

Establishing a  
Retail Fund in  
Ireland for Sale  
in Japan

DILLON  EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO



## Contents

# Establishing a Retail Fund in Ireland for sale in Japan

Introduction to Establishing a Retail Fund for sale in Japan	Page 2
1. Distribution	Page 2
2. Fund Types	Page 3
3. Selection Rules	Page 4
4. Public Offering in Japan	Page 6
5. Private Placement in Japan	Page 10
Irish Fund Structures/Features	Page 11
1. UCITS	Page 11
1.1 Money Market Funds	Page 12
1.2 Index Tracking Funds	Page 12
1.3 Financial Derivative Instruments	Page 13
1.4 Cash Funds	Page 14
Non-UCITS Structures	Page 14
1. Regulatory Categories	Page 14
2. Fund Types – Non-UCITS	Page 19
2.1 Feeder Funds/Fund of Funds	Page 19
2.2 Money Market Funds	Page 19
2.3 Private Equity Funds	Page 19
2.4 Venture Capital Funds	Page 19
2.5 Hedge Funds	Page 20
2.6 Real Estate Funds	Page 20
2.7 Emerging Market Funds	Page 20
2.8 Capital Protected or Guaranteed Funds	Page 20
2.9 Single Country or Regional Funds	Page 21
2.10 Additional/Hybrid Funds	Page 21
Taxation	Page 21
1. Direct Taxes and Withholding Taxes	Page 21
2. Stamp Duty	Page 21
Summary	Page 22
Contact Us	Page 23

## ▣ ESTABLISHING A RETAIL FUND IN IRELAND FOR SALE IN JAPAN

### Introduction to Establishing a Retail Fund for sale in Japan

The issuing of securities of offshore funds for public sale into Japan is governed by a combination of the Securities and Exchange Law of Japan (the "SEL") which is enforced by the Japanese Ministry of Finance ("MOF"), the Law Concerning Investment Trust and Investment Company of Japan (the "Investment Funds Law") which is enforced by the Financial Services Agency of Japan ("FSA").

In addition, the distributing securities companies must comply with the SEL and the self-regulatory rules of the Japanese Securities Dealers' Association ("JSDA"), including regulations relating to trading in foreign securities and the Standard Rules for the Selection of Foreign Investment Trust Funds (the "Selection Rules").

The Financial Product Sales Law which became effective in April, 2001, introduced additional measures for the protection of investors including additional risk disclosure requirements and heavier civil liabilities in order to compensate investors for losses suffered from distributors' non-compliance with the requirements.

The SEL, the Investment Funds Law and the Financial Product Sales Law have been amended by the recently introduced Financial Instruments and Exchange Law.

#### **1. Distribution**

Offshore funds are primarily sponsored and distributed in Japan by Japanese brokers although foreign brokers whose Japanese branch is registered for securities business with the relevant Japanese authorities may also sell securities of offshore funds. Public offerings of such securities are primarily marketed to individual investors and small sized corporations but may also be purchased by larger corporations.

## 2. *Fund Types*

In terms of the types of fund being publicly offered in Japan traditionally domestic funds established in Japan have been structured as investment trusts. This investment trust structure would be similar to the unit trust structure (contractual-type fund) used in Ireland.

The primary historical reason for this preference, until recently, was the favourable tax treatment afforded to individual investors investing in such foreign contractual-type funds. Prior to 31 December, 2003, income from the sale of units in such foreign stock investment funds was not subject to tax. Recent changes to the taxation system have resulted in such gains now being subject to tax at a rate of 10% (due to increase to 20% from 1 January, 2008). The rate for dividends has been reduced from 20% to 10% until 31 March, 2008 (when it will revert to 20%).

Additional reasons why the contractual-type of fund is favoured for Japanese public offerings include such cases where in excess of 50% of a fund is owned by Japanese residents or in excess of 5% by a single Japanese institutional investor; in these cases the Japanese tax authorities may determine that such an investment, if in a corporate type fund, represents an equity shareholding in a tax haven company.

Similarly, the Japanese Foreign Exchange Law provides that the acquisition of 10% or more of a foreign company, including a corporate-type fund, by a Japanese resident requires prior notification to the MOF through the Bank of Japan. To avoid filing such notification, contractual type structures are used instead.

Whilst corporate-type funds are allowed by law to be offered publicly in Japan, their suitability will clearly depend on the investor profile in Japan and indeed in other jurisdictions where it is intended to market the product. Where it is not envisaged that any single Japanese investor may hold in excess of 10% of the fund's securities, there should not be any difficulty using the corporate structure.

Funds have also been established in Ireland, by Japanese promoters, for Japanese retail investors with "limited liquidity". These funds are typically closed-ended for repurchase for a period of time (usually 1-3 years), while continuous sales may be made during this period.

### 3. **Selection Rules**

As indicated above, the public sale of offshore funds into Japan is regulated by, amongst others, the Selection Rules. According to the Selection Rules:-

- ▣ a distributor may only sell securities in foreign investment funds where the distributor confirms that the issuer of these securities is established under the laws of a country or jurisdiction which has well established laws and regulations governing:
  - the establishment of such funds;
  - the disclosures to be made in respect of such securities; and
  - the supervisory requirements for the issuer of such securities
- ▣ the net assets of the fund after the initial offering must be at least JPY 100 million and those of the management company must be at least JPY 50 million
- ▣ the fund's financial statements must be audited by an independent auditor
- ▣ a bank or trust bank must be designated as custodian for the fund's assets
- ▣ a JSDA member company (usually the securities company which acts as the primary distributor in Japan) must be appointed as an agent member company in Japan to act as the agent of the management company to ensure compliance with JSDA rules and requirements
- ▣ a legal representative in Japan, usually the Japanese legal adviser to the fund, must be appointed and maintained within Japan to ensure Japanese jurisdiction over any related litigation and a clear provision must be made for the management company to submit to the Japanese courts in respect of any litigation regarding the units in the fund acquired by Japanese investors
- ▣ the value of securities sold short may not exceed the fund's net asset value
- ▣ borrowing must not exceed 10% of total assets (except temporarily in the event of a merger or similar event)
- ▣ where a restriction from investing more than 15% of the fund's assets in privately placed equity shares, unlisted shares and other assets without

liquidity is not imposed, measures must be taken to ensure the clarity of the price determination of the fund's non-liquid investments

- ▣ the total issued and outstanding shares in one company (excluding a securities investment company) held by the management company on behalf of the funds managed by it may not exceed 50% of the total issued and outstanding shares of such issuing company
- ▣ redemption or repurchase methods must be clearly prescribed in the country where the fund is established
- ▣ the management company, its affiliates, directors and holders of more than 10% of its issued and outstanding stock may not buy or sell the securities of the investment fund or grant or receive loans to or from it
- ▣ a fund may not enter a transaction that is not in accordance with proper management or is detrimental to the interests of the fund's investors
- ▣ changes to the composition of the board of directors of the management company must be subject to the approval of the supervisory body, the investors or the trustee
- ▣ adequate disclosure of the fund's investments must be made to the fund's investors and the supervisory body

No such restrictions except for jurisdictional requirements apply to offshore funds that are offered privately to Japanese investors.

Both a UCITS and a non-UCITS retail unit trust established in Ireland (further details contained in Part B, below) would fit well within the Japanese regulations in terms of exposure to a single issuer and leverage. The exposure with a single issuer and leverage in the case of a UCITS unit trust is obviously more restricted than what is permitted by the Japanese regulations whereas the Japanese regulations are slightly more restrictive than those applicable to a non-UCITS retail unit trust in terms of leverage.

#### **4. Public Offering in Japan**

Where an offering of securities to Japanese investors does not come within the scope of the private placement exceptions set out below, it will be deemed to be a public offering and subject to the various rules governing such offerings.

A public offering is the only method by which foreign investment fund securities can be distributed to the public in Japan in substantial quantities.

Typically, a new public offering is initiated by a foreign investment management company or a Japanese securities company (the "Promoter"). The Promoter selects the relevant service providers, such as the custodian / trustee, administrative agent, manager, investment manager and sub-investment adviser, etc. In selecting these parties the following points should be borne in mind:-

- (a) Neither the fund nor its management company may sell foreign investment fund securities directly in Japan. Only a securities company registered in Japan or a financial institution registered for handling investment fund securities may sell such securities and all contact with the JSDA is handled by that securities company. Typically, Japanese legal counsel will liaise with the MOF and Financial Services Agency ("FSA") on behalf of the fund. It is clear therefore that a non-Japanese Promoter must firstly appoint a securities company registered in Japan or a bank or an insurance company registered for handling investment fund securities as a "partner" in the project;
- (b) Distribution of foreign investments fund securities in Japan can only be made by registered securities companies, banks or insurance companies. In most cases, there is only one distributor in Japan for each fund, which is also the Agent Member Company. However, funds can, if required, be established with multiple distributors appointed by the fund.

One restriction imposed by the Investment Funds Law which is of particular importance is that not less than 50% of the net assets of a fund must be invested in "securities" as defined by the Securities and Exchange Law of Japan. Japanese counsel will advise on the suitability of proposed investments on a case-by-case basis and may, if necessary, consult with the FSA.

### Timetable

The time schedule of filings for a public offering in Japan is crucial and the Irish Financial Services Regulatory Authority (the "Financial Regulator") has demonstrated time and again that it is flexible enough to facilitate within reason the authorisation procedure of a fund in order to meet with the Japanese filing schedule.

The Promoter of the fund has to be approved by the Financial Regulator prior to the submission of the fund documentation. The Financial Regulator also seeks to approve the entity which will carry out the discretionary asset management, whether that be the investment manager or the investment advisor.

#### *Initial Filing Requirements in Japan*

##### *JSDA Filing*

The Agent Member Company is required to submit fund documents to the JSDA in order to confirm compliance with the Standards of Selection, together with Japanese translations of all relevant agreements for the establishment of the fund. The requisite documentation must be accompanied by a letter certifying compliance with the Standards of Selection.

The trust deed / memorandum and articles of association, investment management agreement, unit distribution and repurchase agreement and the agent member company agreement must be executed.

##### *FSA Filing*

The Investment Funds Law requires that a filing is made with the FSA. The filing must include a legal opinion from the legal advisers to the fund in the country of establishment and an incumbency certificate (together with full Japanese translation) together with the trust deed / memorandum and articles of association, various certificates and specific detailed information concerning the fund and the management company.



### *KLFB Filing*

As part of the disclosure procedures in Japan, a Securities Registration Statement ("SRS") must be filed with the Director-General of the Local Finance Bureau of the MOF ("KLFB").

The Japanese prospectus is essentially the same as Part I and Part II of the SRS. If an SRS is required, an agent resident in Japan must be appointed to represent the issuer. The SRS must be accompanied by copies of all material contracts and a legal opinion from the legal advisers to the fund in the country of establishment. All documents must be fully translated into Japanese.

The SRS must contain information on the securities being offered including the name and nature of the issuer, the purpose for which it was incorporated, its capitalisation and matters pertaining to the contribution of capital, the state of its operations, the financial condition and other material matters concerning the substance of its business. The contents of the SRS are specifically prescribed under Ordinance of the Cabinet Office. Accordingly, in addition to the Irish Prospectus there will be the SRS. The Financial Regulator does not review the SRS and will rely on a confirmation from the funds legal adviser that the SRS complies with the relevant regulations.

The SRS becomes effective after expiration of a full 15 day waiting period following the filing of the SRS with KLFB. In the case of the filing of an amendment to the SRS, this waiting period will restart from the date of filing of an amendment but this waiting period for the amendment may be shortened to 3/5 days so that the original fifteen days waiting period will not change but this treatment is applied only if such amendment is filed on the fourth business day before the lapse of such original waiting period. During this waiting period, the Distributors can conduct marketing activities using the preliminary Prospectus, but they can only accept subscription orders from the investors based on the final Prospectus during the offering period after the SRS becomes effective after the waiting period. After the filing of the SRS and before the expiration of the full 15 day waiting period referred to above, an amendment to the SRS may be filed to reflect changes made pursuant to comments received from the Financial Regulator. If this is filed more than three business days prior to the proposed effective date, this will not cause any delay in the launch of the fund. The execution of a Unit Distribution and Repurchase Agreement or amendment to the Trust Deed will require the filing of such an amendment.

*Sample Timeframe for Filings*

<u>Date</u>	<u>Description of Filing</u>	<u>Documents to be filed</u>
T – 17	JSDA	filing a letter certifying compliance with the Standards of Selection; executed versions of the following: trust deed / memorandum and articles of association, investment management agreement; unit distribution and repurchase agreement, minutes of the meeting of the board of directors of the management company, a letter of appointment of legal representatives, a certificate of net assets of the management company and the agent securities company agreement and all Japanese translations.
T – 16	KLFB filing	SRS, copies of all material contracts and a legal opinion and all Japanese translations
T-4	KLFB amendment filing	any amendment to the SRS as a result of the Financial Regulator’s comments
T – 1	FSA filing	legal opinion and incumbency certificate (together with full Japanese translation) together with the executed versions of trust deed and all material contracts and letter of approval from the Financial Regulator.

Initial Offer Period commences

### *Ongoing Disclosure Requirements in Japan*

#### **1. *KLFB Filings***

Annual and semi-annual reports must be filed with KLFB in the forms prescribed in the Cabinet Office Ordinance as long as the Japanese investors remain in the fund. In addition, extraordinary reports must be filed where important changes are made to the fund.

#### **2. *FSA Filings***

The fund must submit to the Commissioner of the FSA, as well as to all Japanese investors, an annual investment management report on the fund's assets. The contents of such a report are specifically prescribed.

In the case of amendment of the fund's trust deed, prior notification must be made to the Commissioner of the FSA. In the case of a material amendment to the fund's trust deed, one month's prior notification is required to be made to unitholders through the distributor.

#### **5. *Private Placement in Japan***

There are several ways to place units with Japanese investors without being deemed to have made a public offering. In the case of such private placements, the KLFB filing requirements (outlined above) do not apply, nor do the JSDA Selection Rules. It is important to note that FSA filing is in the same form as with a public offering and, in case of a private placement to limited numbers (less than 50), a KLFB filing of a Securities Notice is required.

##### *Private Placement to Professionals*

A sale restricted to qualified institutional investors ("QIIs") will not be deemed a public offering. The amount of QIIs solicited is unlimited. Such a Private Placement to Professionals ("PPP") requires that the fund's unit certificates should clearly state that they are restricted from being transferred to non-QIIs and the fund's prospectus should also prohibit transfers to non-QIIs.

### *Limited Numbers*

Where the solicitation is made to less than 50 persons (non-QII) and the securities are not offered so as to facilitate resale to multiple parties, such a placement will be considered private. This is subject to trustee approval being required for transfers and provision in the trust deed for such approval to be withheld if the result of such transfer would be the solicitation of more than 50 investors. The fund may not be listed on a recognised exchange.

### *QII Exclusion*

A private placement to limited numbers can include up to 250 QIIs in addition to the limit of 49 non-QIIs in the case of a new offering. In such circumstances, any QII investor must be prohibited from transferring its interest to a non-QII investor.

### *Previously Issued Securities*

In the case of previously issued securities (i.e. securities issued to an investor already), these securities can be solicited, at the same price, to less than 50 investors without a filing being required. If the price of such securities has changed the limitation of the offering to 49 investors will not include those offered the securities at the previous price.

## Irish Fund Structures/Features

The Central Bank and Financial Services Authority of Ireland Act 2003 (the "Act") came into effect on 22 April, 2003 and significantly revised the financial services industry in Ireland.

The Act established a new body, the Financial Regulator, which was launched on 1 May, 2003. The Financial Regulator carries out functions previously held by the Central Bank of Ireland, the Department of Enterprise, Trade and Employment, the Office of the Director of Consumer Affairs and the Registrar of Friendly Societies.

### **1. UCITS**

Because of the necessity to comply with the common European standard (the UCITS III Product Directive and the UCITS III Management Company Directive), UCITS are the most highly regulated vehicles which can be established in Ireland. UCITS

operate on the basis of their availability to the "man in the street" and their investment and borrowing restrictions are generally not negotiable.

Investments of a UCITS are confined to transferable securities and money market instruments which are either admitted to official listing on a stock exchange in a Member State or non-Member State or which are dealt on a regulated market, recently issued transferable securities which will be admitted to a regulated market within a year, money market instruments other than those dealt on a regulated market, units of other collective investment schemes, deposits with credit institutions, and financial derivative instruments.

Borrowings are restricted to 10% of the net asset value of the UCITS and may only be made on a temporary basis.

Unit trusts and variable or fixed capital investment companies may be set up as UCITS.

### 1.1 *Money Market Funds*

UCITS funds may invest in money market instruments provided such instruments are admitted to or dealt with on a regulated market or, if not, that the specific conditions laid down in Article 19.1 (h) of the Products Directive are met and that the investment does not exceed a maximum of 10% of the fund's assets in money market instruments issued by the same issuer.

### 1.2 *Index Tracking Funds*

UCITS funds may be established as index tracking funds. The following conditions apply however:-

- ▣ the index must be recognised by the competent authorities;
- ▣ the index is sufficiently diversified and represented in appropriate bench-mark;
- ▣ the index is published;
- ▣ no position in a single issuer exceeds a maximum of 20% of the fund's assets (although exceptionally EU Member States may allow an upper limit of 35%).

### 1.3 *Financial Derivative Instruments*

A UCITS may invest in financial derivative instruments ("FDI") provided that:

- ▣ the relevant reference items or indices, consist of one or more of the following: transferable securities, money market instruments, collective investment schemes, deposits, financial indices, interest rates, foreign exchange rates or currencies; and
- ▣ the FDI do not expose the UCITS to risks which it could not otherwise assume (e.g. gain exposure to an instrument / issuer / currency to which the UCITS cannot have a direct exposure); and
- ▣ the FDI do not cause the UCITS to diverge from its investment objectives.

FDI must be dealt in on a market which is regulated, operating regularly, recognised and open to the public in a Member State or non-Member State.

A UCITS may invest in FDI dealt in over-the-counter ("OTC") provided that:

- ▣ the counterparty is a credit institution approved of by the Financial Regulator, or an investment firm, authorized in accordance with the Investment Services Directive, in an EEA Member State;
- ▣ In the case of a counterparty which is not a credit institution, the counterparty has a minimum credit rating of A2 or equivalent, or is deemed by the UCITS to have an implied rating of A2. Alternatively, an unrated counterparty will be acceptable where the UCITS is indemnified against losses suffered as a result of a failure by the counterparty, by an entity which has and maintains a rating of A2;
- ▣ risk exposure to the counterparty does not exceed certain limits set out by the Financial Regulator;
- ▣ the UCITS is satisfied that the counterparty will value the transaction as necessary and will close out the transaction at any time at the request of the UCITS at fair value; and

- ▣ the UCITS must subject its OTC derivatives to reliable and verifiable valuation on a daily basis and ensure that it has appropriate systems, controls and processes in place to achieve this

A UCITS must ensure that its global exposure relating to FDI does not exceed its total net asset value. Global exposure is calculated taking into account the current value of the underlying assets, the counterparty risk, future market movements and the time available to liquidate the positions. A UCITS may not therefore be leveraged in excess of 100% of net asset value.

A transaction in FDI which gives rise, or may give rise, to a future commitment on behalf of a UCITS must be covered.

#### 1.4 *Cash Funds*

- (a) UCITS may invest in cash funds provided that such deposits are repayable upon demand or have the right to be withdrawn;
- (b) are maturing in no more than 12 months;
- (c) do not consist of more than 20% of the fund's assets to be held with the one single credit institution.

The above are in addition to the existing UCITS type funds that may be created under the current UCITS regime.

## Non-UCITS Structures

### 1. **Regulatory Categories**

Each of the non-UCITS fund types can be broken down into five sub-categories depending on the type of investor being targeted:

- the retail investor
- the professional investor
- the qualifying investor (institutional / high net worth)
- the private investor, and
- the collective investor

It is this breakdown which is at the centre of any consideration of regulatory parameters, and is the yardstick which the Financial Regulator uses to gauge the correct level of investment and borrowing restrictions to apply to fund products.

What the Financial Regulator has done is issue a series of notices which set out, *inter alia*, the investment and borrowing restrictions applicable to all fund types, assuming a lowest common denominator. It's then up to the Promoter to take advantage of the Financial Regulator's additional notices which disapply, either in full or to a given extent, those standard restrictions.

The unit trust, the designated and non-designated variable capital investment company and the limited partnership may all be set up as non-UCITS. Once the legal structure has been decided, investor profile will then dictate the regulatory parameters of the scheme as non-UCITS schemes are broken down as follows according to the target investor market:-

(a) *Retail Scheme*

If a fund has no minimum subscription or, if it imposes a minimum subscription of less than Euro 125,000, it will be considered to be a retail scheme. This type of fund is regularly used where the principal target market is retail investors outside the EU although it can of course be used within the EU but will not benefit from any European UCITS passport.

Even though its investment and borrowing restrictions are quite stringent (quite similar to UCITS), it is a very popular vehicle. A retail scheme's investment restrictions prohibit it from investing more than 10% of its NAV in securities which are not listed or traded on an approved market, more than 10% of NAV in the securities of any one issuer, no more than 10% of its NAV in any class of security issued by a single issuer and borrowings cannot exceed 25% of NAV.

(b) *Professional Scheme*

If a minimum subscription requirement of at least Euro 125,000 per investor is imposed, a fund will be considered to be a professional scheme. That means that the standard investment and borrowing restrictions mentioned at (a) can be disapplied to the extent agreed with the Financial Regulator.



Currently the Financial Regulator will allow investment in listed and unlisted securities subject to a general maximum of 20% of NAV in any one issuer. However, it is a case by case approach.

Once appropriate security is put in place a professional scheme can be leveraged to about 1:1 and its debt securities can be listed on the Irish Stock Exchange if guaranteed or virtually guaranteed.

(c) *Qualifying Investor Scheme*

To qualify as a Qualifying Investor Scheme, a scheme must:

- (i) impose a minimum subscription requirement of Euro 250,000 per investor;
- (ii) be marketed solely to the following qualifying investors:
  - (a) any institution which owns or invests on a discretionary basis at least Euro 25 million or;
  - (b) any individual with a minimum net worth in excess of Euro 1.25 million.

As is also the case for professional investor schemes, there are some limited exceptions to these criteria where the investor is the management company, general partner, provides investment management / advice or is a qualifying director or employee or one of those entities. Institutions may not group amounts of less than Euro 250,000 for individual investors unless pursuant to a fully discretionary investment mandate. Qualifying investors must self certify that they meet these minimum criteria, that they are aware of the risk involved in the proposed investment and of the fact that, inherent in such investments, is the potential to lose all of the sum invested.

This structure gives Promoters the opportunity to use Irish vehicles for a complete range of fund types depending on the requirements of their targeted investors. The Financial Regulator disapplies its general investment restrictions and borrowing limits for qualifying investor schemes. This type of fund also enjoys a similar derogation from the Irish Stock Exchange

requirements where again in virtually all cases the Irish Stock Exchange disappplies its investment restrictions.

The Financial Regulator has recently modified the basis on which it approves qualifying investor funds and these type of funds are now authorised by the Financial Regulator on a filing only basis. There is no longer any need for a prior review or approval of qualifying investor scheme fund documentation by the Financial Regulator. A qualifying investor scheme meeting the pre-agreed parameters can file for authorisation on Day X and authorization will issue on Day X+1.

(d) *Non-Designated Scheme*

Non-designated funds are only available as variable capital investment companies and may not be marketed to the public. They are private placement vehicles only.

There are no investment or borrowing restrictions stated in the single applicable Financial Regulator notice on non-designated funds so that, provided one is willing to observe the over-riding principle of risk spreading, the Financial Regulator may accept reasonably high levels of investment i.e. 40/50% of net asset value in one issuer. Leverage as high as 4:1-10:1 has been allowed in the past. The principal drawback with non-designated funds is that (except collective investor schemes) they are subject to Irish corporation tax at a rate of 10% / 12.5% on income / capital gains.

(e) *Collective Investor Schemes*

Insurance or pension industry promoters and discretionary investment managers may be interested in the collective investor concept introduced by the Finance Act, 1995.

The reasons why one may be interested in this type of fund are that:

- (i) it is tax exempt
- (ii) it does not have to be sold publicly
- (iii) if it is set it up as an investment company, it can be *non-*

*designated* which means that there are no minimum subscription requirements and no investment or borrowing restrictions.

To qualify, the investor or investors must be "collective investors", which are life assurance companies, pension funds or other investors:-

- (a) who invest in securities or any other property whatsoever with moneys contributed by fifty or more persons:
  - none of whom has at any time, directly or indirectly, contributed more than 5% of such moneys; and
  - each or a majority of whom has contributed moneys to the investor with the intention of being entitled, otherwise than on the death of any person or by reference to a risk of any kind to any person or property, to receive from the investor –
    - (i) a payment which, or
    - (ii) payments, the aggregate of which exceeds those moneys by a part of the profits or income arising to the investor; and
- (b) who invest in the investment company primarily for the benefit of those persons.

We would point out that, due to the perceived difficulty in meeting the qualifying criteria for "collective investors", this type of scheme has not yet been used widely.

## 2. Fund Types – Non-UCITS

Outlined below are some of the available non-UCITS type schemes.

### 2.1 *Feeder Funds / Fund of Funds*

- feeds into either another single collective investment scheme (feeder fund) or several such schemes (fund of funds)
- the collective investment scheme into which a feeder fund feeds may be established in Ireland or in another jurisdiction where, for example, there are foreign ownership restrictions in the other jurisdiction which can be overcome by investing through a local scheme
- retail funds of hedge funds available without any minimum subscription requirements
- significant fund of funds flexibility

### 2.2 *Money Market Funds*

- amortised cost valuation
- can be rated / listed
- distributing / accumulating shares
- vehicle for collateral off stock lending programmes

### 2.3 *Private Equity Funds*

- closed ended capacity
- EVCA valuation methodology partly paid units/shares
- drawdowns
- co-investment
- carried interest/waterfalls

### 2.4 *Venture Capital Funds*

- closed ended capacity
- the manager may take legal or management control over the targeted venture capital investment in order to protect its interest

- partly-paid units / shares
- carried interest / waterfalls

### 2.5 *Hedge Funds*

- fluctuating high exposures to individual issuers or instruments or combining high exposures with high leverage or using arbitrage techniques generally sold to either professional or qualifying investors full range of prime brokers
- retail fund of hedge funds

### 2.6 *Real Estate Funds*

- increasingly popular in the UK and Italy.
- independent valuation etc.
- development potential
- trustee liability issues
- features common to venture capital/private equity schemes

### 2.7 *Emerging Market Funds*

- have formed quite a significant proportion of the funds launched out of Ireland to date.
- Brazil, Mexico, the Philippines, Korea, Taiwan, China, Thailand are examples of the emerging markets involved.
- renewed interest in Eastern Europe and Russia and the other former states of the USSR for professional or qualifying investors.
- some retail funds taking positions through sub-funds, albeit minor ones, in the Russian market.

### 2.8 *Capital Protected or Guaranteed Funds*

- very popular for sale into many different jurisdictions, in particular the UK and continental Europe.
- 90% / 95% of the fund is typically invested in a spread of international sovereign bonds (or highly rated corporate bonds) with the interest thereon taken.
- together with the remaining 5% / 10% of the fund being invested in derivatives to gain an exposure to a given equities index.

- capital protection is gained through investing in the highly rated (and generally short-term maturity) bonds.
- exposure to the equities market is gained through the future or option, with the downside being eliminated.
- Guaranteed funds are slightly different in that they involve an actual third-party bank guarantee being put in place guaranteeing that the NAV per Unit will be a particular figure on a given dealing day.

### 2.9 *Single Country or Regional Funds*

- 100 plus Korean focused funds have been launched out of Dublin's International Financial Services Centre to date. focus on equities, bonds, venture capital, small-cap, industry focus etc. other popular single country funds have been Russian funds, Czech funds, Philippine funds, Taiwan funds.
- popular regional funds have been Asia Pacific, Central European or Middle Eastern funds.

### 2.10 *Additional/Hybrid Funds*

There are many other types of fund products that can be launched from Ireland including futures and options funds, closed-ended funds etc. Hybrids can also be launched provided that relevant investment restrictions apply pro-rata.

## Taxation

### 1. *Direct Taxes and Withholding Taxes*

Funds domiciled in Ireland are not subject to Irish income or capital gains tax on income and gains arising on a fund's investments. In addition, there are no Irish withholding taxes on distributions to investors provided they correctly declare that they are not tax resident in Ireland.

### 2. *Stamp Duty*

No stamp duty is payable in Ireland on the issue, transfer, repurchase or redemption of units / shares in a fund. Where any subscription for or redemption of units / shares is satisfied by the in-specie transfer of securities, property or other types of assets, Irish stamp duty may arise on the transfer of such assets.

## Summary

So, from the above, one can see that from Ireland one can target a wide spectrum of retail, professional and institutional investors using one or more different structures giving great flexibility within a regulated environment. In particular, it offers a suitable domicile for funds targeted at the Japanese retail market.

**Date:** September, 2007

**Author:** Brian Dillon

 CONTACT US

## Our Offices

**Dublin**

33 Sir John Rogerson's Quay,  
Dublin 2,  
Ireland.  
Tel: +353 1 667 0022  
Fax.: +353 1 667 0042

**Cork**

8 Webworks Cork,  
Eglinton Street,  
Cork, Ireland.  
Tel: +353 21 425 0630  
Fax: +353 21 425 0632

**Boston**

26th Floor,  
225 Franklin Street,  
Boston, MA 02110,  
United States of America.  
Tel: +1 617 217 2866  
Fax: +1 617 217 2566

**New York**

245 Park Avenue  
39<sup>th</sup> Floor  
New York, NY 10167  
United States  
Tel: +1 212 792 4166  
Fax: +1 212 792 4167

**Tokyo**

12th Floor,  
Yurakucho Itocia Building  
2-7-1 Yurakucho, Chiyoda-ku  
Tokyo 100-0006, Japan  
Tel: +813 6860 4885  
Fax: +813 6860 4501

e-mail: [enquiries@dilloneustace.ie](mailto:enquiries@dilloneustace.ie)  
website: [www.dilloneustace.ie](http://www.dilloneustace.ie)

## Contact Points

*For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.*

**Brian Dillon**

**e-mail: [brian.dillon@dilloneustace.ie](mailto:brian.dillon@dilloneustace.ie)**  
**Tel : +353 1 667 0022**  
**Fax: + 353 1 667 0042**

## DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

## Copyright Notice:

© 2008 Dillon Eustace. All rights reserved.



DILLON  EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO

33 Sir John Rogerson's Quay, Dublin 2, Ireland.  
[www.dilloneustace.ie](http://www.dilloneustace.ie)

In alliance with Arendt & Medernach