Fund Management

2018

GETTING THE DEAL THROUGH

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Fund Management 2018

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Preface

Fund Management 2018

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Fund Management*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Hong Kong and Luxembourg.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise.

GETTING THE
DEAL THROUGH

London
May 2018

Ireland

Sarah Cassidy and Shane Geraghty

Dillon Eustace

Fund management

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

The Central Bank of Ireland (the Central Bank) is responsible for the regulation of fund management and marketing in Ireland, pursuant to EU and domestic legislation and guidance issued and conditions imposed by the Central Bank itself. The Central Bank has responsibility for the authorisation and ongoing supervision of all types of funds domiciled in Ireland (ie, both undertakings for collective investment in transferable securities (UCITS) and alternative investment funds (AIFs)) and for Irish-domiciled UCITS management companies, investment managers and alternative investment fund managers (AIFMs).

2 Is fund administration regulated in your jurisdiction?

Yes, the Central Bank is responsible for the authorisation, regulation and supervision of administrators in Ireland under the domestic Investment Intermediaries Act 1995 regime. Fund administration activities include the calculation of the net asset value (NAV), preparation of periodic reports, calculation and payment of distributions, payment of expenses and maintenance of a fund's financial books and records. It is possible for the administrator to delegate certain elements of the administration process outside of the jurisdiction.

3 What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

As noted in question 2, the Central Bank is responsible for authorisation of both UCITS and AIFs. The documentation, process and timelines for approval differ depending on the fund structure and regulatory status. However, the following documentation would be required, at a minimum, in support of an application for approval for all types of funds:

- prospectus or offering document;
- constitutional document;
- depositary agreement;
- administration agreement;
- management agreement; and
- investment management agreement or AIFM agreement (as appropriate).

For UCITS and retail investor alternative investor funds (RIAIFs), the documents are required to be submitted to the Central Bank for prior review and comment. However, qualifying investor alternative investment funds (QIAIFs) can avail of a fast-track procedure under which the fund documents are simply filed the day before approval is required.

Irish-domiciled UCITS management companies, investment managers and AIFMs are also required to be authorised by, and are supervised by, the Central Bank. Such entities are subject to organisational, conduct of business, capital adequacy and corporate governance requirements, as well as having other obligations in areas such as risk and liquidity management, record-keeping, financial control and conflicts of interest. As part of the authorisation process, a business plan or programme of activity satisfying these requirements must be submitted to the Central Bank for consideration.

4 What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

UCITS management companies, EU AIFMs and investment managers authorised under the Markets in Financial Instruments Directive 2014/65/EU (MiFID II) may passport their services into Ireland and will not be subject to an additional regulatory review process by the Central Bank.

Non-EU discretionary investment managers that are not one of the entities listed above may only be appointed where a memorandum of understanding is in place between the Central Bank and the competent authority in the home jurisdiction of the investment manager, and where the Central Bank has approved the investment manager following receipt of a completed investment manager application, which is submitted electronically.

Where the firm is regulated in a jurisdiction not previously considered by the Central Bank, it should be demonstrated, by way of a formal submission, that the regulatory regime for asset management in the relevant jurisdiction is comparable to the model of prudential regulation applicable to firms included in the above categories. The Central Bank has accepted the following jurisdictions as having a comparable regulatory regime: Australia, the Bahamas, Bermuda, Brazil, Canada, Dubai, Guernsey, Hong Kong, India, Japan, Jersey, Singapore, South Africa, Switzerland and the United States.

The Central Bank does not apply an approval process to non-discretionary investment advisers to Irish funds, provided that the manager or directors of the fund confirm to the Central Bank that the adviser in question will act in an advisory capacity only and will have no discretionary powers over any of the assets of the fund.

5 Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

Changes to qualifying holdings in Irish UCITS management companies, MiFID firms and AIFMs are subject to the approval of the Central Bank. Approval is sought by completing and submitting an Acquiring Transaction Notification Form, which is used to provide prior notification to the Central Bank of a proposed acquisition or disposal of, or increase or decrease in, a direct or indirect qualifying holding (within certain thresholds). The Central Bank review process must be carried out within prescribed timelines. It is important in this regard to note that acquiring transactions and increases in qualifying shareholdings, if completed without prior notification to, or assessment by, the Central Bank, will not have legal validity in Ireland. Irish UCITS and AIFMs are also obliged to advise the Central Bank of their ownership structure on an annual basis.

6 Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

Yes, the key regulatory guidance in respect of remuneration is contained in the European Securities and Markets Authority (ESMA) final report on Guidelines on Sound Remuneration Policies under Directive 2009/65/EC, as amended (the UCITS Directive) and the Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD) (the Guidelines). The Guidelines are intended to provide clarity on the requirements for managers when establishing and applying a remuneration policy for its key staff and applies to managers of UCITS and AIFs. At a minimum, managers must put in place remuneration policies and practices as follows:

- that are consistent with, and promote, sound and effective risk management;
- that do not encourage risk-taking that is inconsistent with the risk profile or fund rules governing the relevant fund; and
- that do not impair compliance with the manager's duty to act in the best interest of the fund.

In addition to these general principles, there are specific requirements that deal with the following:

- governance of remuneration;
- pay structure and risk alignment;
- the establishment of a remuneration committee in the case of 'significant' management companies; and
- disclosure of remuneration-related information to investors.

The remuneration rules were introduced as a reaction to the global financial crises and in an attempt to temper inappropriate risk-taking on the part of those who may materially impact the risk profile of a management company or the fund under management. MiFID firms in Ireland are also subject to detailed and extensive remuneration rules under the recently introduced Irish MiFID II Regulations.

Fund marketing

7 Does the marketing of investment funds in your jurisdiction require authorisation?

Yes, the marketing of investment funds in Ireland (UCITS and AIFs) requires certain authorisations and approvals to be granted by relevant regulatory authorities before such investment funds can be marketed. See question 8.

8 What marketing activities require authorisation?

UCITS

Under the framework described in question 7, UCITS established and authorised in one EU member state can be sold across the border into other EU member states without the requirement for additional authorisation. The 'European passport' is central to the UCITS product as it enables fund promoters to create a single product for the entire EU rather than having to establish an investment fund product on a jurisdiction-specific basis. Therefore, on the completion of the appropriate notification procedure, a UCITS established in one member state can be sold in any other member state. If the notification is complete, the home state regulator must transmit the file to the host regulator within 10 working days, after which time the UCITS may commence marketing.

RIAIFs and QIAIFs

Regulation 44 of the EU (Alternative Investment Fund Managers) Regulations 2013 (the Irish AIFMD Regulations) permits the marketing of AIFs to retail investors in Ireland. An Irish RIAIF authorised and regulated by the Central Bank may be marketed to Irish retail investors by the relevant AIFM of the RIAIF. An AIF situated in another jurisdiction that proposes to market its shares or units to retail investors in Ireland must make application to the Central Bank in writing and such an application is required to include certain prescribed documentation and disclosures. The relevant AIF that proposes to market its shares or units to retail investors in Ireland must be authorised by a supervisory authority set up in order to ensure the protection of investors and that, in the opinion of the Central Bank, provides an equivalent level of investor protection to that provided under Irish laws, regulations and conditions governing RIAIFs.

The following AIFs will receive approval to market their units to retail investors in Ireland on completion of the information and documentation requirements of the Central Bank:

- those established in Guernsey and authorised as Class A schemes;
- those established in Jersey and authorised as recognised funds; and
- those established in the Isle of Man as authorised schemes.

Other AIFs must demonstrate that the AIF arrangements are such that they provide an equivalent level of investor protection to that provided under Irish laws, regulations and conditions governing RIAIFs. Marketing of shares or units or other interests to retail investors in Ireland may not take place until the relevant AIF has received a letter of approval from the Central Bank and the AIF marketing its units in Ireland must comply with the law, regulations and administrative provisions in force in Ireland.

The marketing of EU AIFs (including Irish QIAIFs) by an Irish AIFM to professional investors in Ireland is required to be notified to the Central Bank in accordance with Regulation 32 of the Irish AIFMD Regulations. Where the AIF is regulated by the competent authorities of another EU member state, the Central Bank is required to inform those competent authorities that the Irish AIFM may start marketing units or shares of the EU AIF in Ireland.

When an AIFM from another EU member state proposes to market shares or units of an EU AIF to professional investors in Ireland, it must comply with the requirements set out by the respective national competent authority.

Irish AIFMs, or AIFMs from other EU member states proposing to market non-EU AIFs to professional investors in Ireland, must apply to the Central Bank for approval in accordance with the requirements of Regulation 37 of the Irish AIFMD Regulations.

A Non-EU AIFM proposing to market an AIF to professional investors in Ireland must apply to the Central Bank for approval in accordance with Regulation 43 of the Irish AIFMD Regulations and the marketing can only commence once the Central Bank has informed the relevant non-EU AIFM that it can start marketing. The relevant AIFM is required to comply with basic depositary and custody requirements under the AIFMD (such as the safekeeping of assets and the supervision of administrative functions). In addition, there must be a cooperation arrangement for the purpose of systemic risk oversight in place between the authorities of each EU member state where the non-EU AIF is marketed and those in the third countries where the AIFM and the AIF are established and finally, the non-EU country where the AIF is established must not be listed as a non-cooperative country and territory by the Financial Action Task Force on anti-money laundering and terrorist financing.

The marketing of units in collective investment schemes (CIS) in Ireland, other than in accordance with the requirements of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011, SI No. 352/2011 (the UCITS Regulations) and the Irish AIFMD Regulations, must only be undertaken by entities authorised to provide such marketing services. The regulation of the receipt and transmission of orders in relation to, and the placing of financial instruments (including shares and units in CIS) by, Irish entities is regulated by the MiFID II Regulations, as amended, the Investment Intermediaries Act 1995 and consumer protection legislation.

9 What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

See question 8.

10 If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

Although a UCITS manager from another EU member state could market the shares of, for example, a Luxembourg UCITS in Ireland on a freedom of shares basis, or an EU AIFM could market an EU AIF to professional investors in Ireland likewise, most non-institutional investors domiciled in Ireland will buy through an intermediary (ie, a wealth manager, stockbroker or via a wrapper).

11 What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

The form of remuneration paid to intermediaries, whether commission or fixed fees, is driven by the authorisation of the entity making the payment and its duty to ensure investors are aware of the forms of remuneration it is paying to others to distribute or market the fund product.

Retail funds

12 What are the main legal vehicles used to set up a retail fund? How are they formed?

There are several different legal vehicles that can be used to set up retail funds (ie, UCITS and RIAIFs). QIAIFs (which are dealt with separately in question 27) can also be formed using these legal vehicles.

The principal legal structures of UCITS, RIAIFs and QIAIFs are as follows.

Unit trusts

Unit trusts (formed under the UCITS Regulations or under the Unit Trusts Act 1990, or both) are contractual arrangements created under a trust deed made between a management company and a depositary. Unit trusts do not have their own legal personality and contracts are entered into by the management company and, in certain cases, by the trustee. A unit represents an undivided beneficial interest in the assets of the unit trust.

Investment companies

Investment companies (formed under Part 24 of the Companies Act 2014) are public limited liability companies incorporated with variable capital (ie, the actual value of the paid-up share capital is equal at all times to the value of the NAV of the company). Shares issued do not represent a legal or beneficial interest in the company's assets.

Investment limited partnerships (ILPs)

ILPs (formed under the Investment Limited Partnerships Act 1994) are partnerships between one or more general partners and one or more limited partners, constituted by written agreements between the parties known as partnership agreements. A general partner is personally liable for the debts and obligations of the partnership and a limited partner contributes or undertakes to contribute a stated amount to the capital of the partnership.

Common contractual funds (CCFs)

CCFs (formed under the UCITS Regulations or the Investment Funds, Companies and Miscellaneous Provisions Act 2005) are funds constituted under contract law by means of a deed of constitution executed under seal by a management company. The CCF is an unincorporated body and does not have a legal personality, and therefore may act only through the management company. Participants in the CCF hold their participation as co-owners and each participant holds an undivided co-ownership interest as a 'tenant in common' with other participants.

Irish collective asset-management vehicles (ICAVs)

ICAVs (formed) under the Irish Collective Asset-management Vehicles Act 2015 are corporate bodies with limited liability where the actual value of the paid-up share capital is at all times equal to the NAV of the ICAV and the share capital is divided into a specified number of shares without assigning any nominal value to them. The assets of the ICAV belong exclusively to the ICAV and no shareholder has any interest in these assets.

Each of these fund vehicles (with the exception of ILPs) may be established as either standalone entities or as an umbrella fund with separate sub-funds. ILPs are not currently capable of being established as umbrella funds.

It is also possible to have unauthorised AIFs (ie, AIFs that are not authorised by the Central Bank under Irish funds legislation), the principal legal structures of which include real estate investment trusts, exempt unit trusts and limited partnerships established under the Limited Partnerships Act 1907.

13 What are the key laws and other sets of rules that govern retail funds?

In addition to the legislation outlined in question 12, there is a significant amount of legislation at both European and domestic level applicable to retail funds that will vary depending on the fund structure and status. ESMA and the Central Bank have also issued guidance applicable to retail funds.

In summary, for UCITS, the key laws and regulations include the following:

- the UCITS Directive;
- the UCITS Regulations; and
- the Central Bank (Supervision and Enforcement) Act 2013 (section 48(1)) (Undertakings for Collective Investment in Transferable Securities) Regulations 2015, SI No. 420/2015 as amended (the Central Bank UCITS Regulations).

For RIAIFs, the key laws and regulations include the following:

- the AIFMD;
- the Irish AIFMD Regulations;
- Commission Delegated Regulation (EU) No. 231/2013 supplementing the AIFMD with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision;
- the Prospectus (Directive 2003/71/EC) Regulations 2005 (for certain categories of closed-ended funds) (the Prospectus Directive);
- the Central Bank AIF Rulebook; and
- the European Union (Key Information Document for Packaged Retail and Insurance-Based Investment Products) Regulations 2017 (Regulation (EU) No. 1286/2014).

In addition, Commission-delegated and implementing regulations have been adopted by the European Commission in specific areas in order to ensure that the UCITS Directive and the AIFMD are implemented consistently across the EU.

14 Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Yes, retail funds domiciled in Ireland must be authorised by the Central Bank. Once authorised, these retail funds may market to Irish investors by virtue of their authorisation.

15 Who can market retail funds? To whom can they be marketed?

The marketing and distribution of retail funds can be carried out by the fund or the management company (UCITS or AIFM) or delegated to the investment manager, distributor or any other entity authorised to carry out such function, such as regulated intermediaries. There are no minimum subscription or investor qualification requirements, imposed by regulations, for retail funds and they may be marketed to any investors who fulfil the criteria set out in the offering document.

16 Are there any special requirements that apply to managers or operators of retail funds?

Managers of retail funds are subject to the regulatory requirements that derive from European legislation as transposed in Ireland (the UCITS Directive and the AIFMD). In addition, managers are subject to the applicable Central Bank rules and regulations. See question 3.

17 What are the investment and borrowing restrictions on retail funds?

UCITS

In order to seek to ensure investor protection, UCITS are subject to specific investment restrictions, relating both to the type of investment that may be made and the extent of such investment.

Permitted asset classes

In summary, UCITS are permitted to invest in the following:

- transferable securities and money market instruments that are either admitted to official listing on a stock exchange in an EU member state or non-EU member state or that are dealt on a market that is regulated, operating regularly, recognised and open to the public;
- recently issued transferable securities that will be admitted to official listing on a stock exchange or other market (as described above) within a year;
- money market instruments, other than those dealt in on a regulated market, provided that the issue or the issuer is itself regulated for the purpose of protecting investors and savings;
- units of UCITS;
- units of non-UCITS CIS (in certain cases);
- deposits with credit institutions;
- financial derivative instruments that meet certain criteria; and

- transferable securities and money market instruments other than those referred to above (subject to a maximum aggregate limit of the NAV).

Investment and borrowing restrictions

The UCITS investment and borrowing restrictions are set out in the UCITS Directive, UCITS Regulations and Central Bank UCITS Regulations. However, in summary, the following should be noted:

- UCITS are required to provide high levels of portfolio diversification and liquidity;
- no more than 10 per cent of UCITS' net assets may be invested in transferable securities or money market instruments issued by the same body, with a further aggregate limitation of 40 per cent of net assets on exposures of greater than 5 per cent to single issuers (otherwise known as the '5/10/40' rule);
- there are exceptions to the above for investments issued or guaranteed by governments, local authorities or certain public international or supranational bodies;
- certain index replicators can take exposures of up to 20 per cent of net assets to single issuers, with up to 35 per cent to a single issuer in exceptional market conditions;
- up to 100 per cent of net assets can be invested in other CIS, provided no more than 20 per cent is invested in any one CIS, with an aggregate restriction of 30 per cent of net assets applying to investment in non-UCITS CIS as well as strict rules applying to the nature of the CIS in which a UCITS can invest, as well as limiting investment to a maximum of 25 per cent of the units of the underlying CIS;
- master-feeder structures are permitted under which a UCITS may invest, by way of derogation from the above limits, at least 85 per cent of its assets in the units of another UCITS;
- no more than 20 per cent of net assets can be invested in cash deposits with any one credit institution as permitted by the Central Bank and up to 10 per cent of net assets may be held for ancillary liquidity purposes with other credit institutions (which 10 per cent limit is raised to 20 per cent in the case of deposits made with the custodian or trustee);
- investments in or through derivatives may be made or taken to assets into which a UCITS can invest directly including financial instruments having one or several characteristics of those assets, and to financial indices, interest rates, foreign exchange rates and currencies (the maximum exposure to a single over-the-counter derivative counterparty is 5 per cent, increasing to 10 per cent for certain credit institutions) – various aggregations of the above restrictions apply;
- the maximum aggregate exposure to securities and instruments (other than CIS, derivatives and cash) not listed or traded on a recognised market is 10 per cent of net assets;
- additional general provisions apply, including concentration limits, prohibitions on taking legal or management control of issuers or prohibitions on uncovered sales; and
- borrowings are limited to 10 per cent of net assets and can only be used for temporary purposes (for liquidity).

Efficient portfolio management (EPM) techniques and instruments

UCITS are also permitted to use techniques and instruments relating to transferable securities and money market instruments for EPM purposes, which is taken to mean that they are economically appropriate and are entered into with the aim of reducing risk, reducing cost or generating additional capital or income (with a level of risk consistent with the UCITS risk profile).

Derivatives used for EPM purposes must comply with normal rules for investment in financial derivative instruments.

Repos or reverse repos and stock lending are expressly permitted with strict rules regarding collateral including acceptable forms of collateral, levels provided, diversification of collateral, valuation of collateral and how and where it is held and maintained.

RIAIFs

RIAIFs are subject to investment and eligible asset restrictions that are less restrictive than for UCITS funds but are far more restrictive than under the QIAIF regulatory regime. In particular, RIAIFs are subject to the following key investment and borrowing restrictions:

- investment in unlisted securities may be up to 20 per cent of the NAV of the RIAIF;
- investment in securities issued by the same institution may be up to 20 per cent of the NAV;
- index-tracking RIAIFs are subject to a limit of 35 per cent of the NAV of investments in securities by the same institution;
- no more than 20 per cent of the NAV may be invested in any class of security issued by a single issuer (does not apply to investment in other open-ended funds);
- investment of more than 20 per cent and up to 100 per cent of the NAV of the relevant RIAIF in government-backed securities requires the prior approval of the Central Bank;
- no more than 10 per cent of the NAV may be held in deposits with any one institution (this limit may be raised to 30 per cent for European Economic Area institutions or certain other credit institutions or the depositary of the RIAIF);
- up to 30 per cent of the NAV may be invested in any one open-ended regulated fund (this rule may be disapplied for certain categories of regulated funds under the AIF Rulebook);
- RIAIFs investing over 30 per cent of their NAV in other investment funds must ensure that the investment funds in which they invest are prohibited from investing more than 30 per cent of their NAV in other investment funds; and
- no more than 20 per cent of the NAV may be invested in unregulated, open-ended funds (this limit may be disapplied subject to further conditions in accordance with the requirements of the AIF Rulebook).

In addition, a RIAIF may borrow up to 25 per cent of its NAV but it is not permitted to offset credit balances against borrowings when determining the percentage of borrowings that remains outstanding. Repurchase or reverse repurchase contracts, securities borrowing or securities lending do not constitute borrowing for the purposes of the 25 per cent limit.

Unlike UCITS funds, RIAIFs are permitted to invest in certain types of alternative assets, such as real estate and hedge funds.

18 What is the tax treatment of retail funds? Are exemptions available?

Irish retail funds are not subject to any Irish taxes on the income (profits) or gains arising on their underlying investments.

While dividends, interest and capital gains that the fund receives with respect to its investments may be subject to taxes, including withholding taxes, in the countries in which the issuers of investments are located, these foreign withholding taxes may, nevertheless, be reduced or eliminated under Ireland's network of tax treaties to the extent applicable.

19 Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

Yes, a retail fund must appoint a depositary located in Ireland. The depositary is responsible for the safekeeping of assets, cash monitoring and oversight duties. A depositary must be one of the following:

- a credit institution;
- an investment firm subject to EU capital adequacy requirements and authorised under MiFID; or
- another category of institution subject to prudential regulation and ongoing supervision.

Under the AIFMD and the UCITS Directive, the depositary has restitution liability throughout the custody network for financial instruments lost while in custody and has or will have more prescriptive duties relating to daily monitoring of all cash flows, reconciliations and verifications, due diligence and risk assessments, segregation arrangements and sub-custody oversight.

20 What are the main governance requirements for a retail fund formed in your jurisdiction?

Retail funds are – whether UCITS or RIAIF – broadly subject to the same governance requirements. The formalities of registration and incorporation are discussed in question 12. Each of the legal structures available in Ireland is required to have detailed and accurate records kept in order to be able meet their relevant statutory and regulatory obligations. Irish UCITS funds must comply with the record-keeping requirements set out in the UCITS Regulations and Irish AIFs and Irish AIFMs must comply with the provisions of the AIF Rulebook.

Irish retail funds are required to have independent fund administrators appointed who are authorised and supervised by the Central Bank. In addition, UCITS funds and RIAIFs are required to have depositaries appointed for the purposes of holding the assets of the UCITS or RIAIF in custody in accordance with the requirements of the UCITS Regulations and the Irish AIFMD Regulations. A depositary of a RIAIF or QIAIF must enquire into the conduct of Irish corporate UCITS and RIAIFs or the management companies or general partners of non-corporate UCITS and RIAIFs in each annual accounting period and report thereon to the investors via a depositary report included in the annual report of the UCITS or the RIAIF.

Throughout the life of the relevant retail fund, there will be ongoing filing obligations to be made with the Central Bank and other relevant statutory authorities (ie, Companies Registration Office and the Irish Revenue Commissioners (tax authority)).

In addition to complying with regulatory obligations imposed by the UCITS Regulations or the Irish AIFMD Regulations, or both, management companies to UCITS funds, AIFs, self-managed UCITS funds and internally managed AIFs in Ireland are also required to comply with and adhere to the requirements of the Central Bank's 'Fund Management Company – Guidance' published in December 2016 (the Guidance). The Guidance details the Central Bank's requirements with respect to the following matters:

- delegate oversight;
- organisational effectiveness;
- directors' time commitments;
- managerial functions;
- operational issues; and
- procedural matters.

All Irish UCITS and RIAIFs that are structured as corporate entities (ie, ICAVs and PLCs) are required to have a minimum of two Irish-resident directors and an Irish company secretary. The directors of an Irish corporate UCITS or RIAIF or the management companies or general partners of non-corporate UCITS and RIAIFs are required to comply with the Central Bank's Fitness and Probity Standards issued under section 50 of the Central Bank Reform Act 2010 and must be pre-approved by the Central Bank.

Applications to become a director of a UCITS or RIAIF or a management company or general partner of non-corporate UCITS and RIAIFs must be made to the Central Bank via an online individual questionnaire (IQ). The IQ application requires applicant directors to provide detailed information on their educational and professional experience and expertise together with, inter alia, details of the proposed time commitment (in days) that they will provide per year in respect of that directorship. In addition, the appointing entity, in validating the IQ, is required to confirm its expectation regarding the proposed director's time commitment per year.

Finally, corporate UCITS and RIAIFs or the management companies or general partners of non-corporate UCITS and RIAIFs are recommended to adhere to a voluntary corporate governance code for funds put in place by the Irish Funds Industry Association at the request of the Central Bank.

21 What are the periodic reporting requirements for retail funds?

Retail funds are required to publish an annual audited report for each financial year and an unaudited semi-annual or half-yearly report. The annual report must be published within four months of the year end, the semi-annual report must be published within two months of the period end and both must be sent to the Central Bank. Both must also be offered free of charge to investors before the conclusion of a contract and supplied free of charge to investors upon request.

22 Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

For retail funds, there is a general entitlement to refuse an application for shares or units at the discretion of the board of directors or the fund or the relevant management company. In addition, shares or units may not be issued to the following persons:

- those located in jurisdictions where the fund cannot be sold or marketed;
- those who do not provide anti-money laundering or counter-terrorist financing documentation; or
- those that would cause negative legal, tax or regulatory consequences for the fund or other investors.

For UCITS funds, there are no redemption restrictions other than gating the fund in certain prescribed circumstances or suspending it in more extreme cases.

A closed-ended RIAIF does not facilitate redemption requests during the life of the RIAIF. Fund documentation may also provide for temporary suspension in specified circumstances. The Central Bank must be notified immediately of any such suspension.

Non-retail pooled funds

23 What are the main legal vehicles used to set up a non-retail fund? How are they formed?

See question 12.

24 What are the key laws and other sets of rules that govern non-retail funds?

See 'RIAIFs' in question 13.

25 Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

See question 14.

26 Who can market non-retail funds? To whom can they be marketed?

The marketing and distribution of non-retail funds can be carried out by the fund or the AIFM or delegated to the investment manager, distributor or any other entity authorised to carry out that function.

There are regulatory minimum subscription and investor qualification requirements for non-retail funds and they may be marketed to any investors who fulfil the regulatory criteria. Non-retail AIFs may only be marketed to professional investors in Ireland. QIAIFs may only be marketed to qualifying investors (as defined in the AIF Rulebook).

27 Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

A QIAIF may only be sold in Ireland to qualifying investors and a minimum subscription of €100,000 applies.

A qualifying investor is as follows:

- an investor who is a professional client within the meaning of MiFID;
- an investor who receives an appraisal from an EU credit institution, a MiFID firm or a UCITS management company to the effect that the investor has the appropriate expertise, experience and knowledge to adequately understand the investment in the QIAIF; or
- an investor who certifies that they are an informed investor by providing the following:
  - confirmation (in writing) that the investor has such knowledge of, and experience in, financial and business matters as would enable the investor to properly evaluate the merits and risks of the prospective investment; or
  - confirmation (in writing) that the investor's business involves, whether for its own account or the account of others, the management, acquisition or disposal of property of the same kind as the property of the QIAIF.

Qualifying investors must self-certify in writing to the QIAIF that they meet the minimum initial investment per investor and appropriate expertise and understanding tests and 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. When marketing a QIAIF in another EU member state under the AIFMD marketing passport, the AIFM may only market units or shares in the relevant QIAIF to professional investors (as defined in MiFID).

28 Are there any special requirements that apply to managers or operators of non-retail funds?

See question 16.

29 What is the tax treatment of non-retail funds? Are any exemptions available?

Irish non-retail funds are not subject to any Irish taxes on the income (profits) or gains arising on their underlying investments.

While dividends, interest and capital gains that a fund receives with respect to its investments may be subject to taxes, including withholding taxes, in the countries in which the issuers of investments are located, these foreign withholding taxes may, nevertheless, be reduced or eliminated under Ireland's network of tax treaties to the extent applicable.

An amended tax regime to that above applies to non-retail funds that invest significantly in Irish real estate assets.

30 Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

See question 19.

31 What are the main governance requirements for a non-retail fund formed in your jurisdiction?

See question 20.

32 What are the periodic reporting requirements for non-retail funds?

QIAIFs are required to publish an independently audited annual report for each financial year. The deadline for the publication of the annual report of an AIF is within six months of the year end. In addition, QIAIFs that are structured as unit trusts must also prepare an unaudited half-yearly report, which must be published within two months of the relevant half-yearly reporting date. In addition, QIAIFs are required to report their NAV, units in issue, subscription or redemption, profit or loss, fee and expenses data to the Central Bank on a monthly basis and also submit quarterly statistical returns.

Separately managed accounts

33 How are separately managed accounts typically structured in your jurisdiction?

Typically, a client who requires a separately managed account will enter into a discretionary investment management agreement with a MiFID-authorised investment firm who has the authority to engage in portfolio management and who will buy or sell financial instruments on the client's behalf. Where the MiFID-authorised investment firm is authorised to hold client assets, it will hold these assets on the client's behalf with an eligible custodian in accordance with the Client Asset Regulations 2015, SI No. 104/2015, that are designed to protect and safeguard client assets. Where the MiFID-authorised investment firm is not authorised to hold client assets, the client will appoint a third-party custodian and grant the MiFID-authorised investment firm a mandate to issue instructions to the custodian on the client's behalf.

34 What are the key legal issues to be determined when structuring a separately managed account?

The terms for a separately managed account will be set out in the discretionary investment management agreement between the client and the MiFID-authorised investment firm. The level of protection afforded to the client is driven by the client's categorisation by the MiFID-authorised investment firm with a retail client receiving the highest level of protection under MiFID II in terms of how the product is sold to the client, the level of information provided to the client and the duty of care owed to the client. If, on the other end of the spectrum, a client is categorised as an eligible counterparty, it will be afforded very little protection under the MiFID II conduct of business rules and the agreement will be based on negotiation between the parties. Where a MiFID-authorised investment firm has the authority to hold the client's assets it must do so in accordance with the Client Asset Regulations and this will be referenced in the discretionary investment management agreement.

35 Is the management or marketing of separately managed accounts regulated in your jurisdiction?

For an entity to be in a position to offer a client the service of separately managed accounts, it must be regulated either as a MiFID investment firm authorised to engage in portfolio management or an AIFM authorised to provide the additional service of individual portfolio management in accordance with mandates given by investors on a discretionary client-by-client basis.

General

36 Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

Updates to the previous MiFID regime came into force in January 2018. The amendments introduced by MiFID II have created significant new rules that, inter alia:

- impact EU entities manufacturing and distributing funds in terms of product design;
- set requirements relating to how such funds are sold to customers (eg, retail investors will need to seek advice in order to access 'structured UCITS' (deemed a complex product under the new MiFID II rules));
- impose an effective ban on inducements; and
- provide for greater transparency on fees.

37 Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

While there is no requirement for retail or non-retail funds authorised by the Central Bank to be listed, the Irish Stock Exchange (ISE) operates a streamlined listing regime for retail and non-retail funds authorised

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and regulated in an EU member state. The ISE also lists funds from many non-EU jurisdictions. In order to list an investment fund on the ISE, a listing sponsor must be formally appointed and listing particulars must be drafted and published in compliance with the ISE listing regime. In order to list a closed-ended fund on the Main Securities Market of the ISE, application must also be made to the Central Bank (as competent authority under the Prospectus Directive).

An ISE listing increases distribution capacity and meets the needs of institutional investors and pension funds that have limited capacity to invest in unlisted securities. Investors take comfort that an ISE-listed fund has met the suitability, diversification and ongoing compliance and reporting requirements of an internationally recognised listing authority with specific expertise in investment funds. Another benefit of listing to investors is the transparency that comes with complying with the ongoing reporting requirements: the NAV of the listed fund must be published on the ISE upon calculation, market announcements must be made in relation to material changes and the audited financial statements of the fund must be filed with the ISE.

38 Is it possible to redomicile an overseas vehicle in your jurisdiction?

Yes. Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, the Isle of Man and Jersey are approved as jurisdictions from which corporate funds can redomicile to Ireland pursuant to this legislation. The Central Bank has issued guidance on the practical steps involved in the redomiciliation process for both corporate funds and unit trusts. Redomiciliation can be a more efficient alternative to a cross-border merger as it does not involve setting up a new fund or selling or transferring assets, shares or investors. The legal framework seeks to avoid unnecessary administrative burdens and expressly recognises that a migrating fund will not be treated as a new entity in Ireland, so that its existing identity and track record may be preserved. Further, there is no other taxable event as a consequence of the redomiciliation.

39 Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

Other than those outlined above, there are no specific rules.

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