

Funds

An Alternative to
NRDs

Equivalent Measures

DILLON  EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO

Contents

Funds – An Alternative to NRDs Equivalent Measures

Introduction

Page 3

Appropriate Equivalent Measures

Page 3

Appendix

Page 6

Contact Us

Page 9

EQUIVALENT MEASURES

Introduction

Prior to the enactment of the Finance Act 2010, Irish regulated funds were required to deduct exit tax when making a payment to an investor unless the funds were in possession of a declaration by the investor to the effect that the investor is either not resident or ordinarily resident in Ireland for tax purposes (non-resident declarations or “NRDs”) or is an exempt Irish investor. However as the vast majority of Irish domiciled funds in the international funds sector are distributed solely to non-Irish residents, it was considered that those requirements presented a disproportionate administrative burden on industry. Consequently the Finance Act 2010 introduced new measures that permit the above exemption in respect of non-resident investors to apply where appropriate equivalent measures are put in place by the fund to ensure that the investor is not resident in Ireland.

As the requirement for Irish funds to include the NRD was seen as administratively burdensome, the application and introduction of the waiver is a welcome development and follows extensive engagement with the Department of Finance and Revenue Commissioners by the Irish Funds Industry Association Tax Working Group (of which David Lawless and Sean Murray are both members) and Transfer Agency Committee.

Appropriate Equivalent Measures

The Revenue Commissioners have now provided details of how to apply for the waiver and the relevant “equivalent measures” which are attached for your attention.

New & Existing Funds – Customary Measures

Under the “equivalent measures” a fund seeking the non-resident declaration waiver, while acknowledging that a fund may not prohibit Irish residents from subscribing, would undertake not to actively promote units/shares for sale in Ireland. If the fund were to receive an application from an investor who provides an Irish address or bank account for any purpose, the fund would be required to treat that investor as Irish resident for tax purposes unless the investor provides a signed non-resident declaration. Each fund applying the waiver must also include wording in the terms and conditions of its application form outlining the obligation of each investor to notify the fund if they become Irish resident. The fund would also agree to comply with all its obligations in accordance with the provisions and practices of Irish tax law, including its obligations in respect of identifying Irish resident investors.

Set out in the Appendix are the “equivalent measures” (NRD waiver equivalent measures final doc) which are included as an appendix, Appendix I(c), in the Investment Undertakings

Guidelines (i.e. regulated fund guidelines) updated recently by the Irish Revenue Commissioners.

Existing Funds – Additional Measures

With regard to existing funds, Revenue has confirmed the following additional measures:-

- i) In conjunction with making the standard equivalent measures undertakings (as per A) above) in a letter of application, the fund also undertakes to provide Revenue, immediately following the changeover date, with a report of the status of the fund setting out:
 - a) the NAV of the Fund at the chosen cut-off date
 - b) the numbers of shares/units subscribed for at that date;
 - c) breaking a) and b) down into the various categories (i.e. those covered by NRDs, taxable Irish residents, etc); and
- ii) On receipt of approval from Revenue the fund will select the changeover date and the fund will advise this date to Revenue when providing the report provided for at i) above.

The fund will therefore be free to choose a changeover date that suits it once initial approval has issued.

Funds Re-domiciling to Ireland

With regard to funds re-domiciling to Ireland, Revenue has confirmed that funds re-domiciling to Ireland may apply for Revenue approval to adopt appropriate equivalent measures (rather than operate NRDs). In respect of existing investors in the investment fund at the time of re-domiciling to Ireland, the investment fund may make a simple declaration within 30 days from the date the investment fund re-domiciles to Ireland stating that to the best of its knowledge and belief that at the time of the re-domicile it has no Irish resident investors (other than such investors whose name and addresses are set out on the schedule to the declaration). Alternatively investment funds may be able to obtain NRDs from existing investors at the time of the re-domicile.

Application

Any fund wishing to receive such approval should apply in writing to the Office of the Revenue Commissioners, Financial Services (Insurance & Investment Funds Unit), Setanta Centre, Nassau Street, Dublin 2, confirming compliance with the conditions set out in the Appendix I(c). For the avoidance of doubt, there is **no** requirement to submit the funds

application (subscription) form in the initial application (although obviously the Revenue Commissioners can request if they so wish).

Appendix

Non-Resident Declarations and Intermediary Declarations - Equivalent Measures

In order to obtain written notice of approval from the Revenue Commissioners to the effect that subsection (7) or (9) of section 739D of the Taxes Consolidation Act 1997 is deemed to be complied with as respects any unit holder or class of unit holders, an investment undertaking is required to confirm each of the following matters to a nominated officer of the Revenue Commissioners¹:

1. The investment undertaking will verify an investor's identity by complying with applicable anti money laundering procedures.
2. While an investment undertaking cannot prohibit Irish residents from subscribing for units, the investment undertaking will not actively promote the units concerned to Irish investors or in Ireland nor will it actively distribute in Ireland any offering material in connection with such units (an unresolved issue for the moment is whether funds will be permitted to actively promote/distribute to Exempt Irish Investors, such as Irish charities, pension funds etc).
3. Every time an investor makes an initial application to subscribe for units in the investment undertaking (a) in its capacity as an investor on its own behalf or (b) in its capacity as intermediary, that application is required to be made by way of completion of an Application Form that must contain an address for the proposed investor that will be entered on the unit holder register of the investment undertaking (for this purpose the "Registered Address"). An investor may provide an additional address on the Application Form for other purposes, e.g. correspondence. If the investment undertaking receives an Application Form from an investor who provides a Registered Address that is Irish or an Irish address for any purpose, the investment undertaking will for Irish tax purposes treat that investor as if that investor were Irish resident, unless that investor provides the investment undertaking with a signed non-resident declaration or intermediary declaration, as the case may be, in the prescribed form and the investment undertaking is not in possession of any information which would reasonably suggest that the information contained in that declaration is not, or is no longer, materially correct.

Each Application Form must contain terms and conditions which will include language to the effect that: *"Every applicant applying for units on the applicant's own behalf is hereby obliged to notify the Investment Undertaking or an agent of the Investment*

¹ Each reference to units and unit holders in this document is to be construed in accordance with Section 739B(1) TCA 1997 so that references to units and unit holders include *inter alia* references to shares and shareholders. In particular, the language to be included in Applications Forms, as set out in paragraphs 3 and 5 of this document should refer to units or shares as appropriate.

Undertaking appointed for this purpose, as the case may be, in writing if the applicant is or becomes resident or ordinarily resident in Ireland. An individual is ordinarily resident in Ireland if the individual has been resident in Ireland for each of the 3 preceding years of assessment (i.e. calendar years) and that individual continues to be ordinarily resident in Ireland until the individual has not been resident in Ireland in each of the 3 preceding years of assessment.”

4. Every investor is required to provide details of one or more bank accounts into which payments to that investor may be made. If an investor provides details of any Irish situate bank account, the investment undertaking will for Irish tax purposes treat that investor as if that investor were Irish resident, unless that investor provides the investment undertaking with a signed non-resident declaration or intermediary declaration, as the case may be, in the prescribed form and the investment undertaking is not in possession of any information which would reasonably suggest that the information contained in that declaration is not, or is no longer, materially correct.
5. Each intermediary with respect to the holding of units in the investment undertaking, is obliged from the time of completion of an Application Form, as a matter of contract, to notify in writing the investment undertaking or the administrator of the investment undertaking, as the case may be, if it is, or becomes, aware that a person who is beneficially entitled to any units issued by the investment undertaking to that intermediary may be resident or ordinarily resident in Ireland or may have become resident in Ireland. Where an intermediary makes such a notification, the investment undertaking will for Irish tax purposes treat the relevant investor as if that investor were Irish resident, unless that investor provides the investment undertaking with a signed non-resident declaration in the prescribed form and the investment undertaking is not in possession of any information which would reasonably suggest that the information contained in that declaration is not, or is no longer, materially correct.

Each Application Form must contain terms and conditions which will include language to the effect that: *“Every applicant applying for units on behalf of another person is hereby obliged to notify in writing the Investment Undertaking or an agent of the Investment Undertaking appointed for this purpose, as the case may be, if the applicant is, or becomes, aware that any person who is beneficially entitled to any of those units may be resident or ordinarily resident in Ireland or may have become resident in Ireland. An individual is ordinarily resident in Ireland if the individual has been resident in Ireland for each of the 3 preceding years of assessment (i.e. calendar years) and that individual continues to be ordinarily resident in Ireland until the individual has not been resident in Ireland in each of the 3 preceding years of assessment.”*

6. The investment undertaking will comply fully with all of its obligations in accordance with the provisions of Irish tax law and Revenue practice, including but not limited to, its

obligations in respect of all Irish resident or ordinarily resident investors; persons treated as Irish resident investors pursuant to each of 3, 4 and 5 above; and each unit holder in respect of whom it is in possession of any information which could reasonably suggest that the unit holder is resident or ordinarily resident in Ireland.

CONTACT US

Our Offices

Dublin

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

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
39th 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

website: www.dilloneustace.ie

Contact Points

Date: September 2010

Authors: David Lawless & Sean
Murray

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.

David Lawless

e-mail: david.lawless@dilloneustace.ie

Tel : +353 1 667 0022

Fax: + 353 1 667 0042

Sean Murray

e-mail: sean.murray@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:

© 2010 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

In alliance with Arendt & Medernach