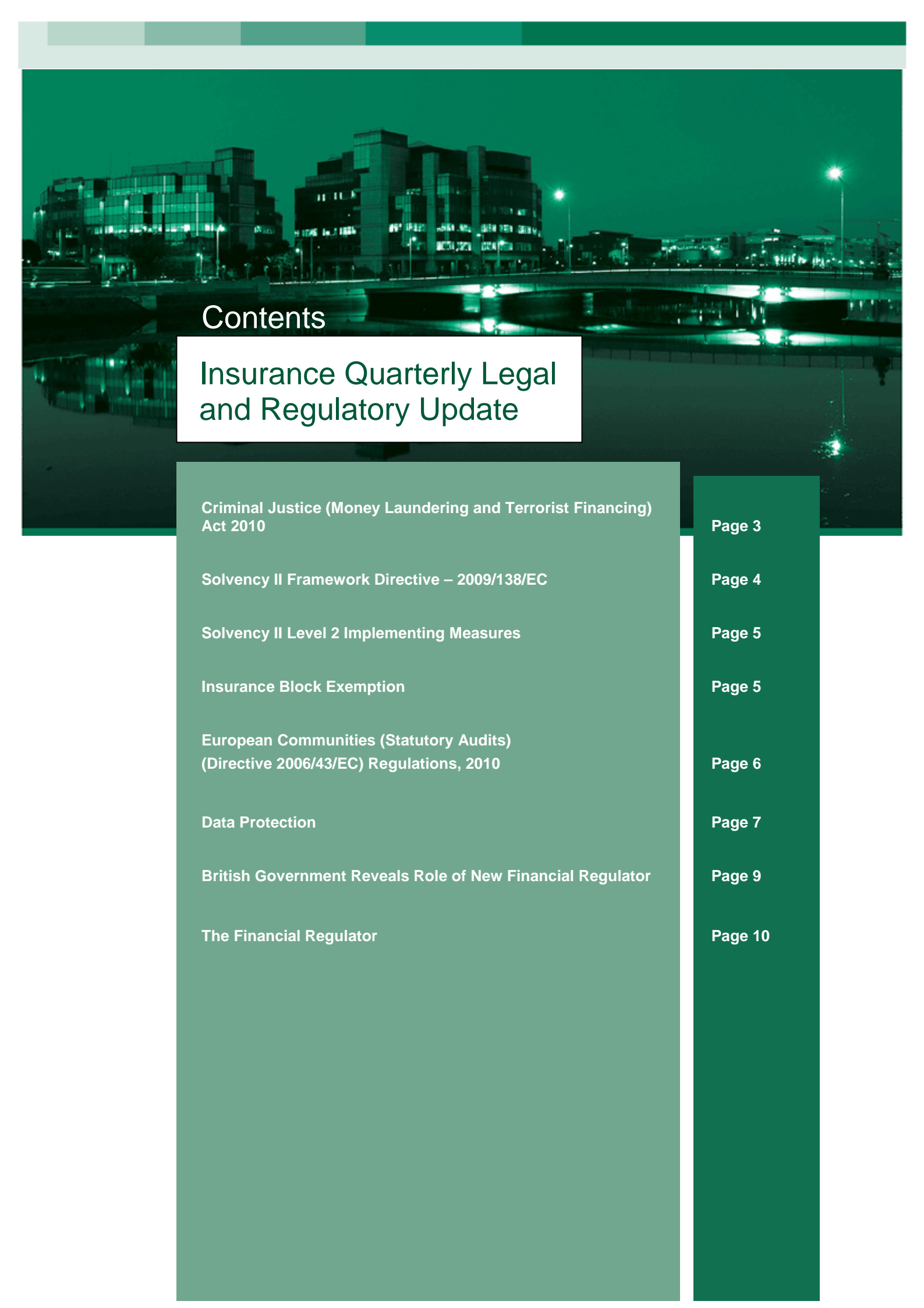


Funds Quarterly Legal and Regulatory Update

Period covered:
1 April to 30 June, 2011

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FUNDS QUARTERLY LEGAL AND REGULATORY UPDATE

Criminal Justice (Money Laundering and Terrorist Financing) Act 2010

The Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010 (the “CJA 2010”), implementing the Third Anti-Money Laundering Directive into Irish law, has been effective as of 15 July, 2010. Pursuant to Section 107 of the CJA 2010, draft guidance notes have been submitted for approval by the Minister for Justice, Equality and Defence in consultation with the Minister for Finance in May 2011. Final guidance notes have yet to be issued.

One area of potential difficulty regarding the CJA 2010 which has arisen relates to reliance on third party performance of customer due diligence. While the Third Anti-Money Laundering Directive recognises that such third parties can be located outside of the European Economic Area, the Irish legislation currently only permits reliance on a third party in certain prescribed jurisdictions, as set out in S.I. No. 343 of 2010. Currently in Ireland, it is not permissible to rely on third parties located in non-prescribed jurisdictions or to apply a risk-based assessment to such jurisdictions. This differs from other Member States which either do not specify a territorial restriction or alternatively permit a risk-based assessment of such jurisdictions. This difference in approach potentially places Irish investment funds and funds service providers at a disadvantage when compared to similar entities in other Member States who have greater freedom to rely on third parties. This matter has been flagged to the Central Bank and the Department for Justice, Equality and Defence.

On the 24 May 2011, Council Implementing Regulations (EU) No. 502/2011 and No. 504/2011 concerning restrictive measures in view of the situation in Libya and Syria respectively came into effect. Designated persons are required to have appropriate procedures in place to meet with the requirements of these Regulations.

If you would like further information on anti-money laundering requirements or any changes arising out of the CJA 2010, Dillon Eustace regularly advises on all aspects thereof and provides training sessions on this topic. Training can be held either at Dillon Eustace’s office at 33 Sir John Rogerson’s Quay, Dublin 2 or in house training can be provided at a venue of your choosing.

UCITS, Non-UCITS & Hedge Funds

(i) UCITS IV

On 29 June 2011 the Department of Finance (the “Department”) published the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (the “Regulations”). This Statutory Instrument transposes into Irish law the UCITS IV Directive which represents a significant modification to the regulation of collective investment funds.

Key aspects of the Regulations, which are available on the Department’s [website](#), include the following:

- ▣ the introduction of the concept of Master/Feeder structures for UCITS funds;
- ▣ requiring the production of a summary Key Investor Information Document (“KIID”);
- ▣ the introduction of a more flexible pan-European Management Company Passport (“MCP”);
- ▣ setting out an improved fund mergers regime; and
- ▣ the introduction of conduct of business rules common to those used by investment firms (“MiFID firms”).

The Regulations come into effect on Friday 1 July 2011 which is also the filing deadline for UCITS IV Business Plans for all management companies and self-managed investment companies (“SMICS”). This leaves little time for affected firms to prepare for the new regime, although the Directive’s publication in November 2009 has enabled them to make some adjustments in anticipation of its implementation. It is likely however that further work will be required to resolve outstanding issues after that date.

In preparation for the 1 July deadline, weekly meetings between the Central Bank and legal advisors have been taking place to provide clarification on matters arising out of comments issued by the Central Bank in respect of UCITS IV Business Plans for Management Companies reviewed by it which has greatly assisted the process.

In light of the publication of the Regulations, it is anticipated that the Central Bank will finalise and publish revised UCITS Notices and Guidance Notes shortly.

(ii) UCITS V

On 17 May 2011 the Commission published a revised schedule for legislative initiatives for the remainder of 2011. Among the changes, the anticipated adoption date of July 2011 for UCITS V, which deals largely with depositary responsibility, has been postponed to December 2011 to facilitate the inclusion of sanctions provisions for breaches of UCITS IV.

(iii) Alternative Investment Fund Managers (AIFM) Directive

On 27 May 2011 the Council adopted the final text of the AIFM Directive, introducing harmonised EU rules for the authorisation and supervision of entities engaged in the management of alternative investment funds, such as hedge funds and private equity firms. It enters into force on the 20th day following its publication in the Official Journal and Member States will have 2 years to transpose its provisions into national law giving an implementation date of Jun 2013.

The Commission has requested technical advice from the European Securities and Markets Authority ("ESMA") on AIFMD Level 2 measures. The deadline for the delivery of the advice by ESMA is 16 November 2011.

(iv) IFIA Corporate Governance Code for Investment Funds

In June 2011 the IFIA published its draft voluntary corporate governance code for the funds industry, following an invitation to do so by the Central Bank. The code is aimed at providing boards and directors of Irish authorised collective investment schemes ("CIS") and Irish authorised management companies of CIS ("ManCo") with a framework for best practice in terms of company governance and oversight.

Although voluntary, it is regarded by the IFIA as formalising "existing industry practice combined with what is seen as best international practice". Furthermore, its adoption is recommended by the Central Bank which considers the draft as an appropriate and robust code of standards for the governance and management of Irish authorised management companies and investment funds.

The Code makes provision for various key corporate governance issues including in particular: the composition and role of the Board; the chairman and directors; board appointments and powers reserved to the board; meetings; delegation; risk management; audits; compliance functions; and internal control.

The current draft was issued for industry consideration. Feedback was to be received by 24 June for discussion with the Central Bank so that an agreed voluntary code would be available at the end of July. It is envisaged that the code will be adopted by the industry from 1 September 2011 on a “comply or explain” basis, similar to other corporate governance codes, meaning that if a Board decides not to apply any provision of the code, reasons why will have to be given in the directors' report or on its website.

A transitional period of 12 months has been proposed and the Central Bank has indicated a review of the application and compliance of the code should be conducted within 18 months of implementation.

(v) Prime Broker Guidance Note

A final Guidance Note on the appointment of prime brokers by Irish authorised professional collective investment schemes (“CIS”) will issue shortly. While the Central Bank requires that the assets of authorised CIS be entrusted to a trustee for safe-keeping, the Guidance Note aims at setting out the circumstances in which a professional CIS may enter into financing arrangements with a prime broker or other financing counterparty, pursuant to which assets may be transferred out of the control of the trustee.

“Pillar A” of the New Companies Bill Published

The new Companies Bill represents a significant consolidation and simplification of Irish Company legislation.

In May 2011 Richard Bruton, Minister for Enterprise, Trade and Innovation, published Parts 1-5 of the Companies Bill (“Pillar A”) which contains legislative provisions relating to private company limited by shares (“CLS”). As this type of company accounts for over 90% of companies in Ireland, its publication is designed to afford stakeholders, including business owners, practitioners, advisers and representative bodies, an opportunity to become familiar with the proposed new legislation and prepare accordingly.

Key reforms to streamline the operation of this company-type provided for in Pillar A include the following:-

- ▣ A CLS will have the same contractual capacity as a natural person, precluding the need for objects clauses, thereby reducing legal disputes arising from the ultra vires doctrine and facilitating transactions with private companies;

- ▣ A CLS will be allowed to have only one director, as opposed to two under the current law, facilitating the use of companies to start businesses;
- ▣ A CLS will have a one-document constitution as the memorandum and articles of association will be replaced by one document. The Bill provides for a default document, removing the need for lengthy internal requirements in the form of articles of association, unless a company's constitution provides otherwise;
- ▣ A CLS will be permitted to have a "written" AGM so that if all the members consent; the need for a "physical" AGM can be dispensed with; and
- ▣ Directors' duties as developed by the courts will be codified so as to increase transparency.

It is expected that drafting of the remaining portion of the Bill ("Pillar B"), containing the law applicable to all other company types, including the public limited company ("plc"), will be completed in mid-2012.

If you need further information on the above subject matter, please contact the Regulatory & Compliance Unit of Dillon Eustace.

Data Protection Commissioner Annual Report

The Data Protection Commissioner (the "Commissioner") published his Annual Report 2010 (the "Report") on 30 May 2011. Some highlights from the Report include the following:

(i) Fall in Complaints

The Report published figures showing that the number of formal complaints for investigation fell from 914 in 2009 to 783 in 2010. However, the Commissioner notes that this decrease may be attributed to greater focus on investigating claims only where evidence of a likely breach of legislation exists. Other complaints are dealt with by providing the complainant with suitable information on their rights.

(ii) Data Security Breaches

The Commissioner also reports on his publication of the Data Security Breach Code of Practice (the "Code"), which was approved in September 2010. The Code focuses on informing those affected by security breaches thereby allowing them to take appropriate measures to protect themselves. It also encourages the voluntary reporting of breaches to

the Commissioner. The number of data security breach incidents reported in 2010 increased by 350% on the previous year as a result of the more exacting demands of the Code.

(iii) Privacy Audits

The Commissioner carried out thirty two privacy audits in 2010. Those audited included financial institutions, schools, pharmacies and charities. The Report outlines a number of concerns arising from these audits including the use of CCTV systems in schools and workplaces without sufficient justification and the collection and retention of PPS Numbers by charities for indefinite periods of time. In relation to the use of biometrics to record attendance in workplaces and schools, amongst other things, the Report notes numerous complaints. In relation to one particular audit, it was found that the inability of employees to opt out of such monitoring along with an absence of information on how the data would be used constituted a breach of the data protection legislation.

The full report is available on www.dataprotection.ie.

Corporate Governance

(i) European Commission Green Paper

On 5 April 2011 the European Commission published a green paper on the EU corporate governance framework to generate a debate on issues including: the effective functioning of more diverse boards of directors; enhancing shareholder engagement with corporate governance issues; and improving monitoring and enforcement of existing national corporate governance codes.

The Commission simultaneously launched a public consultation process on such corporate governance issues which is open until 22 July 2011. A feedback statement is due to be given in the autumn to determine whether legislative proposals are in order.

(ii) Corporate Governance Code for Credit Institutions and Insurance Undertakings

On 8 November 2010, the Central Bank issued the Corporate Governance Code for Credit Institutions and Insurance firms ("the Code"). The Code sets out minimum statutory requirements on how banks and insurance companies (excluding captives) should organise the governance of their institutions. The purpose of these new rules is to ensure that robust

governance arrangements are in place so that appropriate oversight exists to avoid or minimise the risk of a future crisis. The Code includes provisions on the membership of the Board of Directors, the role and responsibilities of the Chairman and other directors and the operation of various board committees.

The Code applies to existing directors and boards from 1 January 2011 with institutions having until 30 June 2011 to introduce the necessary changes. However, where changes to the Board are necessary, this period will be extended to 31 December 2011 to identify and assess suitable candidates with appropriate experience and diversities.

On 27 May 2011, the Central Bank published a Frequently Asked Questions document to assist institutions in interpreting the requirements of the Code. While it clarifies certain aspects of the Code, other areas remain unclear. This may cause difficulties for some institutions in practice given the majority of changes need to be introduced by 30 June 2011.

ODCE Annual Report

On 2 June 2011, the Office of the Director of Corporate Enforcement (“ODCE”), Mr Paul Appleby, published his Office’s Annual Report for 2010. Highlights from the Report include:

- ▣ the submission by the year end of one complete file and a further three reports to the Director of Public Prosecutions (DPP) in relation to the ongoing investigations into Anglo;
- ▣ the determination of over 1,800 complaints and reports in 2010, a 26% increase on 2009;
- ▣ the volume of reports from liquidators in respect of insolvent companies rose to 1,310 in 2010, a 50% increase on 2009;
- ▣ the restriction of 156 directors (up from 108 in 2009) and the disqualification of eight directors (12 in 2009), on foot of liquidator actions;
- ▣ the issue of some 24,000 copies of various Office publications during the year; and
- ▣ the attendance by Office staff at 71 public engagements and events attended by some 2,400 people highlighting the importance of compliance with company law.

The Office also made a major submission in November 2010 to the Department of Justice and Law Reform in response to its Discussion Document on white collar crime. In the submission the ODCE’s main comments included the following:

- ▣ extending criminal liability in the areas of reckless trading, fraudulent trading and the misuse of a false or misleading identity;
- ▣ raising the penalties for potentially serious white collar crime offences;
- ▣ extending the periods for investigating/prosecuting particular ‘white collar crimes’ where these periods are unrealistically short;
- ▣ requiring potential witnesses to give evidence which may be of use in seeking to determine whether a crime has been committed;
- ▣ clarifying the precise form of a corporation’s criminal liability and the duties of its officers to prevent malpractice;
- ▣ clarifying the extent to which those accused can defend themselves on the basis of erroneous legal advice;
- ▣ improving the ability of An Garda Síochána and regulatory bodies to work together to fight white collar crime;
- ▣ introducing a more widespread use of administrative sanctions as an option in addition to criminal sanction and, in some cases, decriminalising minor regulatory obligations which are subject to administrative sanction;
- ▣ improving the investigation and prosecution of white collar crime by the use (or greater use), in appropriate cases, of immunity programmes, plea bargaining, deferred prosecution agreements, certificate evidence and hearsay evidence in criminal investigations; and
- ▣ alleviating, where appropriate, the inhibiting impact of legal professional privilege and the exclusionary rule of evidence in white collar crime investigations and prosecutions.

Foreign Accounts Tax Compliance Act 2009 (“FATCA”)

In June 2011 the European Fund and Management Association (“EFAMA”) made submissions to the US Department of the Treasury (“Treasury”) and Internal Revenue Service (“IRS”) in response to the publication of Notice 2011-34 (the “Notice”) in order to provide further guidance on the implementation of the FATCA reporting and withholding regime requiring Foreign Financial Institutions (“FFIs”) to disclose information on certain US accounts.

Although EFAMA welcomed the Notice as reflecting the continuing efforts of the Treasury and IRS to furnish guidance and to be responsive to industry concerns, it did consider further submissions necessary, including the following:-

- ▣ broader deemed compliant treatment for funds and fund distributors than proposed in the Notice as the fund industry’s characteristics mean they may

encounter compliance challenges not faced by other classes of financial institutions, provided they possess certain characteristics to ensure they do not maintain US accounts or are a member of a class of institutions so that FATCA requirements can be carried out without requiring a full FFI agreement;

- ▣ potential difficulties in the European funds industry applying the “passthru payment withholding” requirement, due for instance to the scale of intermediated relationships, may result in them viewing the withholding on fund distributions as commercially not feasible, leading to extensive severing of distribution agreements and significantly affecting the IRS’s ability to obtain information on US accounts. It is thus proposed to exclude distributions on fund shares to any FFI from passthru withholding, subject to appropriate conditions and restrictions; and
- ▣ in addressing long-term recalcitrant accounts, including by terminating FFI agreements due to the number of recalcitrant account holders remaining after a reasonable period, it should be made clear that a non-participating FFI is not a recalcitrant account, meaning a participating FFI will not have its FFI agreement terminated due to long-term relationships with non-participating FFIs. EFAMA also stresses that the Treasury and IRS should reserve the right to terminate FFI agreements only for egregious cases that clearly demonstrate an FFI’s unwillingness to obtain information regarding such accounts.

For further information on FATCA, please refer to your usual contact at Dillon Eustace.

The Central Bank of Ireland

(i) 2010 Annual Report and Financial Regulation Annual Performance Statement

On 31 May 2010, the Central Bank published its Annual Report for 2010/2011 and for the first time an Annual Performance Statement on its financial regulatory activities undertaken in 2010 as is now required under the Central Bank Reform Act of 2010 (the “Act”). Both documents are available on the Central Bank’s website www.centralbank.ie.

In summary, the Annual Report details the work undertaken in 2010 by the Central Bank, particularly in relation to the pursuit of its major priority of resolving the financial crisis, including:

- ▣ the provision of substantial liquidity support to the banking system;
- ▣ supporting the recapitalisation and restructuring of the main domestic credit institutions;
- ▣ the initiation of significant regulatory reform; and
- ▣ the introduction of new consumer protection initiatives.

The Annual Report also specifies the procedures applicable to the governance of the Central Bank and its reorganisation as a result of the Act into a single entity responsible for both central banking and financial regulation.

(ii) **Consultation Paper 49: Consultation on Impact Metrics for the Risk Based Supervision of Financial Firms by the Central Bank on Impact Based Levies (“CP49”)**

On 27 May 2011, the Central Bank published its response to submissions received on CP49, which outlined proposed metrics to enable the categorisation of all regulated entities based on their impact on the financial system and consumers and how the Central Bank plans to categorise firms into different impact categories for which different supervisory approaches will be adopted.

Firms will be allocated to impact categories as follows: high; medium-high; medium-low; and low in line with the metrics chosen by the Central Bank to gauge the impact of a firm’s failure on the Irish economy and consumers.

The Central Bank is due to notify firms of their impact category in the coming year.

The consultation also sought submissions on the proposed introduction of Impact Based Levies but impact metrics will not be used as a basis for funding levies until after the metrics have been used and considered appropriate for the allocation of supervisory resources.

Speaking about the Central Bank’s new risk assessment framework at the Galway Chamber on 5 May 2011, Matthew Elderfield, Head of Financial Regulation at the Central Bank, noted that the Probability Risk and Impact System (“PRISM”) is designed to afford a more systematic approach to assessing and applying resources to risk and will entail a greater degree of scrutiny, engagement and follow-up by supervisors in the event of problems being identified.

(iii) **Consultation Paper 51: The Fit and Proper Regime in Part 3 of the Central Bank Reform Act, 2010 (“CP51”)**

The period for submissions on CP51, which concerns proposed statutory and enforceable standards of fitness and probity for individuals across all regulated financial services providers pursuant to the additional powers accorded the Central Bank under the Central Bank Reform Act, 2010 (the “Act”), has closed.

The Central Bank is currently considering the responses it has received, which are available on the Central Bank’s website. Various issues have been raised in the submissions, including for instance concerns that the current definitions of pre-approved control functions (“PCFs”) and controlled functions (“CFs”) are too broad and may lead to uncertainty as to the application of the Fit and Proper Regime.

The Central Bank envisages that the finalised rules will come into force from 1 September 2011. This has however given rise to concern, as expressed in the submissions that the proposed timetable for implementation is too short given that CP51 states final draft Regulations shall only be published by September and a request for a longer implementation period was made by various respondents.

Dillon Eustace will provide updates on this matter as they become available.

(iv) **Consultation Paper 54: Second Consultation on the Review of Consumer Protection Code (“CP54”)**

In late October 2010, the Central Bank issued a consultation paper (“CP47”) on amendments to the Consumer Protection Code. In total 51 submissions were received by the Central Bank in respect of CP47.

Having considered the submissions and comments, the Central Bank announced on 4 May 2011 that it would hold a second public consultation on proposed changes to the Code. On 28 June 2011, the Central Bank published its Second Consultation of the Review of the Consumer Protection Code (“CP54”).

The purpose of this second consultation is to:

- outline the position reached by the Central Bank on some of the issues and questions posed in CP47;

- ▣ highlight a number of new or amended provisions that the Central Bank has included on the remaining issues that were posed in CP47, and the additional and emerging issues which have come to the Central Bank's attention as part of its analysis of the submissions received in response to CP47 and also as a result its ongoing regulatory work which has identified issues that the Central Bank believe warrant the inclusion of further protection for consumers through additional Code provisions; and
- ▣ give a final opportunity to stakeholders the opportunity to review a full version of the proposed new Code.

It is proposed that consumer protection measures already harmonised in the three EU Directives, namely the Payments Services Directive; the Consumer Credit Directive; and the Electronic Money Directive, will not be repeated in this proposed revised Code. The scope of the proposed revised Code is to set out the additional requirements, which will apply to regulated firms when providing the activities covered by the three EU Directives mentioned above.

Given that the Central Bank wishes to introduce the updated Consumer Protection Code by 1 January 2012, the consultation period is short with 22 July 2011 being the closing date for submissions. All responses to CP54 should be sent to code@centralbank.ie or by post to:

Consumer Protection Codes Division
Central Bank of Ireland
PO Box 559
Dame Street
Dublin 2

(v) Themed Inspection – Complaints Handling by Investment and Stockbroking Firms

On 15 June 2011, the Central Bank issued an industry letter providing feedback and highlighting concerns in relation to a themed inspection examining complaints handling processes used by investment and stockbroking firms ("firms") authorised under the European Communities (Markets in Financial Instruments) Regulations, 2007 ("MiFID Regulations").

The MiFID Regulations require firms to maintain effective and transparent procedures for the reasonable and prompt handling of complaints received from retail or potential retail clients and to keep a record of each complaint and the measures taken for the resolution of the complaint.

The findings from the on-site visits to 6 firms were largely positive as firms acknowledged complaints; updated clients on the status of complaints; maintained adequate records; and had processes for escalating complaint issues to senior management which the Central Bank specified as important to improve client services and inform procedures and controls.

The Central Bank considered that the desk-based analysis of the 53 firms dealing with retail clients highlighted significant issues regarding the review of the written complaints procedure that all firms had in place, including the failure to define a complaint; acknowledge a complaint in a timely manner; keep the complainant updated; and advise the complainant of their right to refer the matter to the Financial Services Ombudsman.

The Central Bank requests that all firms review their current complaints handling procedures, which should be approved by senior management, to meet the complaint handling requirements set out in the Consumer Protection Code so as to ensure compliance with the MiFID Regulations.

A copy of the letter is available on www.centralbank.ie.

(vi) Settlement Agreement between the Central Bank of Ireland and Scotiabank (Ireland) Limited

The Central Bank entered into a Settlement Agreement with Scotiabank, effective from 2 June 2011, concerning breaches of the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992 and the Central Bank Act 1971. Five breaches were identified and related to Scotiabank's failure to provide accurate information in liquidity reporting returns and failing to have adequate controls and checks to verify the liquidity return process.

The Central Bank reprimanded the firm and imposed a monetary penalty of €600,000. In imposing this penalty, the Central Bank did however take a number of factors into consideration, in particular that: the breaches were not deliberate; the firm reported the failures to the Central Bank; extensive remedial steps were taken by Scotiabank to rectify the contraventions; and the firm cooperated during the investigation and settled at an early stage in the administrative sanctions procedure.

The Settlement Agreement nonetheless highlights the Central Bank's vigorous enforcement strategy. As specified in its Press Release, "the existence of adequate systems and controls

and the provision of timely and accurate information to the Central Bank are priority areas identified in the Enforcement Directorate's Strategy Document 2011- 2012."

The Settlement Agreement may be viewed on www.centralbank.ie .

(vii) Settlement Agreement between the Central Bank of Ireland and MBNA Europe Bank Limited

The Central Bank entered into a Settlement Agreement on 21 June 2011 with MBNA in relation to breaches of regulatory requirements in the Consumer Protection Code (the "Code"). MBNA breached the Code by failing to act with due skill, care and diligence in the best interests of its customers and by failing to have and employ effective resources and procedures, systems and control checks to ensure compliance with the Code. The systems and controls breaches arose as a result of inconsistencies between its systems and its terms and conditions which resulted in 373,105 customer accounts being overcharged a total of nearly €17m between 1 July 2007 and 26 October 2009.

The Central Bank imposed a significant monetary penalty of €750,000 for these breaches, reflecting the importance it places on the requirement to have adequate systems and controls in place to ensure compliance with the Code, particularly to prevent customers being overcharged, a priority area highlighted in the Central Bank's Enforcement Strategy for 2011-2012.

This Settlement Agreement therefore once again demonstrates robust enforcement action to protect consumers. However, similar to the aforementioned Settlement Agreement with Scotiabank, in imposing the above penalty the Central Bank recognised that MBNA had reported the above failures in a timely manner; all affected customers were remediated by MBNA with appropriate interest in a timely manner; and MBNA cooperated in the resolution of the matter and settled at an early stage in the administrative sanctions procedure.

The Settlement Agreement may be viewed on www.centralbank.ie .

Dillon Eustace

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