Funds Quarterly Legal and Regulatory Update

Period covered:
1 January 2013 to 31 March 2013

DILLON EUSTACE

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FUNDS QUARTERLY LEGAL AND REGULATORY UPDATE

UCITS, Non-UCITS & Hedge Funds

(i) SMICS UCITS- *Outstanding Requirements – 1 July 2013 deadline*

In 2011 UCITS self-managed investment companies ("SMICs") went through the exercise of updating SMIC Business Plans in order to ensure compliance by SMICs with the relevant requirements of the Directive by 1 July, 2011. By way of reminder, aside from certain organisational requirements, only certain Chapters of the Commission Directive 2010/43/EU (the "Directive") were required to be implemented by the 1 July, 2011 deadline, as set out below:

- Chapter II of the Directive: Article 6 (Complaints Handling) and Article 12 (Permanent Risk Management Function) only;
- Chapter III of the Directive (Conflicts of Interest);
- Chapter IV of the Directive (Rules of Conduct); and
- Chapter VI of the Directive (Risk Management).

While SMIC Business Plans and Risk Management Documents were required to be updated in 2011 to reflect the above requirements it was not necessary at the time to file the SMIC Business Plans with the Central Bank for prior review.

SMICs are required to comply with the relevant outstanding provisions of the Directive by the transitional date of 1 July, 2013. Accordingly, all Business Plans will need to be revised by that date.

The Central Bank clarified in its letter of 10 August 2012 that UCITS SMICs will be subject to the same basic regime as UCITS management companies. Accordingly, the outstanding sections of Chapter II of the Directive (which were not adopted in 2011) will apply to all SMICs from 1 July, 2013 with the exception of the following provisions:

- Article 10 of Chapter II of the Directive (Permanent Compliance Function); and
- Article 11 of Chapter II of the Directive (Permanent Internal Audit Function).

Chapter II of the Directive is headed "Administrative Resources and Control Mechanism". It covers a range of matters relating to the administration and control of UCITS to include requirements in relation to organisation, resourcing, accounting/recording procedures and record keeping.

In summary, the following sections of Chapter II of the Directive (as mirrored in the relevant paragraphs of UCITS 2 set out below) will apply to SMICs from 1 July, 2013:

Chapter II of Directive	UCITS 2	Heading
Article 4	Paragraphs 8, 14- 20 (i) and 21	General requirements on procedures and organization
Article 5	Paragraphs 23 (ii), 24 and 25	Resources
Article 7	Paragraphs 39 and 40	Electronic data processing
Article 8	Paragraphs 34 to 36	Accounting procedures
Article 9 (other than Article 9 (2) (c))	Paragraph 4 to 7 excluding paragraph 4 (iii)	Control by senior management and supervisory function
Article 13	Paragraphs 55 to 58	Personal transactions
Article 14	Paragraph 37	Recording of portfolio transactions
Article 15	Paragraph 38	Recording of subscription and redemption orders
Article 16 (other than the second paragraph of Article 16 (2))	Paragraphs 41, 42, 44 and 45	Recordkeeping requirements

The UCITS Notices were amended by the Central Bank on 15 February 2013. See section (ii) below for more detail.

Guidance Note 4/07: UCITS - Organisation of Management Companies

The Central Bank previously clarified that the relevant provisions of the following paragraphs of Section B of Guidance Note 4/07 will also be applicable to SMICs from 1 July, 2013:

- Paragraph 10: Organisational Requirements
- Paragraph 11: Resources
- Paragraph 12: Accounting Procedures

The above mentioned paragraphs flesh out the requirements in relation to the relevant provisions of UCITS 2 set out above.

Nature Scale and Complexity

While UCITS SMICs will be subject to the same basic regime as management companies, the Central Bank has stated that "….the requirements in relation to SMICs can be considered in light of the less complex nature of a SMIC. This means that for the most part while the same requirements will apply to SMICs and UCITS management companies, the steps to be taken to ensure compliance will differ for SMICs given their less complex nature." By way of interpretation of the foregoing, the Central Bank has clarified that SMICs should seek to apply the nature, scale and complexity concept to those requirements which are perceived as not readily falling within the remit of a SMIC's business model.

Collective Responsibility

Certain SMICs use "collective responsibility" to monitor and control the managerial functions set out in paragraph 10 of UCITS 2. With the exception of "Decision Taking", the "collective responsibility model" will no longer be permitted for SMICs from 1 July, 2013. Therefore, any SMICs currently using such a model will need to put in place alternative arrangements.

Filing Requirements

All UCITS SMICs must have Business Plans in place by 1 July 2013 which are compliant with the UCITS IV regime as specified by the Central Bank's letter of 10 August 2012. To facilitate the smooth and timely management of submissions, the Central Bank proposes to accept SMIC submissions in 3 tranches, namely end-January 2013, end-March 2013 and end-May 2013.

The Central Bank will neither review all submissions nor issue letters confirming UCITS IV compliance. However, they will carry out a spot checking exercise to get a feel for the level and extent of compliance. Comments may subsequently arise as a result of this process.

Policies and Procedures

SMICs will also be required to put in place certain new policies and procedures to satisfy the above additional UCITS IV requirements.

Side Letters

Finally, SMICs will also need to consider what amendments to existing contracts with its service providers will be necessary to capture the additional requirements above. This will depend on what existing Agreements/Side Letters are in place with such entities. In this regard, it is likely that SMICs

may already have put in place Side Letters with its delegates following the UCITS IV update in July, 2011.

(ii) Revised UCITS Notices and related Guidance Notes 2/07, 3/03, and 4/07

On 15 February 2013, the Central Bank published amended UCITS Notices and revised Guidance Notes in order to implement the ESMA Guidelines on ETFs and other UCITS issues (the "ESMA Guidelines"). These ESMA Guidelines came into effect on 18 February 2013 (subject to certain transitional arrangements) and are reflected through the updated UCITS Notices and Guidance Notes 2/07, 3/03 and 4/07. On 28 March 2013, the Central Bank amended these revised Notices to rectify two errors that had been identified since February.

Summary of the main amendments:

- ***UCITS 2 and Guidance Note 4/07*** *(Supervisory and reporting requirements and conditions for UCITS management companies, UCITS self-managed investment companies and administration companies authorised by the Central Bank)*

This Notice has been amended to apply a more extensive range of organisational requirements to SMICs from 1 July 2013 namely the provisions of paragraphs 4 (excluding 4(iii)), 5-8, 14-20(i), 21, 23(ii), 24, 25, 34-42, 44, 45 and 55-58 of this Notice. References to "management company" should be taken to refer to self-managed investment company. Section C of Guidance Note 4/07 has been amended accordingly to reflect these changes.

- ***UCITS 6*** *(Prospectus)*

This Notice sets out new prospectus disclosure requirements for UCITS funds which employ efficient portfolio management techniques. It will now be necessary to include detailed information in relation to such techniques to include information on the impact of such techniques on the fund's performance. This revised Notice requires a UCITS fund to disclose more detailed information on its collateral management policy. There are also new specific disclosure requirements for Index-Tracking Funds and Index-Tracking Leveraged Funds.

- ***UCITS 8*** *(Publication of annual and half yearly reports)*

This updated Notice requires additional disclosure in relation to financial derivative instruments and efficient portfolio management techniques in the financial statements and in the case of an index-tracking UCITS, the size and tracking error at the end of the period under review must be disclosed.

- ***UCITS 10*** *(Financial derivative instruments) and* ***Guidance Note 3/03***

This Notice and Guidance Note have been revised to apply consistent criteria in relation to collateral in line with ESMA Guidelines. The Notice provides that where a UCITS fund enters into a total return swap then the assets held by that fund must comply with the investment limits which are prescribed in the UCITS Regulations. It should be noted that on 28 March 2013, the Central Bank amended Notice UCITS 10, paragraph 22 to include a reference to "leveraged" so that the amendments to this paragraph are also applied to leveraged index tracking UCITS.

- ***UCITS 12*** *– (Techniques and instruments, including repurchase/reverse repurchase agreements and securities lending for the purposes of efficient portfolio management)*

This Notice has been revised comprehensively, especially in relation to collateral. It requires that the use of efficient portfolio management techniques must be in the best interests of the UCITS fund. It should be noted that on 28 March 2013, the Central Bank amended UCITS Notice 12, paragraph 14 to include a paragraph that re-instates eligibility criteria for counterparties to repurchase/reverse repurchase and securities lending agreements which were omitted in error in February. Subsequent paragraphs are re-numbered.

- ***UCITS 19*** *– (Key Investor information document ("KIID"))*

This Notice has been revised to apply specific KIID disclosure requirements to index tracking UCITS and index tracking leveraged UCITS.

- ***UCITS 20*** *– (Exchange Traded Funds)*

This is a new Notice on Exchange Traded Funds to reflect the provisions in the ESMA Guidelines.

- ***UCITS 21*** *– (Financial Indices)*

This is also a new Notice on financial indices to reflect the provisions in the ESMA Guidelines. On 28 March 2013, the Central Bank advised Dillon Eustace that while the provisions of UCITS Notice 21 are consistent with the ESMA Guidelines they noted that there may be a conflict between the ESMA Guidelines and earlier guidelines issued by the Committee of European Securities Regulators ("CESR"). In particular, paragraph 49 of the ESMA Guidelines may not be consistent with paragraph 22 of CESR's guidelines concerning eligible assets for investment by UCITS (CESR/07-044). The Central Bank will consider whether it should raise this inconsistency with ESMA for further consideration and will also consider amendments to Guidance Note 2/07 "*Undertakings for Collective Investment in Transferable Securities (UCITS) Financial Indices*"

(iii) Central Bank publishes guidance on the Management Company Passport

On 15 February 2013, the Central Bank published an updated Guidance Note 4/07 which details the organisational requirements of UCITS management companies. This updated Guidance Note includes a new section E on the management company passport.

A management company authorised by the Central Bank may wish to carry on activities for which it has been authorised under the freedom of establishment or the freedom to provide services. The UCITS Regulations provide for procedures in such cases. This new section E provides management companies with guidance on this management company passport.

Summary of Guidance:

Managing non-Irish UCITS

Where a management company wishes to avail of this management company passport to manage a non-Irish UCITS it must assess how the nature, scale and complexity of its business will be affected. More specifically it should consider the impact this management company passport will have on its corporate governance, administration function and its interaction with the non-Irish trustee/ depositary. The guidance sets out more detailed factors to be considered in this assessment.

Management company passport notifications

A management company is required to notify the Central Bank if it wishes to avail of this management company passport either through the establishment of a branch or under the freedom to provide services. The Central Bank will review such applications on a case by case basis. This new section E provides guidance on these notifications, in particular the information to be set out in the programme of operations.

Provision of information or documentation to competent authorities

This new section also provides guidance to management companies if any changes to the programme of operations are to be made following submission of the initial notification. The management company must notify the Central Bank and the competent authority of the management company's host Member State before implementing the change.

This revised Guidance Note 4/07 can be found at the following link:

https://www.centralbank.ie/regulation/industry-sectors/funds/Documents/Guidance%20Note%204%2007%20UCITS%20organisation%20of%20management%20companies.pdf

(iv) Investment Entities (Amendments to IFRS 10, IFRS 12 and IAS 27) (the "Amendments")

On 31 October 2012, the International Accounting Standards Board ("IASB") issued amendments titled Investment Entities (Amendments to IFRS 10, IFRS 12 and IAS 27). These Amendments were issued in response to feedback from preparers and users of financial statements. They provide an exception to the consolidation requirements in IFRS 10 and require investment entities to measure particular subsidiaries at fair value through profit or loss rather than consolidate them. The Amendments also introduce new disclosure requirements for investment entities in IFRS 12 and IAS 27. An investment entity under these Amendments refers to an entity whose business purpose is to invest funds solely for returns from capital appreciation, investment income or both and also evaluates the performance of these investments on a fair value basis. The Amendments also set out disclosure requirements for investment entities. The IASB is of the opinion that the most common types of investment entity will be private equity organisations, venture capital organisations, pension funds, sovereign wealth funds and other investment funds.

The Irish Funds Industry Association ("IFIA") Industry Technical Committee prepared a paper to assist in the preparation of financial statements and particularly the disclosure of interests in other entities as required by IFRS 12.

On 18 February 2013, the European Financial Reporting Advisory Group ("EFRAG") issued its endorsement advice to the European Commission ("Commission") supporting these Amendments concluding that the Amendments satisfy the technical criteria for EU endorsement. EFRAG's endorsement advice and effects study report can be found at the following link:

http://www.efrag.org/Front/n1-1106/EFRAG-s-endorsement-advice-and-effects-study-report-on-Investment-Entities--Amendments-to-IFRS-10--IFRS-12-and-IAS-27-.aspx

The Amendments are effective from 1 January 2014, however these amendments must be endorsed by the Commission before they can be adopted by EU investment companies. It is estimated that endorsement of these Amendments will occur later this year (Q3 2013).

(v) European Systemic Risk Board ("ESRB") issues recommendations on Money Market Funds

Following on from the recommendations of the Financial Stability Board (which carried out a review upon request from the G20), the ESRB published a paper on 18 February 2013 which sets out recommendations for the regulatory reform of Money Market Funds. The IFIA has noted these recommendations. While there is general consensus for the need for regulatory reform of Money Market Funds, the IFIA is of the view that in light of the global nature of this market, there is a need

for a globally consistent and coordinated regulatory approach to the area. It is worth noting that the United States is still contemplating how it intends to proceed in relation to the regulation of Money Market Funds. Although the ESRB recommendations strongly support a move to variable net asset value, they also note that careful consideration should be given to ongoing international developments.

These recommendations cover:

- Mandatory move to variable net asset value;
- Liquidity requirements (i.e. explicit minimum amounts of daily and weekly liquidity);
- Public Disclosure (such as valuation procedures and the possibility of principal loss);
- Reporting and information sharing; and
- The implementation of these recommendations.

These recommendations also impose obligations on the Commission to report to the ESRB and the European Council on actions taken in response to the recommendations or adequately justify inaction. The Commission is requested to provide an interim report to the ESRB by end of June 2013 and a final report by end of June 2014. It is anticipated that the Commission may issue a legislative proposal later this year (which could potentially be included as part of UCITS VI).

The ESRB Recommendations can be found at the following link:

http://www.esrb.europa.eu/pub/pdf/recommendations/2012/ESRB_2011_1.en.pdf?06d49a31b1e76b49517f5e7d91557305

(vi) ESMA publishes Q&A document on their Guidance on ETFs and other UCITS Issues

On 15 March 2013, ESMA published a Q&A document on the ESMA Guidelines ("Q&A") with the aim of promoting common supervisory approaches and practices in the application of the UCITS Directive and the ESMA Guidelines. The Q&A targets the various competent authorities but it is also intended to help UCITS management companies by providing clarity on the requirements.

The Q&A provides a number of clarifications on the following areas:

Information to be inserted in the prospectus

If an index-tracking UCITS intends to use both replication methodologies (physical and synthetic replication) either at the same time or alternatively, this should be reflected in the prospectus.

UCITS ETF label

Application at umbrella/sub-fund level - in the case of an umbrella *UCITS*, the 'UCITS ETF' labelling requirement is applicable to all sub-funds which are UCITS ETFs and the UCITS may also apply it at the umbrella level. The requirement does not apply to sub-funds which are not UCITS ETFs.

Secondary market

Redemption Price - with regards to the redemption price where secondary market investors are given the possibility to redeem directly at the level of the UCITS ETF, the redemption price should be the NAV from which costs may be deducted (such costs should not be excessive).

Efficient portfolio management ("EPM") techniques

The Guidelines do not prohibit the deduction of fees paid to securities lending agents from gross revenues arising from EPM techniques, as a normal compensation for its services. However, the annual report of the UCITS should contain details on the revenues arising from EPM techniques for the entire reporting period together with direct and indirect operational costs and fees incurred.

Financial derivative instruments ("FDIs")

Total Return Swaps/Other FDIs - in response to a query on the meaning of total return swaps "and other financial derivative instruments with similar characteristics", ESMA outlined firstly that total return swaps should be treated like any other FDI and secondly that ESMA's intention was to make sure that the Guidelines are not circumvented by using other FDIs which are not total return swaps but have similar characteristics.

Collateral management

Application of collateral requirements - the collateral requirements apply to *all assets* received in the context of OTC financial derivative transactions and EPM techniques to cover counterparty risk, not just fraction of assets that reduce counterparty risk of UCITS to the limit imposed by the UCITS Directive. This requires that assets received in excess (after the application of haircuts) should comply with the same requirements.

Financial indices

Application of Guidelines - the Guidelines on financial indices apply only to UCITS that are using financial indices for investment purposes and to any UCITS investing in financial indices and not only to index-tracking UCITS.

Technical adjustments - Paragraph 54 of the Guidelines prohibits investment in financial indices which re-balance on an intra-day basis but notes "technical adjustments" made to such indices should not be considered as re-balancing. Technical adjustments in the context of the Guidelines are adjustments which:-

- are based solely on algorithmic non-subjective frameworks;
- are generally published on an ex-ante basis;
- draw on publicly available criteria; and
- do not rely on the judgement of the index-provider.

Transitional provisions

Application of Paragraphs 43-45 and 46 of Guidelines (Section VIII Collateral Management) - UCITS existing before the Guidelines should comply with Paragraphs 43-45 and 46 within 12 months of the date of application of the Guidelines. However, as per Paragraph 65 (alignment of collateral portfolio), any new reinvestment of cash collateral made by such existing UCITS after the application date of the Guidelines should comply with the Guidelines immediately.

The Q&A can be found at the following link:

http://www.esma.europa.eu/news/ESMA-publishes-QA-ETFs-and-other-UCITS-issues

Dillon Eustace has prepared a memo entitled 'Summary of ESMA's Q&A on its Guidelines on ETFs and other UCITS Issues' which is available on www.dilloneustace.ie

(vii) The Swedish Financial Services Authority (Finansinspektionen) announces changes in its requirements for foreign UCITS marketing into Sweden

The Swedish Financial Services Authority contacted the Central Bank via email to provide information on the implementation of Article 92 of Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS IV Directive) in Sweden.

The Swedish Investment Funds Act provides that foreign UCITS marketed in Sweden shall take necessary measures in Sweden to enable it to make payments to unit holders, redeem units and provide any and all information required of the undertaking pursuant to regulations applicable in Sweden. The Swedish Financial Services Authority is of the opinion that to meet these requirements a paying and information agent needs to be appointed in Sweden.

An Irish UCITS planning for cross-border marketing activities in Sweden should provide information on who it has appointed as the paying and information agent in Sweden as set out in in Part B, section 2 of the standard notification letter.

(viii) Return of Value (Investment Undertaking) Regulations 2013

On 21 January 2013, the IFIA wrote to the Revenue Commissioners regarding the Return of Value (Investment Undertaking) Regulations 2013 (the "Regulations") over concerns relating to the submission of the first return of value of units and the date for the commencement of tax reference number procedures.

In this letter, the IFIA recommended that:-

- The submission date for the first return of value, which is 30 June 2013 in the Regulations, be revised to 30 September 2013;

- An acceptable date by which funds could have all requirements for the provision and reporting of the unit holder's tax reference number be 1 January 2014 instead of 1 January 2013.

Having considered the recommendations in the letter, the Revenue Commissioners responded on 6 February 2013 confirming the Revenue Commissioners' agreement to the revised dates.

As such, the new date for the first return of value will be 30 September 2013 and the tax reference number procedures will commence on 1 January 2014.

(ix) Update on UCITS V

UCITS V is a further revision to the regime for UCITS and is intended to enhance certain measures within the UCITS framework, particularly in relation to investor protection. The Commission has stated that the purpose of UCITS V is to bring the UCITS regime into line with the Alternative Investment Fund Managers Directive.

UCITS V covers three key elements, namely the Depositary role (covering eligibility criteria, liability, delegation and oversight function relating to cash), Manager remuneration and Regulatory sanctions.

ECB opinion on draft UCITS V proposals

In February the ECB delivered its opinion on the draft UCITS V proposals. It broadly welcomes the proposals and considers that the new rules may play an important role in preventing malpractices and enhancing investor confidence. The ECB also makes some observations relating to the reuse of

assets by a UCITS depositary, delegation by a depository, the eligibility conditions to act as a UCITS custodian and the liability of depositary. The opinion also sets out the amendments proposed by the ECB.

The ECB's opinion can be accessed at the following link:

http://register.consilium.europa.eu/pdf/en/13/st05/st05943.en13.pdf

ECON vote on UCITS V proposals

In March 2013, ECON voted on the UCITS V proposals. ECON supported bonus caps for fund managers and better protection for investors. More specifically, in relation to remuneration the draft proposals provide that the variable component of a fund manager's total salary should not exceed the fixed component salary and 50% of the variable remuneration should be paid in the units (assets) of the UCITS concerned. Further, the fund managers' pay should always be aligned with the investors' interests and the performance of the fund in question.

In relation to assets and liabilities, depositaries should act independently and solely in the interest of the UCITS asset holders. They must not trade in UCITS assets on their own account. Also, the new rules would make UCITS fund depositaries liable to UCITS and their asset holders for any loss of their assets, even if these assets were held in custody by a third party.

European Parliament indicative plenary sitting date

The European Parliament's legislative observatory has been updated and the indicative plenary sitting date for the UCITS V proposals is now 21 May 2013.

(x) Update on UCITS VI

On 26 July, 2012 the Commission published a consultation paper entitled "Product Rules, Liquidity Management, Depositary, Money Market Funds, Long Term Investments" (the "Consultation Paper"). The Consultation Paper focused on eight topics under consideration by the Commission and which may form the basis of a UCITS VI. It does not address and is separate to the proposals concerning the UCITS depositary, remuneration and administrative sanctions commonly referred to as UCITS V. The areas considered by UCITS VI mirror those which have been recently considered by ESMA in their guidelines for UCITS ETFs and UCITS generally.

The consultation focused on eight key topics;

1. *Eligible assets and use of derivatives:* evaluation of the current practices in UCITS portfolio management and assessment of certain fund investment policies, in particular the scope of assets and exposures that are deemed eligible for a UCITS fund;

2. *Efficient portfolio management techniques:* assessment of current rules regarding certain types of techniques and instruments for the purposes of efficient portfolio management;

3. *Over the counter (OTC) derivatives:* treatment of OTC derivatives cleared through central counterparties and assessment of the current framework regarding operational risk and conflicts of interest;

4. *Extraordinary liquidity management rules*: assessment of the potential need for uniform guidance in dealing with liquidity issues;

5. *Depositary passport*: currently there is no European passport for depositaries. The Consultation Paper assessed the possibility of introducing a cross border passport for the performance of the depositary function;

6. *Money Market Funds (MMFs):* assessment of the potential need to strengthen the resilience of the MMF market in order to prevent investor runs and systemic risks;

7. *Long term investments:* assessment of the potential need for measures to promote long term investments and of the possible form of such measures (including investments in social entrepreneurship); and

8. *Addressing UCITS IV:* the Commission has highlighted a number of areas as part of UCITS IV which need to be examined following the implementation of UCITS IV in July 2011.

This consultation closed on 18 October 2012 and the Commission has now published all the responses received on its website.

The responses can be found at the following link:

http://ec.europa.eu/internal_market/consultations/2012/ucits/index_en.htm

European Market Infrastructure Regulation ("EMIR")

(i) Regulatory Technical Standards ("RTS") and Implementing Technical Standards ("ITS")

The EU Regulation on OTC derivatives, central counterparties and trade repositories ("EMIR") came into force on 16 August 2012. EMIR introduced the following;-

- Reporting to trade repositories ("TRs");
- Clearing obligations;
- Risk mitigation requirements for non-centrally cleared trades;
- Requirements for central clearing counterparties ("CCPs") and TRs.

Regulatory Technical Standards ("RTS") and Implementing Technical Standards ("ITS") have been adopted to supplement EMIR.

Regulatory Technical Standards

The RTS adopted for EMIR cover:

- Capital requirements for CCPs;
- Requirements for CCPs;
- Indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, risk mitigation techniques for OTC derivatives contracts not cleared by a CCP;
- The minimum details of the data to be reported to TR;
- Specifying the details of the application for registration as a TR;
- Specifying the data to be published and made available by TR and operational standards for aggregating, comparing and accessing the data.

On 23 February 2013 the RTS were published in the Official Journal.

Implementing Technical Standards

The ITS for EMIR cover:

- Requirements for central counterparties;
- The minimum details of the data to be reported to trade repositories;
- Specifying the details of the application for registration as a trade repository.

The ITS were published in the Official Journal on 21 December 2012.

Effective date

The RTS and ITS came into effect on 15 March 2013 with the exception of certain provisions highlighted in the RTS and ITS which will take effect from a later date, for example certain risk mitigation techniques relating to non-centrally cleared trades such as rules relating to the Portfolio Reconciliation, Portfolio Compression and Dispute Resolution which will apply from 15 September 2013. Despite being published on 21 December 2012, the ITS only took effect once the RTS entered into force because the provisions defined in the ITS complement provisions defined in the RTS and are not stand-alone obligations.

(ii) International Swaps and Derivatives Association ("ISDA") publishes the EMIR Non-Financial Counterparty (NFC) Representation Protocol

On 8 March 2013, ISDA published the EMIR NFC Representation Protocol. This Protocol enables parties to Covered Master Agreements to amend the terms of such agreements to reflect certain know your counterparty requirements, and the consequences of transacting on the basis of an incorrect classification, imposed by EMIR. An NFC refers to a non-financial counterparty or an entity established outside the European Union that would constitute a non-financial counterparty if it were established in the European Union.

A party that has entered into a Covered Master Agreement may adhere to this Protocol and be bound by its terms by completing and delivering a letter in the form of Exhibit 1 to this Protocol to ISDA. This Protocol is open to ISDA members and non-members. Parties will pay a one-time fee to adhere to this Protocol.

This Protocol, the Frequently Asked Questions on this Protocol and related documents can be accessed at the following link:

http://www2.isda.org/functional-areas/protocol-management/protocol/11

(iii) ESMA publishes practical guidance for the recognition of Third Country CCPs

On 12 March 2013, ESMA published practical guidance for the recognition by ESMA of Third Country CCPs under Regulation (EU) No 648/20121 (EMIR) and Commission Delegated Regulation (EU) No 153/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 with regard to regulatory technical standards on requirements for central counterparties.

This guidance covers the following:

- Communication with ESMA prior to the application;
- The timeframe for submission of an application;
- The submission of an application;
- Acknowledgment of receipt of the application;
- Deadlines;
- Assessment of completeness, requests for additional information and notification of completeness;
- Examination of the application;
- Decision on the registration application;
- Publication on ESMA's website; and
- Notification of material changes.

The guidance can be found at the following link:

http://www.esma.europa.eu/news/ESMA-publishes-practical-guidance-recognition-Third-Country-CCPs-ESMA?t=326&o=home

(iv) ESMA publishes Opinion on the Regulatory Technical Standards on colleges for central counterparties supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012

On 15 March 2013, ESMA published its opinion on the RTS on colleges for central counterparties supplementing EMIR. This opinion was issued after the Commission informed ESMA that it did not endorse ESMA's draft regulatory technical standards on CCP colleges because it considered them to be incompatible with EMIR. More specifically, the Commission believed that some of the provisions included in the draft RTS on CCP colleges exceeded the mandate given by the legislator to specify the details of the practical arrangements of the agreement for the establishment and functioning of CCP colleges. As such, ESMA has amended its draft RTS on CCP colleges on the basis of the Commission's proposed amendments.

The opinion can be viewed at the following link:

http://www.esma.europa.eu/content/Regulatory-technical-standards-colleges-central-counterparties-supplementing-Regulation-EU-N

(v) ESMA publishes Guidelines and Recommendations for establishing consistent, efficient and effective assessments of interoperability arrangements

On 15 March 2013, ESMA published its Final Report on Guidelines and Recommendations for establishing consistent, efficient and effective assessments of interoperability arrangements (the

"Guidelines") following a public consultation. These Guidelines are intended to clarify obligations for national competent authorities relating to their assessment of applications from CCPs to enter into interoperability arrangements. Article 2(12) of EMIR defines an interoperability arrangement as "an arrangement between two or more CCPs that involves a cross-system execution of transactions". Interoperability arrangements facilitate integration of the post-trading market within the European Union but expose CCP's to greater risk. The Guidelines cover the following areas which should be assessed by the national competent authorities:

- Legal risk;
- Open and fair access;
- Identification, monitoring and management of risks;
- Deposit of collateral; and
- Cooperation between national competent authorities.

These Guidelines will become effective one month after their publication by ESMA on its website in the EU official languages. National competent authorities should comply with these Guidelines and they should notify ESMA whether they comply or intend to comply including a justification for any non-compliance within two months of publication by ESMA on its website of these Guidelines in all EU official languages. It must be noted that financial market participants are not required to report to ESMA whether they comply with these Guidelines.

These Guidelines can be found at the following link:

http://www.esma.europa.eu/news/ESMA-publishes-guidelines-interoperability-arrangements?t=326&o=home

(vi) ESMA publishes Questions and Answers document on the implementation of EMIR

On 20 March 2013, ESMA published Questions and Answers on the practical implementation of EMIR throughout the EU. This document provides responses to questions from various stakeholders. The purpose of this document is to ensure convergence in supervisory practices in line with ESMA's responses but it should also help other investors and market participants by providing clarity on EMIR's requirements.

The Q&A document provides a number of clarifications in relation to OTC contracts, CCPs and TRs some of which cover:

- The procedure for non-financial counterparties to notify the relevant competent authority that they exceed/cease to exceed the clearing threshold;
- The calculation of the clearing threshold;
- Timely confirmation(s);

- Exemptions from the clearing obligation;
- Collateral requirements and recording of client assets;
- Collateral portability;
- Deposit of financial instruments;
- Model validation for authorisation purposes;
- Authorisation of a CCP;
- TR registration;
- Reporting of outstanding positions following the entry into force of EMIR; and
- Reporting to TRs.

The Q&A document can be found at the following link:

http://www.esma.europa.eu/news/ESMA-publishes-QAs-EMIR-implementation?t=326&o=home

(vii) Information update in relation to reporting under the European Market Infrastructure Regulation (EMIR)

On 22 March 2013, the Central Bank published an information update in relation to reporting under EMIR. Article 12.4 of European Commission Delegated Regulation No 149/2013 which came into effect on 15 March 2013 requires financial counterparties to have the necessary procedure to report on a monthly basis to the relevant competent authority the number of unconfirmed OTC derivative transactions that have been outstanding for more than five business days.

As such the Central Bank have clarified that, at this point, financial counterparties do not need to submit a report unless specifically requested to do so by the Central Bank. However, the Central Bank went on to state that "*it is expected that all impacted financial counterparties will, from 15 March 2013, have the necessary procedures in place to report to the Central Bank when requested to do so.*"

(viii) Basel Committee on Banking Supervision ("BCBS") and Board of the International Organisation of Securities Commissions ("IOSCO") publish responses to second Consultative Document on Margin requirements for non-centrally cleared derivatives

On 15 February 2013, the BCBS and IOSCO issued a second consultative document on margin requirements for non-centrally cleared derivatives. This consultative document presented the near-final policy framework that establishes minimum standards for margin requirements for non-centrally cleared derivatives as agreed by BCBS and IOSCO. It was developed in consultation with the Committee on Payment and Settlement Systems ("CPSS") and the Committee on the Global Financial System ("CGFS") and was issued following consideration of the responses to the first consultative document issued in July 2012 and the results of the quantitative impact study.

In this consultative document the BCBS and IOSCO sought comments on the near-final proposal and more specifically on the following:

- The treatment of physically-settled foreign exchange (FX) forwards and swaps under the framework;
- The ability to engage in limited re-hypothecation of collected initial margin;
- The proposed phase-in framework; and
- The adequacy of the conducted quantitative impact study (QIS).

The BCBS and IOSCO invited interested parties to submit comments by 15 March 2013.

The consultative document and the comments received are now available on the Bank for International Settlements website at the following link:
http://www.bis.org/publ/bcbs242/comments.htm

Alternative Investment Fund Managers Directive ("AIFMD")

(i) Publication of Feedback statement on CP60 and Revised Alternative Investment Funds ("AIF") handbook

With AIFMD implementation in the pipeline, the Central Bank saw an opportunity to review, consolidate and simplify the existing regulation of Non-UCITS investment funds into a single "AIF Handbook" (a final version of the AIF Handbook is expected in April 2013). The first draft of the AIF Handbook was published by the Central Bank on 30 October 2012. The Central Bank also engaged in a public consultation on the implementation of AIFMD in Ireland and this draft handbook formed the basis of Consultation Paper CP60 *Consultation on implementation of Alternative Investment Fund Managers Directive* ("CP60").

The closing date for receipt of comments was 11 December 2012 and the Central Bank received 17 responses. Following this, the Central Bank published its Feedback Statement on CP60 on 1 February 2013 which sets out a summary of the responses received to each question along with the Central Bank's comments and decisions.

In addition to this Feedback Statement on CP60, the Central Bank published a revised draft AIF Handbook. This revised draft incorporates changes resulting from (i) the consultation process, (ii) the publication in December 2012 of the Commission's Delegated Regulation supplementing the AIFMD and (iii) other amendments necessary for drafting purposes. This draft handbook is intended to assist in the implementation of the AIFMD which will be effective from 22 July 2013.

The Feedback Statement, all responses to this consultation and the Draft AIF Handbook can be found at the following link:

http://www.centralbank.ie/regulation/poldocs/consultation-papers/pages/closed.aspx?CPNumber=CP60

(ii) ESMA publishes guidelines on remuneration of alternative investment fund managers (AIFMs).

On 11 February 2013, ESMA published its final guidelines on remuneration of alternative investment fund managers in line with AIFMD following a consultation paper released in June 2012. Under these guidelines, AIFMs will have to introduce sound and prudent remuneration policies to promote effective risk management and deter excessive risk taking which will ultimately lead to improved investor protection. These guidelines are aligned with guidelines on remuneration policies in other financial sectors.

The key elements of the guidelines include:

- AIFMs' internal governance;
- Categories of staff covered; and
- Types of remuneration covered.

These Guidelines will apply from 22 July 2013, subject to the transitional provisions of AIFMD.

A copy of the final report on the guidelines can be found at the following link:

http://www.esma.europa.eu/content/Guidelines-sound-remuneration-policies-under-AIFMD

(iii) Publication of AIFMD Level 2 Regulation in the Official Journal

On 22 March 2013, the Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision ("Delegated Regulation") was published in the Official Journal. These provisions supplementing AIFMD were implemented in the form of a Regulation to ensure the requisite degree of harmonisation, uniform conditions of competition and the highest possible standard of investor protection.

This Delegated Regulation covers the following areas relating to AIFMD:

- Calculation of assets under management;

- Methods and calculation of leverage;
- Additional own funds and professional indemnity insurance;
- Operating conditions for AIFMs – general principles and conflicts of interest;
- Operating conditions for AIFMs– risk management;
- Operating conditions for AIFMs – liquidity management;
- Operating conditions for AIFMs — investment in securitisation positions;
- Organisational requirements – general principles;
- Valuation Delegation of AIFM functions;
- Depositary;
- Transparency requirements and the exchange of information;
- Rules related to third countries; and
- Exchange of information relating to potential systemic consequences.

It will enter into force twenty days following its publication in the Official Journal but it will apply from 22 July 2013.

The full text of the Delegated Regulation can be found at the following link:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:083:FULL:EN:PDF

(iv) ESMA publish draft Regulatory Technical Standards ("RTS") on types of AIFMs

ESMA has published its final report on the draft RTS on types of AIFMs. This report sets out the feedback statement to the consultation paper previously published by ESMA and covers AIFMs of open and closed-ended AIFs and other criteria to determine the application of the AIFMD to certain types of AIFMs. The final report also sets out the legislative mandate to develop draft RTS, the cost-benefit analysis related to the draft RTS and the full text of the final draft RTS.

The Draft RTS will be submitted to the Commission for endorsement. The Commission will then have a period of 3 months to decide whether or not to endorse same.

The draft RTS on types of AIFMs can be found at the following link:

http://www.esma.europa.eu/news/ESMA-publishes-draft-RTS-determine-types-alternative-investment-fund-managers?t=326&o=home

MiFID

European Banking Authority ("EBA") publishes updated version of the templates, instructions, validation rules and data point model for implementing technical standards (ITS) on supervisory reporting (COREP and FINREP).

On 15 March 2013, the EBA published an updated version of the templates, instructions, validation rules and data point model for implementing technical standards (ITS) on supervisory reporting (COREP and FINREP). This updated version is relevant to MiFID firms who are subject to the Capital Requirements Directive ("CRD") and aims to facilitate the timely preparation for the implementation of the harmonised reporting requirements.

The updated version includes the following COREP and FINREP technical documents:

- Draft templates and related instructions regarding supervisory reporting requirements;
- Draft validation rules;
- A draft data point model (DPM);and
- A FAQ document based on questions on the supervisory reporting requirements raised by stakeholders.

It should be noted that these documents are still in draft form and should not be considered as final products. These will be finalised and submitted to the Commission for endorsement when the final CRD IV text is adopted (expected 1 January 2014).

This updated version can be found at the following link:

http://www.eba.europa.eu/News--Communications/Year/2013/Update-on-the-technical-standards-on-supervisory-r.aspx

MiFID II

Irish Presidency publishes compromise texts on draft MiFID II Legislation

The draft MiFID II Legislation, first published in October 2011, includes potentially comprehensive reforms to the existing regulatory regime currently in place in Ireland. The draft MiFID II Legislation is divided into two parts;

(i) A revised Directive which will be an amendment and restatement of MiFID, (the "MiFID II Directive"); and

(ii) A new Regulation which will set out requirements relating to trade transparency and the mandatory trading of derivatives on organised venues, (the "MiFID II Regulation"). EU Regulations take effect as soon as they are published by the Commission and are binding on all EU Member States as soon as they become effective. It is hoped that the MiFID II Regulation will minimise any scope for divergences in the interpretation of transparency and transaction reporting provisions.

The Irish Presidency has issued several compromise texts since the start of the year, the latest being in March 2013.

The latest Presidency compromise text on the draft MiFID II Directive can be found here:

http://register.consilium.europa.eu/pdf/en/13/st06/st06016-re02.en13.pdf

The latest Presidency compromise text on the draft MiFID II Regulation can be found here:

http://register.consilium.europa.eu/pdf/en/13/st06/st06018-re02.en13.pdf

Short Selling Regulation

ESMA to deliver technical advice on the evaluation of the effects of the Short Selling Regulation ("SSR")

On 12 February 2013, ESMA published a Call for Evidence on the evaluation of the SSR following a mandate from the Commission seeking technical advice on the evaluation of the effects of the SSR.

This Call for Evidence focuses on the six main areas of SSR including transparency and reporting requirements; restrictions on short selling of shares and sovereign debt; restrictions on entering into uncovered sovereign credit default swap positions; settlement discipline; buy-in procedures; exemptions from provisions of SSR; and intervention powers and emergency measures of national regulators/ESMA.

ESMA invited interested stakeholders to provide responses to the questions outlined in the Call for Evidence by 15 March 2013. The deadline for ESMA to deliver technical advice is 31 May 2013 as the Commission must report to the European Parliament and the Council by 30 June 2013.

The Call for Evidence can be found in the following link:
http://www.esma.europa.eu/consultation/Call-evidence-evaluation-Regulation-short-selling-and-certain-aspects-credit-default-sw#responses

Anti-Money Laundering/Counter-Terrorism Financing

(i) Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2013

The Department of Justice published the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2013 (the "Bill") on 31 January 2013. The purpose of this Bill is to amend the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the "Act") in order to align certain provisions more closely with international standards and to amend certain provisions to reflect operational requirements.

Some of the proposed amendments include;

- Applying the definition of 'occasional transaction' where the aggregate of the transaction is less than €15,000 in the following situations:

  - Private members' gaming clubs when an amount or value of €2,000 is reached;
  - Wire transfer funds within the meaning of Regulation (EC) No. 1781/2006 when an amount of €1,000 is reached.

- Section 34 of the Act, which deals with specified customers and specified products – i.e. the situations where simplified due diligence can be applied – is proposed to be amended whereby the designated person can only apply simplified due diligence to such customers/products where the designated person has taken steps to determine whether or not the customer or product is a specified customer or product;

- Section 37 of the Act to be amended such that the rules relating to politically exposed persons ("PEPs") will be tightened. A designated person will need to perform ongoing monitoring on its customers to determine whether a customer obtains PEP status during the course of the business relationship and conduct source of wealth and source of funds checks on such customers. In addition, it proposes a requirement for ongoing monitoring of transactions with PEPs including ongoing monitoring of source of wealth and source of funds.

- Section 39 of the Act to be amended to require designated persons to apply additional customer due diligence measures where the designated person has reasonable grounds to believe that there is a higher risk of money laundering or terrorist financing. This is currently a discretionary requirement.

- Section 54 of the Act to be amended to require additional matters to be included in policies and procedures to prevent and detect the commission of money laundering and terrorist financing. These additional matters include:

  - Measures to be taken by designated person to keep customer due diligence documents and information up to date;
  - The additional measures taken to apply enhanced customer due diligence and the circumstances in which such measures will be taken;
  - Measures to be taken to prevent the risk of money laundering or terrorist financing which may arise from technological developments including the use of new products and practices.

The initial proposals for this Bill were contained in the draft heads for the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill, 2012 ("2012 Heads"). The most notable difference is that the Bill omits a number of the provisions proposed under the 2012 Heads such as the amendment relating to the appointment of a Compliance Officer/MLRO with responsibility for AML and the amendment relating to the maintenance of records and the location of same.

(ii) Commission publishes the proposed Fourth Anti-Money Laundering Directive and the proposed Regulation on the information accompanying the transfer of funds

On 5 February 2013, the Commission published the proposed Fourth Anti-Money Laundering Directive and the proposed Regulation on the information accompanying the transfer of funds to ensure that the EU Anti-Money Laundering framework remains fully compliant with international standards.

Fourth Anti-Money Laundering Directive ("Fourth AML Directive")

This Fourth AML Directive will repeal the third Anti Money Laundering Directive (2005/60/EC) and the implementing Directive (2006/70/EC).

Some of the main proposals include:

- *Risk based approach* - The Fourth AML Directive recognises that employing a risk-based approach is an effective way to identify and mitigate risks to the financial system and ensure wider economic stability in the internal market area and as such imposes risk assessment requirements on Member States and designated entities.

- *Customer Due Diligence* - The proposals under the Fourth AML Directive adopt a risk based approach to the application of customer due diligence measures. This involves the use of evidence based decision-making to target money laundering and terrorist financing risks and

the level of customer due diligence applied will have to be justified on the basis of risk. As such, entities would be required to apply enhanced customer due diligence where risks are greater and simplified customer due diligence where risks are lower. The Fourth AML Directive provides for a list of the minimum factors which must be considered when making such decisions.

- *Reliance on Third Parties in Third Countries* - Under the current Directive, if a relevant third party is based in a third country which is deemed to have equivalent AML standards to the EU then a designated person can automatically rely on that relevant third party. However, under the Fourth AML Directive, the geographic risk will be one of the factors to be considered when determining whether or not to rely on a relevant third party. The location of the relevant third party in a third country that is deemed equivalent will not automatically qualify that party as a relevant third party.

- *Beneficial Owner* - The Fourth AML Directive provides for a clear mechanism to identify beneficial owners and requires legal persons to hold information on their own beneficial ownership. This information should be available to both competent authorities and designated entities.

- *PEPs* - The Fourth AML Directive expands the provisions relating to PEPs to include domestic politically exposed persons and persons entrusted with a prominent function by an international organisation.

- *Data Protection* - The proposals under the Fourth AML Directive introduce provisions to clarify the interaction between anti-money laundering/combating terrorist financing and data protections requirements.

- *European Supervisory Authorities ("ESAs")* - The ESAs have been tasked with adopting regulatory technical standards and issuing guidelines in a number of areas of the Fourth AML Directive.

- *Cooperation* - The Fourth AML Directive introduces provisions for enhanced cooperation amongst Member States, the Financial Intelligence Units, the Commission and the ESAs.

- *Sanctions* - The Fourth AML Directive provides for minimum administrative measures and sanctions that can be applied in the case of a breach. It also provides for the publication of these sanctions or measures, subject to certain exceptions, that are imposed for breach of the national provisions adopted.

- *Extension of scope* - The proposals aim to broaden the scope of the Fourth AML Directive to cover gambling and also to reduce the threshold for traders in goods from €15,000 to €7,500 for cash transactions.

Regulation on the information accompanying the transfer of funds ("Regulation")

This Regulation proposes to update the Funds Transfer Regulation (Regulation 1781/2006) which provides information about rules to be followed by the payer and the payee involved in transfers of funds so as to detect and deter crimes of money laundering and terrorist financing. The new Regulation is based to a large extent on the recommendations made by the Financial Action Task Force ("FATF") and aims to improve traceability of payments and to ensure that the EU Framework remains fully compliant with international standards.

The new Regulation will impose obligations on Payment Service Providers relating to:

- Information accompanying transfer of funds;
- Detection of missing information on the payer and the payee;
- Transfer of funds with missing or incomplete information on the payer and the payee; and
- Assessment and Reporting.

The new Regulation will also impose obligations on Intermediary Payment Service Providers relating to:

- Retaining information associated with the transfer – on the payer and the payee;
- Transfer of funds with missing or incomplete information on the payer and the payee; and
- Assessment and Reporting.

Timeline

The two proposals will have to be adopted by the European Parliament and the Council of Ministers under the ordinary legislative procedure. It is not yet clear when these proposals will be adopted. However, once adopted, Member States will then have two years to transpose the provisions of the Fourth AML Directive into national law. The Regulation will apply from the date of the transposition of the Fourth AML Directive.

Public conference

A public conference was held on 15 March 2013 where the main changes in the international framework as well as the new Directive were discussed among various groups of stakeholders.

Central Bank

(i) Central Bank Enforcement Priorities in 2013

On 12 February 2013, the Central Bank published its enforcement priorities for 2013 which highlight the importance of enforcement within its risk-based regulatory framework (PRISM).

The Central Bank intends to pursue enforcement actions across a number of areas, including non-compliance identified by their Supervisory Divisions in the following enforcement priority areas for 2013:

- Retail Intermediaries;
- Payment Protection Insurance;
- Client Asset Requirements;
- Prudential Requirements;
- Anti-Money Laundering and Counter Terrorist Financing;
- Systems and Controls;
- Timeliness and Accuracy of Information submitted to the Central Bank;
- Errors and Overcharging;
- Payment Services Regulations; and
- Suitability Requirements (Consumer Protection Code - 2012).

This list of enforcement priorities comprises the priority areas highlighted in 2012 and the inclusion of three new priority areas relating to 'errors and overcharging', 'payment services regulations' and 'suitability requirements (Consumer Protection Code – 2012)'.

The Central Bank has advised that enforcement actions taken in 2013 will not relate solely to these 'pre-defined' enforcement priorities, but will also extend to 'reactive' enforcement in respect of issues identified through day-to-day supervisory work and from other information sources.

(ii) Central Bank Programme of Themed Reviews for 2013

On 12 February 2013, the Central Bank also published its planned series of themed reviews and inspections for 2013. Themed reviews and inspections form part of the Central Bank's supervisory framework allowing for review, assessment, transparency and mitigation of risks which have emerged in various industry sectors and across individual firms. They may also form the basis for the Central Bank taking regulatory or enforcement action where necessary. The publication of planned themed inspections enables the relevant sectors to prepare and raise standards by identifying and highlighting both good and poor practices across the firms in each sector.

The main themes for 2013 include:

- Code of Conduct on Mortgage Arrears;
- Sales incentives in the banking, insurance, investment and stockbroking sectors;
- Provision of information to consumers by investment and stockbroking firms;
- Property insurance claims handling;
- Retail intermediaries compliance (insurance, investment and mortgage intermediaries);
- Moneylenders;
- Outsourcing;
- Post-authorisation application of business plans to delegating UCITS and non-UCITS managers;
- Client assets;
- Review of governance on pricing procedures;
- Data integrity of regulatory returns; and
- Anti-Money Laundering, Countering the Financing of Terrorism and Financial Sanctions.

In addition to the planned series of inspections, the Central Bank will also continue to conduct additional reactive inspections on key issues and themes as they arise throughout the year.

(iii) Publication of responses received to CP61

The Central Bank published Consultation Paper 61 on 20 November 2012 on proposed changes to the basis for calculating the industry funding levy payable by regulated entities. The most notable change is to more closely align the funding levies paid by regulated entities with the costs of their supervision. This is logical because the impact categorisation of regulated entities, as determined by PRISM, determines the number of supervisors assigned to that firm.

The Central Bank also proposes introducing application fees for firms seeking authorisation to provide financial services. These application fees will reflect the average cost involved in processing applications.

The closing date for responses was 22 February 2013. The Central Bank published the responses received on 21 March 2013. All responses can be viewed at the following link:

http://www.centralbank.ie/regulation/poldocs/consultation-papers/Pages/closed.aspx?PagingID=1

(iv) Fitness and Probity

The Central Bank issued a revised version of its Frequently Asked Questions on the Fitness and Probity Regime on 5 March 2013.

The revised document provides that PCFs who were in situ in a particular role at the time of introduction of the regime on 1 December 2011 will be required to go through the pre-approval process and submit an Individual Questionnaire ("IQ") to the Central Bank when they are re-elected or re-appointed to that role.

For example, where a person held the position of chairman on 1 December 2011, that person was not required to submit an IQ to the Central Bank seeking approval at that time. Now, on re-appointment to that role, the chairman will be required to submit an IQ, though only for the first such re-appointment to that role provided there is no break in service.

This procedure will also apply to in-situ PCFs who are subject to employment contract renewals.

On 28 March 2013, the Central Bank issued another revised Fitness and Probity FAQ document which provides further clarification in relation to individuals who were in-situ at the time the regime was introduced. This clarification provides that the Central Bank does not require an IQ to be submitted for individuals who were in-situ at the time the regime was introduced and who have been re-elected or re-appointed in the interim period prior to the publication of the revised FAQs on 5 March 2013. However, an IQ will be required for re-elections/re-appointments made on/after 5 March 2013.

(v) IFIA issues letter to Central Bank seeking clarification on revised Fitness and Probity – Frequently Asked Questions ("FAQs")

On 19 March 2013, the IFIA wrote to the Central Bank seeking clarifications on the recently updated Fitness and Probity – Frequently Asked Questions document published on 5 March 2013. More specifically, the IFIA highlighted issues that arise in respect of Section 3.17 for certain types of fund companies.

Under this section of the revised FAQs, the Central Bank confirmed that individuals who were in situ at the time of the introduction of the fitness and probity regime on 1 December 2011 are required to go through the pre-approval process and submit an individual questionnaire ("IQ") to the Central Bank when they are re-elected or re-appointed to this role.

The IFIA is seeking clarifications for certain types of fund companies covering:

- Directors who were re-elected or re-appointed before the publication of the revised FAQs who did not submit an IQ and are not subject to re-election;
- AGM Notices issued before 5 March 2013 at which AGM directors are due to be re-elected or re-appointed given that there will not be enough time for directors to obtain pre-approval from the Central Bank before the AGM; and
- Pre-approval letters issued by the Central Bank which do not state that the individual will not be required to undergo the approval process again for as long as there is no break in service.

(vi) Regulatory Reporting Requirements of Irish Authorised Investment Funds

The Central Bank published its guidance note on regulatory reporting requirements of Irish authorised investment funds in March 2013. This is relevant for all Irish authorised Investment Funds and their service providers and provides information on the reporting requirements relating to the extension of the Central Bank's online reporting system ("ONR") to investment funds.

This note provides guidance on the following returns:-

- Investment Funds Annual Audited Financial Statements;
- Investment Funds Interim Financial Statements;
- Investment Funds Annual Sub-Fund Profile Return;
- UCITS Annual Update of Key Investor Information Document ("KID");
- UCITS Annual Financial Derivative Instrument ("FDI") Return; and
- Investment Funds Regulatory Report – reporting by an investment fund of suspensions, material breaches, material errors and significant matters.

This guidance note is also relevant to Depositaries and Independent Statutory Auditors reporting on behalf of Investment Funds and also covers the following returns:

- Independent Statutory Auditor Confirmation – Auditor Statutory Duty Confirmation Letter and associated reports for Investment Funds; and
- Depositary Regulatory Report- reporting of Investment Fund's material breaches, material errors and significant matters.

The Central Bank has also published a guidance note on the assignment of reporting responsibilities for Irish authorised investment funds.

These guidance notes and other related documents can be found on the Central Bank website at the following link:

http://www.centralbank.ie/regulation/industry-sectors/funds/Pages/OnlineReportingForInvestmentFunds-Guidance.aspx

Separately, the IFIA has published a paper which is intended to provide some practical guidelines for fund administrators for this new regulatory reporting process.

Data Protection

European Parliament rapporteurs present draft reports on the Commission's reform proposals for data protection

On 10 January 2013, European Parliament rapporteurs presented two draft reports on the Commission's proposals for a Data Protection Reform Package which includes a general Data Protection Regulation and a Directive for the law enforcement sector.

The implementation of the proposed new Data Protection Regulation will lead to a uniform and coherent data protection legal system across all Member States, whereby companies will only have to deal with the national data protection authority of the Member State in which they have their main establishment. However, the Data Protection Regulation will introduce stricter rules and procedures, which will involve many significant changes and costs for both EU and non-EU companies. As the Data Protection Regulation will be directly effective, preparations should be made as soon as possible to ensure compliance.

Overall, the European Parliament rapporteurs support the proposed package approach and the objectives of this reform package.

For more information the draft reports can be found at the following links:

Draft report on the proposal for a regulation:

http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/922/922387/922387en.pdf

Draft report on the proposal for a directive:

http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/923/923072/923072en.pdf

Finance Bill 2013

On 13 February 2013, the Finance Bill 2013 was published with the aim of further enhancing Ireland's financial services sector by introducing innovative measures that are intended to stimulate and sustain growth and ensure on-going competitiveness in the global financial services industry.

Some of the main proposals include:

- Investment Funds

Investment Limited Partnerships (ILPs)

The Bill proposes a fundamental change in the manner that Investment Limited Partnerships established under the Investment Limited Partnerships Act, 1994 (ILPs) are to be treated from an Irish tax perspective. ILPs will now be treated as transparent entities for tax purposes, similar to the treatment of Common Contractual Funds (CCF's).

Gross Roll-up Funds

The Bill proposes to increase the rates of exit tax applicable to certain Irish resident investors in Irish investment undertakings under the gross roll-up regime by 3% whereby the new rates will be 33% for payments made annually or more frequently and 36% for other payments.

VAT – Fund Management Services

There were a number of technical amendments made to the VAT deduction entitlements of businesses supplying fund management services. The amendments align the domestic legislation with the EU VAT Directive ensuring strict compliance with the Directive by refining the definition of a qualifying activity.

- Real Estate Investment Trusts (REITs)

A positive and welcoming note announced in the Budget, and introduced in the Bill, is the introduction of Real Estate Investment Trusts (REITs). While Ireland already has a tax efficient property fund regime, the favourable tax regime is only applicable for regulated funds. The REIT will not need to be regulated and is already a well-established vehicle in Europe, the US, Asia and Australia and therefore it is hoped that the introduction of the REIT will help to stimulate growth in the Irish property market by encouraging foreign investment.

Conditions

The new REITs regime provides for an exemption from tax on income and chargeable gains of a property rental business once certain conditions are satisfied.

- Section 110 Companies – Extension of Stamp Duty Reliefs

Current Irish stamp duty legislation allows for an exemption from stamp duty on a wide range of financial instruments such as transfers of units in Irish investment undertakings, transfers of units in collective investment schemes not incorporated/formed in Ireland and transfers of stocks and marketable securities of a company or other body corporate not registered in Ireland.

The above exemptions are generally only available where the transfer does not relate to Irish situate real property or stocks or marketable securities in an Irish registered company save for investment undertakings (i.e. Irish regulated funds) where the exemption still applies even if the transfer does relate to stocks or marketable securities in an Irish registered company which is an investment undertaking.

The Bill extends this latter exemption to apply to stocks or marketable securities of a qualifying company (within the meaning of Section 110) in the same way as it applies to investment undertakings.

This Bill is likely to be enacted in the second quarter of 2013.

Companies Bill 2012

The Minister for Jobs, Enterprise and Innovation, Richard Bruton published the Companies Bill, 2012 (the "Bill") on 21 December 2012. The Bill aims to reduce the costs associated with incorporating companies in Ireland and to reduce certain administrative red tape with which companies in Ireland must currently comply. It also proposes to make company law obligations easier to understand. The Bill, which is issued in 2 volumes, proposes to consolidate the existing 16 Companies Acts, which date from 1963 to 2012, into a single Act.

Volume 1 will govern the private company limited by shares which account for over 90% of the companies in the State. Volume 2 will govern other corporate entities including Public Limited Companies, Unlimited Companies and a new type of company the Designated Activity Companies ("DACs") amongst other corporate forms.

The following significant reforms of Irish Company Law are proposed:

- The private company limited by shares will be the model company under the legislation (rather than the public company, as is currently the case);
- Currently, a private company limited by shares must have two directors. The Bill provides that a private company limited by shares will be permitted to have only one director but must have a separate company secretary;
- A single document constitution is envisaged replacing the current requirement for a memorandum and articles of association;
- The abolition of the doctrine of "ultra vires" which operates to render a contract, purportedly entered into by a company, void and unenforceable to the extent that it is not contemplated in the company's memorandum of association. The private company limited by shares will be given the contractual capacity of a natural person;
- The codification of directors' fiduciary duties and inclusion of a non-exhaustive list of fiduciary duties which a director owes to a company. e.g. the requirement to act in good faith, to avoid conflicts of interest etc.; and
- A private company limited by shares may dispense with the requirement to hold an annual general meeting where the members unanimously agree to do so. The members will also be permitted to pass a majority written resolution.

Other proposed changes include:

- The simplification and removal of anomalies pertaining to the various modes of winding up companies and the appointment of liquidators, examiners and receivers. New qualification requirements will be introduced for liquidators and mandatory indemnity insurance is proposed;
- "Summary approval procedures" which will allow companies to carry out certain activities by means of a directors' declaration and a shareholders' resolution for those activities which under the current law would require High Court approval (for example, certain transactions with directors, capital reductions, and solvent windings up);
- New procedures regarding mergers and divisions;

- Implementing changes to section 45 of the Companies (Auditing and Accounting Act), 2003 which has not as yet come into effect. Directors of companies, unless otherwise exempted, will be required to provide a compliance statement and a related statement, the latter of which must confirm that there is material compliance with the company's relevant obligations which will extend only to indictable offences under the Companies Acts and Irish tax law. The previous provisions of section 45 were unduly onerous and will be replaced with a less prescriptive approach as detailed in the Companies Bill.

- Offences, subject to a small number of exceptions, will be categorised into a more streamlined four tier scheme.

The passage of the Companies Bill through the Houses of the Oireachtas will begin shortly with the Second Stage debate scheduled to begin on 23 April 2013. Once the Second Stage for the Bill is complete, work will begin on amendments for the next phase, the Committee Stage. In order to allow time for drafting, organising, briefing and getting the Minister's and, where necessary, the Government's, approval, the deadline for accepting proposals for amendments has been set for the end of June 2013. Any amendments proposed in relation to the Bill should be submitted before the end of June 2013.

Dillon Eustace

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