparty risk.

It remains the case that a feeder fund must satisfy itself that certain investment restrictions are adhered to by the fund into which the assets of the applicant will be invested. These include the requirements that the feeder fund and its service providers comply with the requirements relating to conflicts of interest, the requirements for an independent custodian, independent auditor. It must also describe to the ISE the method by which the fund can control the underlying fund in this manner.

The other current conditions of the Chapter 2 of the Listing Rules which are being removed include those relating dividend policy as well as those relating to the investment manager. Other key conditions that remain include those relating to directors, custody and NAV calculation.

Chapter 3 of the Listing Rules– Disclosure

Any disclosure requirements that relate to listing conditions which have been removed or amended in Chapter 2 of the Listing Rules have also been reflected in Chapter 3. There will be additional disclosure required to demonstrate how investment and counterparty risk is spread. Also new disclosures will be required only for SSFs which are detailed in Policy Note 1/08 and these include:

- ▣ a statement of the minimum subscription amount of at least US\$500,000;
- ▣ a statement on the cover of the document or other prominent position that the fund is suitable only for super sophisticated investors. This will clarify that the fund is a SSF and it will also be indicated on the ISE website and on the daily official list to avoid any confusion; and
- ▣ a description of the proposed investments of the fund which demonstrates compliance with the requirements for a spread of both investment and counterparty risk.

Chapter 5 and Chapter 8 of the Listing Rules

The usual requirements for audited financial requirements together with most of Chapter 5, will remain in place. Regarding the unaudited portfolio details which can sometimes be problematic for issuers, the ISE has indicated that the “comprehensive and meaningful analysis” option is always available.

The requirements of Chapter 8 will apply on an ongoing basis.

However, the ISE are currently reviewing Chapter 5 and Chapter 8 and further changes may be proposed.

Closed-End Investment Funds

The ISE recently issued revised guidelines for closed-end investment funds (“CEIFs”) listed on the regulated market of the ISE. The revised guidelines amend the current listing regime for CEIFs by removing a number of listing conditions where a fund complies fully with the requirements of the Prospectus Directive, Admissions Directive, Market Abuse Directive and Transparency Directive (the “Directives”). The ISE believes the reduction in the number of conditions, in light of the disclosure requirements under the above Directives, will allow issuers greater freedom in achieving their investment objective while maintaining a high quality issuer base.

The restrictions retained include the requirements for a fund to:

All Funds

- ▣ have a suitable investment manager and custodian;
- ▣ have a board of directors, who collectively have appropriate and relevant expertise and experience;
- ▣ have two independent directors;

- ▣ seek shareholder approval for material changes to the investment objective within the first three years of operation;
- ▣ confine investment to sophisticated investors where the fund is not regulated in an approved jurisdiction;
- ▣ have an independent auditor;
- ▣ require the NAV to be notified to the ISE upon calculation;
- ▣ have control over any master fund into which the fund invests; and
- ▣ appoint a listing sponsor.

Property Funds

- ▣ have an independent valuer acceptable to the ISE;
- ▣ have a suitable investment manager with relevant property expertise;
- ▣ have a board of directors who collectively have relevant property expertise; and
- ▣ have a minimum size of €10 million on listing.

The ISE has removed the requirements for quantitative investment restrictions and replaced them with conditions requiring the fund to demonstrate that it has a spread of investment and counterparty risk. This ensures that there will be a spread of risk while allowing more flexibility than may be

permitted under the current quantitative restrictions. Disclosure of the fund's investment restrictions are already addressed in the Prospectus Directive.

The conditions in relation to dividend policy and qualified accounts for initial listings are also being removed. Both of these issues are subject to disclosure rules under the Prospectus Directive and the ISE is of the view that prospective investors in a fund can make an informed investment decision based on this full disclosure.

Summary

The ISE believe that the amendments outlined above will allow issuers the flexibility required to list the innovative and sophisticated products which are developing in current market conditions.

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Debt Listing

March 2008

Banque AIG and AIG Inc. filed a number of SEC supplemental filings with the ISE in March. Additionally, AIG FP Matched Funding (Ireland) Plc, an issuer under the multi-issuer Banque AIG programme, issued CHF25,000,000 Index Linked Notes due June 15, 2011 by way of Final Terms.

Several repack deals were also listed: Corsair Finance (Ireland) Limited listed its Series 99 and 102 notes while Corsair Finance (Ireland) No. 6 Limited listed Series 23. The Series 99 notes are capital protected fund linked notes linked to an RMF fund basket; the Series 102 notes are variable rate secured notes; and the Series 23 notes are zero coupon global bond index portfolio credit-linked notes. M&G Credit Finance (Ireland) Plc issued its Series 9 variable rate secured portfolio credit linked notes under its recently updated Programme for the Issuance of Notes and Other Secured Obligations. Also, Espri Limited listed another fungible issue of its Series 7 notes, which were first issued in May 2007 and October 2007.

Additionally, a whole business securitisation deal was listed on the ISE in March. This whole business securitisation involves Applebee's, the largest casual dining brand in the United States. After a series of transactions in which IHOP Corp. acquired Applebee's International, Applebee's International and its subsidiaries contributed their assets to newly established securitisation entities in order to collateralize the issue of nearly \$1,800,000,000 of fixed

rate notes. The notes are guaranteed by Applebees's Holdings LLC and Applebee's Franchising LLC and certain notes enjoy the benefit of a financial guaranty insurance policy issued by Assured Guaranty. This deal was arranged by Lehman Brothers.

April 2008

Banque AIG and AIG Inc. filed a number of SEC supplemental filings with the ISE in April. In addition, AIG-FP Matched Funding (Ireland) Plc issued its Series 2008-IRE01 and Series 2008-IRE02 notes, both of which comprise \$44,000,000 equity linked non-interest bearing notes due in 2010, under its EMTN programme.

Corsair Finance (Ireland) Limited also listed its Series 103 variable rate secured notes under its multi-issuer programme.

Two CDOs were listed this month: Aberdeen Loan Funding Limited and Riverside Park CLO Limited. The Aberdeen deal was arranged by Merrill Lynch and involved the listing of \$45,000,000 floating rate senior secured extendable notes and floating rate senior secured preferable interest extendable notes. Riverside Park involved the listing of over \$850,000,000 floating rate and floating rate deferrable notes due 2018 and was arranged by Citigroup.

May 2008

Banque AIG and AIG Inc. filed a number of SEC supplemental filings with the ISE in May. Additionally, AIG Inc. listed €750,000,000 8%

Series A7 junior subordinated debentures and £900,000,000 8.625% Series A8 junior subordinated debentures on the ISE.

Another whole business securitisation deal was also listed this month. The IHOP deal involves the securitisation of the assets of the International House of Pancakes, a well-known restaurant chain in the United States. After a series of transactions, IHOP Franchising LLC (the issuer) came to own the IHOP assets which include, among others, the franchising agreements, license agreements, development agreements, leases, IP assets and licenses, equipment leases etc. The issuer, along with IHOP IP LLC (the co-issuer) established a programme, allowing for the issue of fixed and floating rate notes. The primary source of these notes will be payments due the issuer under franchise agreements, area license agreements, development agreements, credit agreements, profits generated in respect of product sourcing agreements, royalties, rental income due the issuer pursuant to equipment leases, rental income from real property leased to franchisees, and royalties and income pertaining to the IP assets and licensing agreements.

Simultaneous to the listing of the IHOP Franchising LLC/IHOP IP LLC base offering circular, the same issuers also listed \$245,000,000 Series 2007-3 Fixed Rate Term Notes under the programme.

Corsair Finance (Ireland) Limited also listed €53,000,000 Series 104 single name physically settled credit-linked notes under its multi-issuer programme.

June 2008

Banque AIG and AIG Inc. filed a number of SEC supplemental filings with the ISE in June. AIG-FP Matched Funding Corp also issued its Series 2008-32 NOK 250,000,000 Fixed Rate Notes due 2018, under its EMTN programme.

M&G Credit Finance (Ireland) Plc listed approximately \$181,000,000 Series 10-12 Secured Portfolio Credit Linked Notes due 2012 under its 2008 programme.

July 2008

Both Banque AIG and AIG Inc. have filed SEC supplemental filings with the ISE. In addition, Corsair Finance (Ireland) Limited has filed €25,000,000 Series 105 fixed rate secured notes due 2012.

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Funds Listing

April 2008

Ivy Select Fund Plc listed two more sub funds in April, namely Ivy Global Equity Opportunities Feeder Fund, the main investment objective of which is to deliver to its investors, long term risk-adjusted returns that exceed those of the world's major equity markets and Ivy Credit Opportunities Feeder Fund with an investment objective being, through diversified asset management, to seek above average capital appreciation while taking low to moderate risk. Each of the sub funds will invest substantially all of their assets into their respective underlying funds. Baring Asia Strategic Fund, BNY Mellon Enhanced Coefficient Select Fund Plc and The Baring Global Investment Umbrella Fund (No. 1) Plc also listed this period.

May 2008

Coronation Latitude Fund a sub fund of Coronation Global Opportunities Fund listed in May. The investment objective is to achieve maximum long term total return by the allocation of assets to mutual funds and collective investment schemes managed by international fund managers investing primarily in long only global listed equities.

June 2008

Coronation Prism Fund a sub fund of Coronation Fund Plc listed in June, along with Lyxor/Sofaer Capital Asian Hedge Fund Limited. GAM Star Fund Plc listed one sub fund - GAM Star Frontier Opportunities. The investment objective is to achieve capital

appreciation through investment primarily in quoted equity and equity related securities (including, but not limited to warrants) listed on or dealt in any Recognised Market. LG Asian Green Fund, a Fund of Lloyd George Investment Company Plc also listed. The Fund aims to achieve long-term capital growth through investment in an actively managed portfolio, primarily invested in equity and equity-related securities of companies in the Asia Pacific region which support the more efficient use of global resources. In addition, AXA Alternative Asian USD Feeder 2 a sub fund of AXA Alternative Multi-Manager Master Fund also listed in this period.

July 2008

Axial Strategic Solutions Fund a new sub fund of Axial Systematic Strategies Funds Plc listed in July. The Fund aims to source excess return from pure alpha strategies, without seeking to have beta exposures to any major asset classes, such as equities. Other listings this period included F&C Jade Fund Limited a feeder fund of F&C Jade Master Fund Limited, SGAM A.I. Asian Arbitrage Fund which is a Sub-Fund of the SGAM A.I. Arbitrage Strategies Fund whose main investment objective is to provide superior risk-adjusted returns through a broad range of arbitrage strategies on primarily Asian markets. Finally in this period we saw New Vision Strategies Fund Plc, a new umbrella fund, launch Pulsar Absolute Return Fund.

For further information in relation to any of the above matters, please contact any member of our Listing Department who will be happy to assist with any queries.

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