


Funds Quarterly Legal and Regulatory Update

Period covered:
1 July, 2011 to 30 September, 2011

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FUNDS QUARTERLY LEGAL AND REGULATORY UPDATE

UCITS, Non-UCITS & Hedge Funds

(i) UCITS IV Notices and Guidance Notes

Following the signing into law of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (the “Regulations”) – making Ireland one of only six Member States to have implemented the UCITS IV Directive by the transposition deadline – on July 1 2011, the Central Bank also issued revised Notices and Guidance Notes to explain and clarify various aspects of the Regulations and set down conditions not contained in the Regulations with which UCITS must conform, including:-

-  changes to the minimum activities regime as proposed under Consultation Paper 48;
-  provisions regarding the eligibility of and the process of changing trustees/custodians;
-  changes to the requirements for money market funds;
-  change of the minimum subscription amount for a Professional Investor Fund (“PIF”) from €125,000 to €100,000; and
-  confirmation that the new disclosures for a investment fund’s financial statements are required to be included in financial statements for financial years commencing July 1, 2011 onwards.

The Notices and Guidance Notes are both available on the Central Bank’s website:
www.centralbank.ie.

(ii) Non-UCITS Notices and Guidance Notes

The Central Bank has revised and updated its Non-UCITS Notices and Guidance Notes, applicable to collective investment schemes other than UCITS, including a new Guidance Note 2/11 regarding the appointment of Prime Brokers.

The Notices and Guidance Notes are both available on the Central Bank’s website:
www.centralbank.ie.

(iii) Guidance Note on FINREP for Fund Service Providers

On 8 September 2011 the Central Bank issued a guidance note, applicable to fund service providers authorised under the Investment Intermediaries Act 1995 and UCITS and Non-UCITS Managers, to provide information and direction on the completion of FINREP returns.

Fund Service Providers must submit their individual management/interim accounts, quarterly and monthly, as required and audited year-end financial statements to the Central Bank via its Online Reporting System.

It is available on the Central Bank's website: www.centralbank.ie.

(iv) Discussion Paper on UCITS ETFs and Structured UCITS

On 22 July 2011 the European Securities and Markets Authority ("ESMA") published a discussion paper seeking industry views to help focus its policy approach towards and possible guidelines on UCITS exchange traded funds ("ETFs") and structured UCITS. ESMA considers that existing regulatory requirements applicable to UCITS ETFs and structured UCITS are not sufficient to take account of the specific features and risks associated with these types of fund.

The discussion paper examines possible measures that could be introduced to mitigate risks, particularly where complex products are made available to retail investors. It also highlights the potential systemic risk caused by these innovative products and their impact on financial stability.

The specific topics covered by the discussion paper, in respect of which ESMA considers guidelines should be developed, include index tracking issues; securities lending activities; actively-managed ETFs; leveraged ETFs; secondary market investors; and quality and types of collateral received.

Responses to the discussion paper were due to be received by 22 September 2011 and in light of the feedback received, ESMA will develop a consultation paper on proposed guidelines for UCITS ETFs and structured UCITS.

ESMA has announced open hearings on 26 September 2011 in the Auditorium in ESMA, Paris, on this discussion paper.

The discussion paper may be viewed on the ESMA website: www.esma.europa.eu.

(v) Q&A Document on European Money Market Funds

On 26 August 2011, ESMA published a Questions and Answers document to promote common supervisory approaches and practices in the application of the guidelines on a Common Definition of European Money Market Funds developed by its predecessor, the CESR, applicable for instance to collective investment undertakings authorised under Directive 2009/65/EC (which forms part of the UCITS legislative framework). Although the document is primarily aimed at ensuring supervisory authorities' actions converge along the lines of ESMA responses, it is also intended to help management companies by providing clarity as to the content of the CESR guidelines.

The document provides responses to questions posed by the public and competent authorities, on issues including the:-

- ▣ management company's internal rating process;
- ▣ treatment of instruments;
- ▣ determination of a recognised credit rating agency;
- ▣ maturity of securities for money market funds; and
- ▣ investment and share classes in different currency.

The Q&A document is available on the ESMA website: www.esma.europa.eu. Questions on the practical application of the requirements of the CESR guidelines may be emailed to: moneymarketfunds@esma.europa.eu. ESMA will review the questions and answers to determine whether any material needs to be converted into ESMA guidelines and recommendations.

(vi) Requirement for Original Application Forms/Documentation for Irish and Non-Domiciled Funds Removed

On 12 July 2011 the Central Bank confirmed it is willing to allow managers/administrators to dispense with requiring original application forms and other original instructing documentation for both Irish and non-domiciled funds where trade orders are transmitted electronically.

This follows confirmation in March 2011 by the Central Bank that managers/administrators could dispense with original application forms in connection with non-domiciled funds, subject to appropriate controls.

The extension of this confirmation to Irish domiciled funds follows a second submission from the Irish Funds Industry Association (“the IFIA”) which recognised that the implementation by Revenue of the non-resident declaration “equivalent measures” removes the necessity to obtain original applications for Irish domiciled funds.

In applying the derogations from the requirement to obtain original applications/documents, managers/administrators must be satisfied that there are appropriate controls and procedures in place to comply with the applicable anti-money laundering/counter terrorist financing legislation and to mitigate the risk of fraud associated with the processing of transactions based on fax or other electronic instructions.

(vii) Alternative Investment Fund Managers Directive (the “AIFMD”)

The AIFMD, which introduces harmonised EU rules for the authorisation and supervision of entities engaged in the management of alternative investment funds (“AIFs”), came into force on 21 July 2011. Member States must implement the AIFMD by 22 July 2013.

It is envisaged that the final version of the Level 2 implementing measures, which should afford clarity to the investment fund industry as to how the AIFMD will operate in practice, will be published by the European Commission (the “Commission”) in early 2012.

In this regard, on 13 July 2011, ESMA published a consultation paper setting out its advice to the Commission on possible implementing measures of the AIFMD. It is available on the ESMA website: <http://www.esma.europa.eu/>.

The proposals published in the Consultation Paper cover three broad areas:

General provisions, authorisation and operating conditions

This section includes draft advice on various issues, including the identification of portfolios of AIFs under management by an alternative investment fund manager (“AIFM”), valuation of the assets of the fund, calculation of the value of assets under management, initial capital and own funds, conflicts of interest, risk management, liquidity management, delegation of AIFM functions and organisational requirements.

Depositaries

This section sets out draft advice on the contract evidencing the appointment of the depositary, depositary functions, segregation obligations, depositary liability on the loss of financial instruments, external events beyond reasonable control and objective reasons to contract a discharge, i.e. to delegate liability in certain limited circumstances.

▣ *Transparency and leverage*

This section covers advice on the definition of leverage, appropriate methods for its calculation and limits to leverage, the content and format of the annual report to be prepared by the AIFM and information to be reported to authorities and investors.

Stakeholders had until 13 September 2011 to submit their feedback to ESMA and in light of the feedback received, it will finalise its advice to the Commission in time for submission by the deadline of 16 November 2011. The IFIA welcomed the consultation and the opportunity to clarify, among other things, the requirements relating to valuations and the depositary which are of crucial importance to the industry in Ireland. The IFIA issued their responses to the Consultation Paper on 14 September 2011.

The IFIA responses can be found at: www.esma.europa.eu

(viii) **ESMA Consultation Paper – Possible Implementing Measures of the AIFMD in relation to Supervision and Third Countries**

On 23 August 2011 ESMA published a Consultation Paper, setting out its proposals for detailed rules on supervision and third country entities underlying the AIFMD, which complements the consultation documented above. Feedback from stakeholders was to be received by 23 September 2011, in light of which ESMA will finalise its proposals for submission to the Commission by the deadline of 16 November 2011.

The topics covered by the Consultation Paper in relation to dealing with third countries include the following:-

- ▣ supervisory co-operation and the exchange of information;
- ▣ the marketing of non-EU alternative investment funds (“AIFs”);
- ▣ the delegation of certain functions (i.e. risk and portfolio management) to service providers outside the EU; and
- ▣ the assessment of equivalence of third country depositary frameworks.

The Consultation Paper is available on the ESMA website: <http://www.esma.europa.eu/>.

(ix) **ESMA Consultation Paper – Guidelines on Systems and Controls in a Highly Automated Trading Environment for Trading Platforms, Investment Firms and Competent Authorities**

On 20 July 2011, ESMA published a consultation paper setting out proposals for detailed guidelines for trading platforms, investment firms and competent authorities to address the challenges of a highly automated trading environment. The proposals cover four broad areas, namely electronic trading systems, fair and orderly trading, market abuse and direct market access and sponsored access. The proposed guidelines seek to clarify the obligations of trading platforms (regulated markets and multilateral trading facilities) and investment firms executing orders on behalf of clients and/or dealing on their own account under the existing EU legislative framework. As such, separate standards are included in each of the above areas for trading platforms and investment funds.

ESMA considers that the proposed guidelines contribute to the efficiency, orderly functioning and resilience of trading in a highly automated environment. This initiative is being undertaken as part of the update review of the Market in Financial Instruments Directive (“MiFID”). As such the proposals may need to be adapted to the revised version of MiFID once finally adopted and/or transformed into technical standards, where appropriate.

The consultation paper is available on the ESMA website: www.esma.europa.eu. ESMA will consider the responses it receives to this consultation by October 3 2011 and expects to adopt final guidelines at the end of 2011.

(x) **IFIA Voluntary Corporate Governance Code for Investment Funds**

The IFIA received a significant volume of feedback from the funds industry on the draft “Industry Corporate Governance Code - Investment Funds and Management Companies Code” by the submission deadline of 24 June 2011. This feedback has been discussed with the Central Bank and a number of the issues raised therein are now being considered by the Central Bank’s policy committee. Its response is awaited, following which a finalised voluntary Code will be published. Given the additional time required for this consideration, the final code will not become effective until 1 January 2012, as opposed to the original anticipated adoption date of 1 September 2011, although it is still envisaged that a transitional period of 12 months will be included.

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 and as such, although the Code is voluntary, its adoption will be recommended by the Central Bank. The Code makes provision for various key corporate governance issues including: 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.

(xi) Irish UCITS in Chile

The IFIA obtained clarification from a Chilean legal expert, Felipe Cousiño, of the status of Irish UCITS in Chile, following the recent move by the Chilean pension regulator, the Comisión Clasificadora de Riesgo (CCR), which resulted in a change in the classification of Irish domiciled UCITS funds from the General Investment Category to the Restrictive Investment Category.

It is understood, that Irish UCITS are reclassified and that this means that Chilean pension funds will continue to be allowed to invest in Irish domiciled funds but will be subject to the special investment limits contained in the Investment Regime set out by the Chilean Superintendency of Pensions. These special limits are quite high so in practice it would seem there would not be regulatory pressure for any divestment and there would still be room for further investment, possibly subject to a rebalancing of the portfolio of investments that fall under the special limits.

The timing of the decision to reclassify Irish funds is set against a background of recent EFAMA statistics that show that for the first half of 2011 Irish domiciled UCITS funds recorded the highest level in the EU of net inflows of EUR 39 billion.

New Legislation to Combat White Collar Crime

On 9 August 2011, the main provisions of the Criminal Justice Act 2011 (the “Act”), came into operation, namely Part 1 (other than Section 5), Section 7 (other than paragraph (c)) and Section 8 of Part 2, Part 3 and Schedules 1 and 2.

The Act provides protection for whistleblowers, extends the Garda Síochána’s powers of investigations into suspected breaches and creates a wide range of “serious and complex offences”, which attract a penalty of at least five years’ imprisonment, in the following areas:-

-  banking, investment of funds and other financial activities;

- ▣ company law;
- ▣ money laundering and financing terrorism;
- ▣ theft and fraud;
- ▣ bribery and corruption;
- ▣ competition and consumer protection;
- ▣ cybercrime; and
- ▣ the raising and collection of taxes and duties.

The comprehensive nature of the offences covered by the Act demonstrates a commitment to vigorously pursue white-collar crime.

The Act makes provision for the following:-

- ▣ the suspension of detention periods of arrested persons on up to two occasions, for not more than four months from the date on which the detention was first suspended, if the Gardaí have reasonable grounds to believe this is necessary to conduct further investigations in order to make more effective use of detention periods;
- ▣ District Court order may require the subject to furnish the Gardaí with documents and/or to provide information obtained in the ordinary course of business by answering questions or making a statement for the purposes of investigating relevant offences;
- ▣ measures relating to how documents should be furnished to the Gardaí so as to reduce delays associated with the production of large volumes of poorly ordered and uncategorised documents to them in the course of their investigations;
- ▣ measures to prevent unnecessary delays in investigations arising from claims of legal privilege; and
- ▣ a new offence of failing to provide information to the Gardaí in relation to the prevention or investigation of relevant offences without reasonable excuse. This is however offset by the introduction of strong legal protection for whistleblowers which makes it an offence for employers to penalise an employee (including dismissal, demotion, reduction of wages, etc.) as a result of making a disclosure in good faith in relation to a relevant offence to the Gardaí.

Guidance Note on Data Protection in the Electronic Communications Sector

On 1 July 2011 the Data Protection Commissioner (the “Commissioner”) issued a Guidance Note to assist organisations comply with new data protection requirements in relation to electronic communications and networks following the commencement of the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations, 2011 (the “Regulations”) which transpose the ePrivacy Directive.

Key requirements which have been introduced include the following:-

- ▣ compulsory notification of data breaches by all telecommunication companies and internet service providers to the Office of the Data Protection Commissioner and notification of customers where there is a risk their data may be accessed. Failure to do so can lead to prosecution by the Commissioner and a possible fine of up to €5,000 per instance. The Commissioner can also, for the first time, prosecute such companies for allowing a data breach, which upon conviction on indictment attracts a fine of up to €250,000;
- ▣ more stringent requirements for all companies relating to the provision of information and obtaining the consent of users for the placing of “cookies” on electronic devices, save in limited circumstances where the cookie is strictly necessary for the provision of the service in question. In practice this means that websites placing cookies on user equipment that are not deleted when the user leaves the website must identify a means of obtaining user consent; and
- ▣ stricter requirements for the sending of electronic marketing messages and the making of marketing phone calls. For instance, it is now an offence for any company or entity to phone a person on their mobile phone for a marketing purpose without having obtained their prior consent for such contact. The requirements now extend to all forms of marketing carried out by means of a publicly available electronic communications service – including for example the soliciting of support for charitable organisations or political parties.

The guidance is available at www.dataprotection.ie.

Irish Takeover Panel Consultation on Changes to Takeover Rules

On 7 July 2011 the Irish Takeover Panel (the “Panel”), the statutory body responsible for monitoring and supervising takeovers and other relevant transactions in relevant companies in Ireland, issued two Consultation Papers setting out proposals to amend the Irish Takeover Panel Act 1997, Takeover Rules, 2007 to 2008 (the “Rules”). They may be viewed at: www.irishtakeoverpanel.ie.

Comments on the Consultation Papers must be received by 7 October 2011 and may be emailed to: takeoverpanel@eircom.net or sent to:

Irish Takeover Panel
Lower Ground Floor
76 Merrion Square
Dublin 2

FAX: 353 1 6789289

(i) Consultation Paper 1 - Incorporation by Reference Requirement to Publish on Website Other Miscellaneous Amendments - Proposals to amend the Takeover Rules

The main rule amendments being proposed in this Consultation Paper are as follows:-

- ▣ offerors and offerees will be permitted to incorporate certain information into documents required under the Rules to be dispatched to the shareholders (“relevant documents”) by reference to another source, including information on a website;
- ▣ offerors and offerees will be required to make available on their websites, or with Panel consent, the website of another person, all information published by it in relation to an offer, other than certain limited information; and
- ▣ the list of documents required to be put on display by offerors and offerees will be amended and copies of all such documents will have to be published on a website as well as displayed in hard copy format.

The Panel considers that offeree shareholders will continue to be afforded equivalent treatment and will have sufficient time and information to enable them to reach a properly informed decision in relation to an offer.

The Panel notes that similar amendments have been made to the Takeover Code in the UK and in undertaking its review of the Rules, the Panel has considered these amendments and it is proposed that a number of them will be adopted in the Rules.

(ii) Consultation Paper 2 – Proposals to Amend Various Takeover Rules

Some of the key proposed amendments in this Consultation Paper are as follows:-

- ▣ to extend and clarify how the “put up or shut up” mechanism operates and the restrictions and exemptions applicable in specific circumstances;
- ▣ to extend the restrictions that apply to an offeror whose offer has lapsed or been withdrawn and to impose a dealing restriction in the securities of the offeree on a competing offeror whose offer has lapsed;
- ▣ to amend the prohibition on an offeror who has made a statement of intention not to make an offer from making another offer for the offeree concerned within 12 months of the release of the statement so that the restrictions imposed are similar to those when offers or possible offers are withdrawn or lapse;
- ▣ to set out the terms of a possible offer announcement and the extent to which an offeror will be bound by the information contained in its possible offer announcement;
- ▣ to provide more detail as to the use of pre-conditions and the circumstances in which they can be invoked and address the invocation of offeree protection conditions;
- ▣ to clarify that the prohibition on publishing an advertisement in connection with an offer unless it falls within one of a number of specified categories applies to every form of advertisement;
- ▣ to set out the circumstances in which joint interviews and debates will be permitted; and
- ▣ to impose specific responsibilities on advisers to an offeror and to the offeree.

In undertaking its review of the Rules, the Panel has considered various amendments to the Takeover Code adopted by the Panel on Takeovers and Mergers in the UK.

Central Bank of Ireland

(i) New Fitness and Probity Regime

On 1 September 2011 the Central Bank published its Regulations and Standards of Fitness and Probity, pursuant to its powers under Part 3 of the Central Bank Reform Act 2010, together with Draft Guidance on Fitness and Probity Standards.

The new regime will commence on 1 December 2011 for all existing staff and new staff holding senior positions i.e. Pre-approval Controlled Functions (“PCFs”). In respect of new appointments to less senior positions, i.e. Control Functions (“CFs”), the new regime will commence on 1 March 2012 and from 1 December 2012 for existing staff in CF roles. This phased introduction is aimed at allowing regulated financial service providers (“regulated firms”) time to implement the necessary internal controls and procedures to comply with the new regime.

The Regulations

The Central Bank Reform Act 2010 (Sections 20 and 22) Regulations 2011 (the “Regulations”) confirm that the new regime will apply to two distinct groups i.e. persons performing PCFs and CFs. The list of PCFs, set out in Schedule 2 of the Regulations, specifically identify 42 senior positions as PCFs in a regulated firm. The Central Bank’s approval is required before a regulated firm can offer to appoint a person to those functions.

The Regulations afford a more generic definition in respect of the 11 categories of CFs, which include a function related to the provision of financial services which is, for example, likely to enable the person responsible for its performance to exercise significant influence over the conduct of the firm’s affairs. While the Central Bank’s prior approval is not required for persons to be appointed to a CF position, it will be able to investigate, suspend, remove and/or prohibit a person from carrying out such a function in the future.

Regulated firms must identify and maintain a record of persons performing PCFs in their organisations and by 31 December 2011, must submit to the Central Bank a list of persons in a PCF as of 1 December 2011. Written confirmation must also be submitted by the CEO, where appropriate, of regulated firms, that the regulated firm is satisfied that the persons on the list comply with the Standards of Fitness and Probity (the “Standards”) and that the firm has obtained written agreement from such persons to abide by the Standards.

While all new persons appointed to a CF role will be required to adhere to the Standards by 1 March 2012, regulated firms must by 1 December 2012, also identify and maintain a

record of all persons performing CFs in their organisation and carry out the necessary due diligence to ensure such persons meet with the Standards including obtaining a written statement that such persons will abide by the Standards.

The Standards

The Standards set the conditions which a person must satisfy to perform a PCF or CF and may form the basis for refusing to approve the person's appointment to a PCF or for removing or prohibiting a person from a CF if he/she does not meet those standards. The Standards require a person to be competent and capable; act honestly, ethically and with integrity; and be financially sound. The Standards outline in greater detail what each of these conditions entail.

Draft Guidance

The Draft Guidance on Fitness and Probity Standards (the "Draft Guidance") specifies the due diligence that firms should, at a minimum, carry out to ensure persons are fit and proper to perform PCFs or CFs before proposing them for appointment thereto. The measures considered appropriate to determine a person's fitness require firms, for example, to obtain evidence of requisite qualifications and to retain a record of the application and interview process. Due diligence in respect of probity requires firms to take steps to ensure they are aware of and assess matters which may adversely affect persons' ability to perform the function to a material degree, for instance if the person has been the subject of disciplinary action. Interested parties had until 30 September 2011 to respond to the Draft Guidance.

The Regulations, Standards and Draft Guidance are available on the Central Bank's website: www.centralbank.ie.

(ii) Central Bank (Supervision and Enforcement) Bill 2011

On 28 July 2011, the Department of Finance published the Central Bank (Supervision and Enforcement) Bill 2011 (the "Bill"). The Bill is aimed at enhancing the supervisory and enforcement powers of the Central Bank so as to ensure the proper and effective regulation of financial services, particularly by increasing its investigative powers and the sanctions it may impose. It represents further reform of financial regulation in Ireland and the introduction of such legislation constitutes a further requirement of the EU-IMF programme of support for Ireland.

If enacted in its current form, the Bill will introduce the following measures:-

- ▣ Fines and sanctions – the maximum penalties which could be imposed under the administrative sanction regime will increase from €5m to €10m (or 10% of prior year turnover, whichever is the higher) for corporate bodies and from €0.5m to €1m for natural persons. Regulated financial services providers in breach of financial services legislation could also have their authorisation suspended or revoked;
- ▣ Restitution – following an application by the Central Bank, the High Court may order restitution for those who have suffered as a result of a breach of regulatory provisions by a financial service provider;
- ▣ Skilled persons reports – financial services providers (or related undertakings) could be required to commission (and bear the cost of) reports by independent experts on matters reasonably required in connection with the exercise of the Central Bank’s statutory functions e.g. examination or inquiry into suspected breaches of financial services legislation;
- ▣ Directions – if the Central Bank has concerns as to regulated financial services providers’ ability to meet their capital requirements, legislative obligations or obligations to creditors or customers, the Central Bank will be able to issue directions, requiring such financial services providers, for instance, to take certain actions or suspend certain activities to address these concerns;
- ▣ Regulations – the Central Bank will be able to make regulations on a wide range of issues including risk minimisation; monitoring staff training and qualifications; restricting “cold calling”; and dealings with customers, in terms of suitability of products and resolving complaints. In many instances, this power would relate to matters which are already Central Bank requirements under Codes e.g. consumer protection, related party lending and minimum competency requirements;
- ▣ Authorised officers of the Central Bank – the authorised officer regime will be consolidated, replacing some 20 existing regimes. Further, authorised officers may attend financial services provider meetings to assist the Central Bank in its statutory functions;
- ▣ Settlement Agreements - if the Central Bank and a regulated financial services provider enter an agreement to resolve a suspected contravention and the regulated financial services provider does not abide by it, the Central Bank may seek a High Court order compelling compliance therewith;
- ▣ Whistle-blowing protections – a whistleblower will be protected from civil liability and penalisation by their employer for making a protected disclosure i.e. one made to appropriate persons (e.g. Central Bank officers/employees) if they have reasonable grounds to believe it will show a prescribed contravention, breach of or offence under financial services legislation is or was being committed or evidence regarding same is being or is likely to be deliberately concealed or destroyed; and

- ▣ Mandatory disclosure regime – persons performing pre-approval controlled functions (those in which they may exercise significant influence on the conduct of a regulated financial service provider’s affairs) must report a breach of financial services legislation unless this might incriminate them personally. Failing to so disclose could be the basis for an investigation and action under the fitness and probity regime.

The Bill is expected to progress to the second stage in Dáil Éireann during the autumn session. The Bill may be viewed on the Oireachtas website: www.oireachtas.ie.

(iii) Central Bank Issues Consultation Paper 56 (“CP56”)

On 11 August 2011 the Central Bank issued a public consultation, CP56, dealing with the protocol to be established between the Central Bank and the Auditors of Regulated Financial Service Providers (the “Auditor Protocol”). It aims to provide a framework which will allow the Central Bank and the auditing profession to exchange relevant information on a timely basis with a view to enhancing both the regulatory and statutory audit processes.

To fulfill its objectives, the draft Auditor Protocol specified that it is necessary for communication channels between the Central Bank and auditors to remain open and an environment that facilitates frank discussions should exist. In this regard it suggested that the following measures should be adopted:

- ▣ firms should advise the Central Bank of the contact details of the Lead Partner of its auditor and similarly should advise its auditor of the contact details of the Senior Examiner in the Central Bank; and
- ▣ at meetings between the Central Bank and auditors, they should endeavor to share information they believe would lead to higher quality audits or would assist in the exercise of their supervisory functions.

To further pursue the above aims, the consultation highlighted the need to identify and remove barriers to sharing information. As such, it emphasised that the contractual agreements between auditors and firms should not hinder information sharing and provision should be made therein acknowledging that the Central Bank and the firm’s auditors can discuss issues relevant to their oversight of the firm and that such communication will not be determined to be a breach of duty by either party.

The proposed framework also provides a structure for bilateral meetings (between the Central Bank and auditors) which are expected to take place twice yearly at the pre- and post-audit stage and trilateral meetings (between the Central Bank, auditors and the audit

committee or Independent Non-Executive Director) to be conducted at the planning stage of the audit process.

The Protocol will be subject to annual review and will be updated to reflect changes in legislation, auditing practice and other relevant developments.

The Central Bank indicated that the Auditor Protocol may apply in the first instance to firms rated high impact under its regulatory risk model, PRISM, which is due to be rolled out in 2011/2012. Such categorisation will reflect the firms' relative size and potential to harm the economy, consumers or the wider financial system and will be based on balance sheet size, turnover, client base etc.

Comments were to be submitted on the proposals by 23 September 2011. It is anticipated that the Auditor Protocol will be published later in 2011, whereupon an implementation plan will be agreed with the auditing profession, to commence no later than the beginning of the new audit cycle for relevant firms in 2012.

CP56 may be accessed from the Central Bank's website: www.centralbank.ie.

(iv) Responsibility for Information within a Prospectus for Debt Securities

On 16 September 2011, the Central Bank published a communication to industry participants to clarify the requirements of Article 6 of the Prospectus Directive.

The publication indicates that an issue has arisen with regard to the drafting of responsibility statements in debt prospectuses. Recent practice has allowed "split responsibility" statements where it would appear that the issuer disclaims responsibility for certain parts of the prospectus. This practice has its roots in the regime that existed prior to the implementation of Directive 2003/71/EC (the "Prospectus Directive") in Ireland by the Investment Funds, Companies and Miscellaneous Provisions Act, 2005 (the "2005 Act") and the Prospectus (Directive 2003/71/EC) Regulations 2005 (the "Irish Regulations"). The Central Bank publication clarifies that this practice is not permitted.

The publication clarifies that whilst Schedule 1, Paragraph 3(2) of the Irish Regulations permits others to assume responsibility for certain sections of the prospectus, this does not substitute for the responsibility under Regulation 31(2) of at least one of the other "persons" mentioned in Schedule 1 of the Irish Regulations, such as the issuer, to assume responsibility for the whole of the prospectus.

In this regard, Schedule 1, Paragraph 3(2) of the Regulations states: “In a case to which this paragraph applies, each of the following persons is, subject to the other provisions of this Schedule, responsible for the prospectus:

- (a) the issuer of the securities;
- (b) each person who accepts, and is stated in the prospectus as accepting, responsibility for the prospectus;
- (c) if the case involves an offer of securities to the public, the offeror of the securities, if this is not the issuer;
- (d) if the case involves the admission to trading of securities, the person seeking admission, if this is not the issuer;
- (e) if there is a guarantor for the issue, the guarantor in relation to information in the prospectus that relates to the guarantor and the guarantee; and (f) each person not falling within any of the preceding provisions of this subparagraph who has authorised the contents of the prospectus.

Regulation 31(2) of the Irish Regulations provides that, *“For the purposes of these Regulations, responsibility for the information given in a prospectus attaches, subject to the provisions of that Schedule, in each of the cases specified in Schedule 1 to these Regulations to the persons specified in the relevant case, and references in these Regulations to responsible persons shall be construed accordingly.”*

As a result under the Irish Regulations, the issuer, offeror and the person seeking admission to trading will be responsible for the whole of the prospectus. Therefore, qualifying language limiting the issuer’s responsibility will no longer be acceptable unless the issuer is wholly excluded from the offer or application for admission to trading.

The publication also clarifies; (a) the requisite wording to be inserted into a prospectus in respect of the declarations by those responsible for the information in the prospectus; and (b) that the use of certain confirmations in respect of third party-sourced information (to the extent permitted as highlighted therein) does not obviate the responsibility of the issuer with regard to that information in the prospectus.

This industry communication may be accessed on the Central Bank’s website:

www.centralbank.ie

(v) Appointment of Inspectors to Custom House Capital Limited

Following an application by the Central Bank under the European Communities (Markets in Financial Instruments) Regulations 2007 (the “Regulations”), on foot of information which gave rise to concern about the status of client assets managed by Custom House Capital Limited (the “firm”), on 15 July 2011 the High Court appointed Inspectors to conduct an investigation into its affairs.

The Central Bank has taken this action to evaluate the records of the firm relating to client assets and customer holdings and to assess the financial position of the firm. It has placed restrictions on the firm, preventing it from carrying out any transactions or making payments to any clients to protect the interests of all existing clients until the impact of these issues has been established.

This is the first time that these powers of court appointment, prescribed by section 116 of the Regulations, have been exercised and their invocation introduces an element of compulsion on directors and employees to produce records, appear before and assist the inspectors. It demonstrates the Central Bank’s commitment to ensuring its supervisory obligations are performed properly and without delay due to the reluctance of relevant persons to voluntarily assist with investigations.

The Inspectors have now presented three interim reports to the High Court and the matter has been listed for 21 October 2011, with a final report and recommendations as to what (if any) orders the Court may consider making, expected on that date.

More information on this matter may be obtained on the Central Bank’s website:

www.centralbank.ie.

(vi) Settlement Agreement between the Central Bank and Aviva Investors Ireland Limited

The Central Bank entered into a Settlement Agreement with effect from 20 July 2011 with Aviva Investors Ireland Limited (the “firm”), a regulated financial services provider, in relation to six breaches of regulatory requirements contained in the Client Asset Requirements (the “CAR”). The breaches included failures in relation to properly designating client accounts, obtaining confirmations in respect of dealing with client monies and performing reconciliations. These breaches, which did not result in financial loss to clients, occurred because the firm’s policies and procedures governing compliance with the CAR were

inadequate and in some instances, not adhered to. The Central Bank reprimanded the firm and required it to pay a penalty of €30,000. In determining the appropriate penalty, the Central Bank recognised that all breaches had been rectified and the firm cooperated in resolving the matter and settled at an early stage in the Administrative Sanctions Procedure.

This is the second Settlement Agreement concluded for breaches of the CAR in the past nine months and reflects the importance attached to the CAR as a key protection for customers of authorised investment firms and their assets. Peter Oakes, the Central Bank's Director of Enforcement, specified that "the CAR is a priority area for the Central Bank and [it] will continue to focus [its] supervisory and enforcement resources to help achieve acceptable standards of compliance with this important safeguarding requirement". In this regard, firms were advised to monitor and test internal policies and procedures to ensure that they are effective so as to minimise the potential for non-compliance with the Regulations or binding requirements issued under the Regulations.

By way of background to such actions, the Central Bank's press release also contained links to other items including, an industry letter on the introduction of the CAR regime in 2008 and to the Enforcement Strategy 2011-2012. These documents, as well as the Settlement Agreement, are available on the Central Bank's website: www.centralbank.ie.

(vii) Settlement Agreement between the Central Bank and Pan Index Ltd

The Central Bank entered into a Settlement Agreement with effect from 25 August 2011 with Pan Index Limited ("the Firm"), a regulated financial services provider, in relation to its breaches of the EC (Markets in Financial Instruments) Regulations 2007 (the "MiFID Regulations"). These breaches involve the firm's failure to ask (potential) clients to provide information regarding their knowledge and experience of spread trading contrary to Regulation 76(4)(a) and 94(9) and its failure to take into account the information required pursuant to Regulation 76(4)(a) to assess whether the spread trading services sought by the client were appropriate for that client.

The Central Bank reprimanded the Firm and required it to pay a penalty of €40,000, reflecting the seriousness with which it views breaches of the above obligations under the MiFID Regulations. In determining the penalty the Central Bank did however recognise that the breaches are no longer continuing and that the firm cooperated in resolving the matter and in settling at an early stage in the Administrative Sanctions Procedure.

These breaches were detected by the Central Bank during a themed inspection of contracts for difference ("CFD") and financial spread betting firms in March 2011, the findings of which,

published on 16 June 2011, specified that “consumers need to be made fully aware of the complexity and very high risks of CFD and financial spread betting before making investment decisions”. As such, the Central Bank’s press release advised firms to ensure they have adequate processes and procedures in place so that consumers receive appropriate warnings before engaging in high risk and complex ‘Spread Betting’ or ‘Spread Trading’. It further reiterated that the Central Bank will fully investigate potential breaches of the MiFID Regulations and apply proportionate and robust sanctions, where appropriate. The press release and the Settlement Agreement are available on the Central Bank’s website: www.centralbank.ie.

(viii) Settlement Agreement between the Central Bank and Goldman Sachs

The Central Bank of Ireland ("the Central Bank") has entered into a Settlement Agreement with effect from 8 September 2011 with Goldman Sachs Bank (Europe) plc ("the firm"), a regulated financial service provider in relation to breaches of regulation 16(3) of the European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992 ("the Regulations").

The Central Bank reprimanded the firm and required it to pay a monetary penalty of €160,000.

On 13 December 2010 the firm disclosed errors in calculations of the firm's counterparty risk requirement to the Central Bank. This issue arose due to a failure in the firm's control mechanisms giving rise to an error in the firm's in-house regulatory counterparty risk capital requirement calculation.

The Central Bank of Ireland also issued a general comment from Director of Enforcement, Peter Oakes:

“The existence of adequate systems and controls is a priority area identified in the Enforcement Directorate's Strategy Document 2011 — 2012.

The existence of proper systems and controls to ensure continuous and proper calculation of risk and regulatory capital requirements is essential to the maintenance of stable and properly financed financial service providers. The reliance on automated systems should therefore be tempered by adequate oversight to ensure that systems and controls are, and continue to be, comprehensive and proportionate.

Firms are reminded to monitor and test their internal control systems on a regular basis and should take great care to ensure that any changes to systems are properly and fully tested so that regulatory requirements are adhered to and all regulatory reports provided to the Central Bank are accurate.”

(x) New Deputy Governor

On 1 September 2011, Stefan Gerlach took up his position as Deputy Governor of the Central Bank with responsibility for central banking functions. He is one of two deputy governors, the other being Matthew Elderfield who is responsible for financial regulation. Mr. Gerlach succeeds Tony Grimes who retired, having served most recently as Director General, and then Deputy Governor, since 2007.

Prior to his appointment as Deputy Governor, Mr. Gerlach was Professor of Monetary Economics and Managing Director of the Institute for Monetary and Financial Stability at the University of Frankfurt. Before this he worked with the Bank of International Settlements in Basel, most recently as Head of Secretariat of the Committee on the Global Financial System. He has also served as Chief Economist at the Hong Kong Monetary Authority.

Announcing the appointment in July 2011, the Central Bank Governor, Patrick Honohan said: “I am delighted to welcome Stefan Gerlach to the Central Bank of Ireland. He brings exceptional skills to the role. His experience across the monetary and economic spectrum and the qualities he has developed over his career are perfectly suited to the new role he is taking on, at what remains a very challenging time”.

Anti-Money Laundering/Counter-Terrorism Financing

(i) Central Bank Inspections

The Central Bank is currently in the process of carrying out on-site inspections to confirm that certain companies (including funds) are in compliance with the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, (the “**CJA 2010**”), particularly with respect to the customer due diligence obligations and internal policies and procedures including training.

In advance of the inspection, companies are required to provide (among other matters) the following:

- ▣ details in relation to the list of new customers since 15 July 2010;
- ▣ confirm those customers who have not been fully identified and verified in accordance with the CJA 2010;
- ▣ confirm those who have been verified by a relevant third party;
- ▣ provide copies of policies and procedures to prevent and detect money laundering and terrorist financing; and
- ▣ provide copies of board minutes for the last two years.

(ii) Central Bank Instructions on EU Financial Sanctions

On 24 August 2011 the Central Bank, as the Competent Authority responsible for the administration and enforcement of EU Financial Sanctions, issued Instructions to institutions, requiring them, for example, to:

- ▣ examine their records and confirm to it on or before 1 November 2011 whether they have any funds or economic resources in the name of any person, group or entity currently the subject of EU restrictive measures;
- ▣ provide the Central Bank with details of any funds and economic resources, belonging to, owned or held by such persons which the institutions have frozen;
- ▣ bring any name(s), so discovered, to the attention of the Garda Bureau of Fraud Investigation; and
- ▣ have adequate systems and controls in place to ensure compliance with their obligations under financial sanctions legislation including (a) screening new clients against current restrictive measures and (b) screening customer databases on an ongoing basis for compliance with prevailing restrictive measures.

Persons who fail to comply with an Instruction issued by the Central Bank are liable on conviction to imprisonment and/or a fine.

All correspondence with the Central Bank in relation to the information requested above should be addressed to:

Financial Sanctions Unit,
Enforcement,
Central Bank of Ireland,
Block D,
Iveagh Court,
Harcourt Road, Dublin 2.

Email: sanctions@centralbank.ie

The Central Bank's Financial Sanctions Notification August 2011, which includes information on outstanding financial sanctions-related Statutory Instruments and EU Regulations, is available on its website: www.centralbank.ie.

(iii) EU Financial Sanctions

In July and August further Council Implementing Regulations No. 611/2011, 755/2011 and 804/2011 were introduced, extending the scope of Council Implementing Regulations No. 442/2011 and 204/2011 in terms of the persons and entities upon whom those Regulations impose restrictive measures and financial sanctions in Syria and Libya respectively.

However, in view of the developments in Libya, Council Implementing Regulations Nos. 572/2011, 573/2011 and in September No. 204/2011, eased the restrictions imposed, for instance by permitting Member States to authorise the release of frozen funds or economic resources of specified persons/entities in Libya for humanitarian purposes and by deleting specified entities to whom Regulation (EU) No 204/2011 apply.

These Regulations may be accessed by visiting the Financial Regulation section of the Central Bank's website: www.centralbank.ie.

(iv) EU Commission Presents Options for Establishing an EU System for Tracking Terrorist Financing

Following the conclusion in June 2010 of the agreement on the processing and transfer of financial messaging data for the purpose of the EU-US Terrorist Financing Tracking Programme ("EU-US TFTP Agreement"), the European Parliament and Council of the European Union requested that the European Commission ("Commission") propose, by 1 August 2011, "a legal and technical framework for the extraction of data on EU territory".

The Commission took an initial step in this regard on 13 July 2011 by adopting a Communication outlining the main options for establishing an EU Terrorist Financing Tracking System ("EU TFTS").

It is considered that a European TFTS should have two main objectives, namely it must contribute to limiting the amount of personal data transferred to the US and it should contribute significantly to efforts to cut off terrorists' access to funding and materials and follow their transactions.

The Communication gives clear indications about the key issues which need to be decided upon before such a system can be established. These include the need to fully respect the fundamental rights of European citizens, data protection and data security issues, the operational scope of the system, as well as costs.

The Communication presents the different options under consideration at this stage, without indicating any preferred one, which the Commission will now discuss with the Council and the Parliament before deciding on further steps on the basis of a thorough impact assessment.

The Communication is available on the Commission's website:
http://ec.europa.eu/index_en.htm.

(v) AML/CTF Equivalent Jurisdictions List

The EU Commission has published an updated list of third countries considered as having equivalent AML/CTF systems to the EU. This common agreed list is not binding on Member States and does not override the need to continue to operate a risk-based approach. Indeed, the fact that a financial institution is based in a 3rd country featuring on the list only constitutes a refutable presumption of the application of simplified customer due diligence ("CDD"). Moreover, the list does not override the obligation under article 13 of the AML Directive to apply enhanced CDD measures in all situations which by their nature can present a higher risk of money laundering or terrorist financing, when dealing with credit and financial institutions, as customers, based in an equivalent jurisdiction.

In Ireland, S.I. 343 of 2010 is the current legislative provision which specifies the countries deemed to have AML/CFT equivalence ("white list countries") and only institutions in such white list countries can qualify as a "specified customer" (for simplified CDD), a "relevant third party" (for letters of assurance) or an "acceptable institution" (for source of funds as an enhanced due diligence measure).

The current Irish white list now differs in some respects from the agreed EU common list. For instance, on the current Irish list but not the EU list are Argentina and New Zealand, while India and South Korea appear on the EU but not the Irish list. This may result in revisions to the Irish list.

The Commission's updated list is available on its website: www.europa.eu.

(vi) Financial Action Task Force (“FATF”) – Review of the Standards

The FATF is currently conducting a review of the 40+9 Recommendations, recognised as the international AML/CFT standards to combat the misuse of financial systems and which also form the basis of the EU’s AML Directives. To ensure these standards remain relevant and to learn lessons from their implementation, the FATF has prepared a second public consultation paper, the first consultation having been undertaken between October 2010 and January 2011, outlining a set of policy proposals concerning issues such as: beneficial ownership; data protection and group-wide compliance programmes; wire transfers; targeted financial sanctions; and politically exposed persons.

Interested parties were invited to submit their views on the proposals no later than 16 September 2011. Substantive feedback on the FATF responses to the consultations will be provided when the revised standards are adopted in February 2012. The FATF expects to commence a new round of assessments towards the end of 2013.

The Consultation Paper may be viewed on the FATF website: www.fatf-gafi.org.

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