Investment Firms Quarterly Legal and Regulatory Update

Period covered:
1 July 2014 – 30 September 2014

DILLON EUSTACE

DUBLIN CAYMAN ISLANDS HONG KONG NEW YORK TOKYO

Table of Contents

	Page
European Market Infrastructure Regulation ("EMIR")	2
Markets in Financial Instruments Directive ("MiFID II")	9
CRD IV	13
Credit Rating Agencies Regulation	16
Regulation on Securities Settlement and on Central Securities Depositaries in the EU	19
Market Abuse	21
Transparency Directive	23
Prospectus Directive	25
Financial Conglomerates	26
Central Bank of Ireland	27
Fitness and Probity	30
Data Protection	33
Whistleblowing	35
Companies Bill Update	37
Anti-Money Laundering/Counter-Terrorism Financing	39
Irish Taxation Update	41
Contact Us	42

INVESTMENT FIRMS QUARTERLY LEGAL AND REGULATORY UPDATE

European Market Infrastructure Regulation ("EMIR")

(i) ESMA Launches First Round of Consultations to Prepare for Central Clearing of OTC Derivatives in the EU

ESMA launched a first round of consultations to prepare for central clearing of OTC derivatives within the European Union on 11 July 2014. The two consultation papers sought stakeholders' views on draft regulatory technical standards ("**RTS**") for the clearing of Interest Rate Swaps ("**IRS**") and Credit Default Swaps ("**CDS**") that ESMA has to develop under EMIR.

With the overarching objective of reducing systemic risk, EMIR introduces the obligation to clear certain classes of OTC derivatives in central clearing houses ("**CCPs**") that have been authorised ("**European CCPs**") or recognised ("**Third-Country CCPs**") under its framework. To ensure that the clearing obligation reduces systemic risk, EMIR specifies a process for the identification of the classes of OTC derivatives that should be subject to mandatory clearing. This includes the assessment of specific criteria that the relevant classes of OTC derivatives have to meet.

ESMA is required to draft RTS on the clearing obligation within six months of the authorisation or recognition of CCPs. ESMA has analysed the classes from several CCP notifications and has determined that some IRS and CDS classes should be subject to the clearing obligation. Although equity and interest rate futures and options are also offered for clearing, ESMA has decided that a clearing obligation is not necessary for these classes at this stage. However, the two consultation papers may be followed by one or more on other asset classes.

For IRS, the draft RTS propose the following four classes, on a range of currencies and underlying indices should be subject to central clearing:

- Basis swaps;
- Fixed-to-float interest rate swaps;
- Forward rate agreements; and
- Overnight index swaps.

For CDS, the draft RTS propose that European untranched index CDS (for two indices) should be subject to central clearing.

The IRS Consultation Paper closed on 18 August 2014 and the CDS Consultation Paper closed on 18 September 2014. ESMA will use the answers received to draft its final RTS on the clearing obligation for IRS and CDS and send them for endorsement to the European Commission. The clearing obligation will take effect following a phased implementation, with the current proposal ranging from six months to three years after the entry into force of the RTS, depending on the types of counterparties concerned.

For further information, please see: http://www.esma.europa.eu/news/Press-release-ESMA-defines-central-clearing-interest-rate-and-credit-default-swaps?t=326&o=home

IRS Consultation Paper: http://www.esma.europa.eu/system/files/2014-799.pdf
CDS Consultation Paper: http://www.esma.europa.eu/system/files/2014-800.pdf

(ii) ESMA Updates EMIR implementation Q&As

ESMA issued a revised "Questions and Answers" document on the implementation of EMIR, (the "**Q&A**") on 10 July 2014. The Q&A specifically addresses two main issues:

- Clarifies that the clearing exemption for certain European pension schemes does not extend to pension schemes established in third countries; and
- Contains information on the segregation requirements applicable to Third Country CCPs under Article 39 of EMIR.

The latest version of the Q&A can be found here:

http://www.esma.europa.eu/content/QA-X-EMIR-Implementation

(iii) Updated EMIR FAQs from the European Commission

The European Commission has also updated its FAQs on EMIR (Part IV) on 10 July 2014 to include clarity around segregation requirements for non-EU clearing members of EU CCPs.

Please find the FAQs here:

http://ec.europa.eu/internal_market/financial-markets/news/index_en.htm

(iv) List of Central Counterparties authorised to offer services and activities in the European Union

ESMA's list of European CCPs that have been authorised to provide services and activities in the European Union was last updated on 16 September 2014. There are now thirteen such European CCPs authorised in the European Union. The updated list can be found at this link; http://www.esma.europa.eu/system/files/ccps_authorised_under_emir.pdf

(v) IOSCO Consults on Risk Mitigation Standards for Non-Centrally Cleared OTC Derivatives

On 17 September 2014, IOSCO published a consultation paper on risk mitigation standards for non-centrally cleared OTC derivatives. The consultation proposes nine standards, which relate to the following areas which aim at mitigating risks in uncleared OTC derivatives:

- Standard 1 : Scope of coverage
- Standard 2 : Trading relationship documentation
- Standard 3 : Trade Confirmation
- Standard 4 : Valuation with counterparties
- Standard 5 : Reconciliation
- Standard 6 : Portfolio Compression
- Standard 7 : Dispute Resolution
- Standard 8 : Implementation
- Standard 9 : Cross-border transactions.

The proposed standards have been developed in consultation with the Basel Committee on Banking Supervision ("**BCBS**") and the Committee on Payments and Market Infrastructures. They are intended to complement the margin requirements developed by BCBS and IOSCO in September 2013.
The consultation recognises that some jurisdictions have already implemented or are implementing requirements in this area and specifically recognises the risk mitigation measures which have been implemented in the U.S. and the European Union. IOSCO calls for the proposals contained in the consultation paper to be implemented as soon as possible. IOSCO also notes that, due to the global nature of the derivatives markets, any regulatory standards should be compatible across jurisdictions to avoid arbitrage, conflicting rules and to level the playing field.

The consultation closes on 17 October 2014.

(vi) IOSCO Launches Public Information Repository for Central Clearing Requirements

IOSCO unveiled an information repository for central clearing requirements for OTC derivatives, which provides regulators and market participants with consolidated information on the clearing requirements of different jurisdictions.

The repository sets out central clearing requirements on a product-by-product level, and any exemptions from them. The information in the repository will be updated quarterly.

The repository can be accessed at this link:

http://www.iosco.org/library/index.cfm?section=information_repositories

(vii) ESMA Discussion Paper on Calculation of Counterparty Risk by UCITS for OTC Derivatives subject to EMIR clearing

On 23 July 2014, ESMA published a discussion paper (the "**Discussion Paper**") on the calculation of counterparty risk by UCITS for OTC derivative transactions subject to clearing obligations under EMIR.

The Discussion Paper is seeking stakeholders' views on how the limits on counterparty risk in OTC derivative transactions that are centrally cleared should be calculated by UCITS, and whether the same rules should be applied by UCITS for both centrally cleared OTC transactions and Exchange Traded Derivatives.

The Discussion Paper is focused on the impact of a default of a clearing member or of other clients of that member on the UCITS that enters into centrally cleared OTC derivative transactions. This takes into account the fact that European CCPs and Third Country CCPs are already subject to stringent collateral requirements, and should generally be considered as entailing low counterparty risk.

This Discussion Paper distinguishes between different clearing arrangements:

1. Direct clearing arrangements, i.e. the UCITS is a client of the clearing member with:

   - Individual client segregation;
   - Omnibus client segregation;
   - Other types of segregation arrangement; or
   - Segregation arrangements with a non-EU CCP outside the scope of EMIR.

2. Indirect clearing arrangements between the CCP, the clearing member, the client of the clearing member and the UCITS.

The consultation is open for feedback until 22 October 2014. ESMA will use the feedback received from the public consultation to determine its final views on the appropriate way forward, including a possible recommendation to the European Commission on a modification of the UCITS Directive.

(viii) Joint Consultation on Draft RTS on Risk-Mitigation Techniques for OTC-derivative Contracts not Cleared by a CCP

The European Supervisory Authorities ("**ESA's"**) launched a consultation on 14 April 2014 regarding draft RTS on risk mitigation measures for OTC derivative contracts not cleared by a CCP. The consultation closed on 14 July 2014.

For those OTC derivative transactions that will not be subject to central clearing, the draft RTS prescribe that counterparties apply robust risk mitigation techniques to their bilateral relationships, which will include mandatory exchange of initial and variation margins. This will reduce counterparty credit risk, mitigate any potential systemic risk and ensure alignment with international standards.

The draft RTS elaborate on the risk-management procedures for the exchange of collateral and on the procedures concerning intragroup exemptions including the criteria that identify practical and legal impediments to the prompt transfer of funds.

The draft RTS lay down the methodologies for the determination of the appropriate level of margins, the criteria that define liquid high-quality collateral, the list of eligible asset classes, collateral haircuts and concentration limits.

Based on the responses received, the ESAs will prepare the final draft RTS and intend to submit these to the European Commission before the end of 2014.

The responses can be found at this link; http://www.esma.europa.eu/consultation/Joint-Discussion-Paper-Draft-Regulatory-Technical-Standards-risk-mitigation-techniques-#responses

(ix) Treatment of FX Forwards under EMIR

As previously reported, the treatment by regulators of FX Forwards under EMIR varies across the European Union. The reason for these diverging approaches is the fact that a derivative under EMIR is defined by reference to Directive 2004/39/EC (the "**MiFID Directive**") and Member States transposed the MiFID Directive differently.

Concerns have been expressed by both the European Commission and ESMA about the lack of consistency between EU Member States with regards to the definition of an FX Forward. On 31 July 2014, (further to previous correspondence between ESMA and the European Commission on the topic) ESMA published a letter (dated 23 July 2014), (the "**Letter**") from the European Commission on the need for clarity regarding the definition of a financial instrument relating to FX.

The Letter outlines the need for a consistent interpretation to ensure the effective application of the reporting regime of EMIR. However, unfortunately the European Commission has now clarified that it is not in a position to develop such a definition using an implementing act, for legal reasons[1]. However, the Letter provides that MiFID II and related implementing measures (which will apply from 3 January 2017) will be able to provide legal certainty as to the definition of a FX contract. In addition, the Letter suggests that ESMA should consider whether "the current approach by Member States achieves a sufficiently harmonised application of the EMIR reporting obligation in the period before the application of MiFID II or whether further measures by ESMA e.g. guidelines are necessary". The Letter sets out the "broad consensus" on a definition of FX spot contracts, which have been reached following extensive public debate and meetings of the European Securities Committee as follows:

- To use a T+2 settlement period to define FX spot contracts for European and other major currency pairs;
- To use the "standard delivery period" for all other currency pairs to define a FX spot contract;
- Where contracts for the exchange of currencies are used for the sale of a transferable security to use the accepted market settlement period of that transferable security to define a FX spot contract, subject to a cap of 5 days; and
- A FX contract that is used as a means of payment to facilitate payment for goods and services should also be considered a FX spot contract.

Following the publication of the Letter by ESMA, the Central Bank updated its "Frequently Asked Questions", (the "**Q&A**") to reflect the updated developments at European level. The Q&A now provides as follows;

- All FX transactions with settlement before or on the relevant spot date are not to be reported;
- All FX transactions with settlement beyond seven days are to be reported;

[1] Directive 2010/78/EU introduced a sunset clause in Article 64a of MiFID I which provides that "the powers conferred on the Commission in Article 654 to adopt implementing measures that remain after the entry into force of the Lisbon Treaty on 1 December 2009 shall cease to apply on 1 December 2012".; i.e. the legal power of the European Commission to adopt implementing legislation that could clarify the definition of FX financial instruments lapsed on 1 December 2012.

- All FX transactions with settlement between the spot date and seven days (inclusive) are to be reported only if, in a jurisdiction where one counterparty to the trade is located, local laws, rules or guidance would deem the transaction reportable. Where an Irish counterparty is entering into FX transactions with a counterparty located in another jurisdiction, the Irish counterparty should rely on documentation from that counterparty to inform it as to whether there is a requirement in the relevant jurisdiction to report the transaction.
- All FX transactions between two Irish counterparties with settlement between the spot date and seven days (inclusive) are not required to be reported. However, counterparties should have the capacity to report such trades (notwithstanding that there is no obligation to report) and that counterparties build a capacity to report such trades in the future.

The Central Bank has indicated that its guidance is a temporary measure and that the Q&A may be updated / superseded if there are any further developments at a European level on this topic.

(x) European Commission Response to ESMA letter setting out its Intention to Ease EMIR Frontloading Requirements

On 8 May 2014, ESMA sent a letter to the European Commission proposing to limit the scope of the frontloading requirement under EMIR.

The frontloading requirement imposes an obligation on counterparties to clear OTC derivative contracts which have been executed after a CCP has been authorised under EMIR (the first of which was authorised on 18 March 2014) and before the date of application of the clearing obligation (i.e. the date specified for the clearing obligation to apply by ESMA in the relevant regulatory technical standards).

In this way under the frontloading rules an OTC derivative contract concluded after the authorisation of a CCP might at a later date become subject to the clearing obligation before its expiration date. According to Recital 20 of EMIR, the objective of the frontloading requirement is to ensure a uniform and coherent application of EMIR and a level playing field for stakeholders when a class of OTC derivative contracts is declared subject to the clearing obligation.
This frontloading obligation has proved to be particularly controversial as many in the industry have argued that the uncertainty over which OTC contracts will become subject to the clearing obligation and the unknown duration of the frontloading period has created legal uncertainty about the status of OTC derivative contracts entered into after the CCPs are authorised and an inability to correctly price such transactions.

The period during which frontloading is relevant can be divided into two separate periods:

- Period A: the period between the notification of the classes to ESMA and the entry into force of the relevant regulatory technical standards ("**RTS**") on the clearing obligation; and

- Period B: the period between the entry into force of the RTS and the date of application of the clearing obligation.

In its letter, ESMA suggested that the frontloading requirement should not apply to transactions that are entered into during Period A and should only apply to transactions entered into during Period B. The determinant of whether an OTC contract entered into during Period B will be subject to the frontloading obligation is whether, as at the date of the application of the clearing obligation for that OTC derivative contract and for the counterparty in question, there is a certain minimum remaining maturity.

On 8 July 2014, ESMA received a response from the European Commission whereby the European Commission indicated its agreement with the proposals relating to frontloading which were contained in ESMA's letter of 8 May 2014.

A copy of the European Commission's letter can be found at this link; http://www.esma.europa.eu/system/files/d2392454.pdf

Markets in Financial Instruments Directive ("MiFID II")

(i) An update on MiFID II

MiFID II comprises of:

- MiFID II Directive which is largely an amendment and restatement of the original MiFID I Directive; and
- MiFID II Regulation setting out the requirements relating to trade transparency and the mandatory trading of derivatives on organised venues (together "**MiFID II**").

MiFID II entered into force on the 2 July 2014 and will apply from 2 January 2017.

The new rules contained in MiFID II can be summarised as follows:

- Introduction of new trading venue concept called the Organised Trading Facility ("**OTF**") so as to ensure that trading takes places on a regulated platform wherever possible;

- Restriction on the exemptions that a number of firms currently rely on in order to ensure that they are outside the scope of MiFID. For example MiFID II will restrict the "dealing on own account exemption";
- The introduction of wide ranging reforms to the regulation of derivatives in Member States; e.g. MiFID II will require certain classes of derivatives to be traded on a Regulated Market ("**RM**"), Multilateral Trading Facility ("**MTF**"), OTF or on a third country trading venue which the European Commission has confirmed meets an equivalency test;
- Extension of the current pre and post trade transparency requirements;
- Extension of the current transaction reporting regime;
- Introduction of controls for firms that engage in algorithmic trading;
- Introduction of high-level organisational and conduct of business standards to all investment firms (e.g. client order handling rules, best execution requirements, requirements when providing investment advice, rules regarding inducements, client classification rules, appropriateness and suitability tests, etc);
- New regime for third country firms who want to provide investment services to clients in the European Union; and
- Introduction of a harmonised administrative sanctions regime.

From a funds perspective, all UCITS had been classified as non-complex financial instruments and therefore had not been subject to appropriateness tests under MiFID. MiFID II introduces the concept of a "structured UCITS" which will be treated as a complex financial instrument. This means that investment firms selling these products (i.e. structured UCITS) will be required to obtain information from retail investors to ensure that the product is appropriate to him/her.

MiFID authorised investment firms should be aware of the provisions in MiFID II so that they can take steps to ensure compliance where impacted by MiFID II. In addition, firms which currently avail of certain of the exemptions within MiFID will need to consider whether they will need to become authorised under MiFID II to continue providing such services.

(ii) Level 2 Implementing Measures

ESMA, as part of the Lamfalussy process has been asked by the European Commission to draft more detailed "level 2" rules over the next eighteen months. In this regard it is expected that ESMA will produce and prepare a number of regulatory technical standards, implementing technical standards, various recommendations, guidelines and other technical advice, (hereinafter the "**Level 2 Measures**") over the next while.

In order to achieve these objectives ESMA launched a consultation paper (the "**Consultation Paper**") and a discussion paper (the "**Discussion Paper**") on MiFID II on 22 May 2014. The publication of these documents represented the first step with regards to the preparation of Level 2

Measures and represented an important part of the process of translating the MiFID II requirements into practically applicable rules and regulations.

The Consultation Paper covered all of the topics on which the European Commission has formally requested ESMA to provide technical advice for the adoption of delegated acts by the European Commission. Therefore the Consultation Paper focuses on; (i) investor protection; (ii) transparency; (iii) data publication; (iv) micro-structural issues; (v) requirements applying on and to trading venues; (vi) commodity derivatives; and (vii) portfolio compression. The deadline for response to the Consultation Paper was 1 August 2014 and a complete list of the responses received from market participants can be found at this link; http://www.esma.europa.eu/consultation/Consultation-Paper-MiFID-IIMiFIR#responses

Respondents to the Consultation Paper include:

- Bloomberg L.P.
- European Association of Corporate Treasurers (EACT)
- Investment Management Association (AIMA)
- European Banking Federation
- Irish Banking Federation
- International Swaps and Derivatives Association, Inc

ESMA will consider the responses it receives to the Consultation Paper, and will finalise draft technical advice for submission to the European Commission by 12 December 2014 (i.e. no later than six months after the entry into force of MiFID II).

On the other hand, the Discussion Paper focuses on more innovative or technically complex topics in order to receive feedback from stakeholders for the preparation of regulatory technical standards and implementing technical standards. The feedback received on the Discussion Paper will provide the basis of a further consultation on the issues raised in the Discussion Paper.

The deadline for response to the Discussion Paper was 1 August 2014 and a complete list of the responses received from market participants can be found at this link:

http://www.esma.europa.eu/consultation/Discussion-Paper-MiFID-IIMiFIR#response

Respondents to the Discussion Paper include:

- International Swaps and Derivatives Association (**"ISDA"**)
- Irish Stock Exchange
- European Banking Federation

- London Stock Exchange Group plc
- Federation of European Securities Exchanges
- Gafta - The International Grain and Feed Trade Association
- European Association of Central Counterparty Clearing Houses

ESMA will consider the responses it received to the Discussion Paper, and will publish a subsequent paper that will include the draft technical standards in the coming months.

(iii) EBA consults on criteria for intervention on structured deposits under the MiFID II Regulation

On 5 August 2014, the European Banking Authority ("**EBA**") published a consultation paper containing draft technical advice on possible delegated acts on criteria and factors for intervention powers concerning structured deposits under Articles 41 and 42 of the MiFID II Regulation.

Under the MiFID II Regulation, the EBA is tasked with monitoring the market for structured deposits across the EU. Under certain specified circumstances, the EBA can also temporarily prohibit or restrict the marketing, distribution or sale of certain structured deposits. In June 2014, the European Commission requested the EBA to provide technical advice on the criteria and factors to be taken into account when exercising these powers.

The consultation closes on 5 October 2014.

(iv) ESMA consults on draft guidelines clarifying the definition of commodity derivatives under MiFID

On 29 September 2014, ESMA published a consultation paper on future guidelines clarifying the definition of commodity derivatives as financial instruments under Directive 2004/39/EC ("**MiFID I**").

The different approaches to the interpretation of MiFID I across Member States mean that there is no commonly-adopted application of the definition of derivative or derivative contract in the EU for some asset classes. Whilst this issue has in the past been noted as a concern since the implementation of MiFID I, the practical consequences have come to the forefront with the implementation of EMIR.

ESMA considers it essential to ensure, amongst other things, a consistent application of EMIR in the European Union and is therefore considering the adoption of guidelines to ensure the consistent classification of certain financial instruments as derivatives.

The consultation period runs until 5 January 2015.

All contributions should be submitted online via:

http://www.esma.europa.eu/consultations/overview/10

CRD IV

(i) European Commission consults on economic consequences of country-by-country reporting under CRD IV Directive (2013/36/EU) (the "CRD IV Directive")

On 11 July 2014, the European Commission published a consultation on the potential economic consequences of country-by-country reporting under the CRD IV Directive.

Article 89 of the CRD IV Directive requires firms to disclose on a country-by-country basis key specified information relating to their businesses. The CRD IV Directive distinguishes between certain general information listed at Article 89(a) to (c) (names, nature of activities, geographical location, turnover and employee numbers) and potentially more sensitive information listed at Article 89(1)(d) to (f) (profit on loss before tax, tax on profit and loss and public subsidies received). The obligation to disclose under Article 89(1)(a)to (c) applied from 1 July 2014, whereas the obligation to disclose under Article 89(1)(d) to (f) will apply from 1 January 2015.

Article 89(3) of the CRD IV Directive requires the European Commission to report to the European Parliament and the Council of the EU by 31 December 2014 on the potential negative consequences of the public disclosure country-by-country reporting information. If it identifies significant negative consequences, the European Commission may consider amending Article 89 of the CRD IV Directive and it may defer the obligation to disclose the information required by Article 89(1)(d) to (f).

In the consultation the European Commission seeks stakeholders view on the potential economic consequences of disclosing the Article 89(1)(d) to (f) information, with the aim of highlighting the effects on competitiveness, investment and credit availability and the stability of the financial system.

The consultation closed on 12 September 2014.

(ii) EBA publishes revised XBRL taxonomy (v.2.2) for remittance of supervisory reporting

On 18 August 2014, the EBA published a revised XBRL taxonomy (v.2.2) to be used by competent authorities for the remittance of data under the EBA implementing technical standards on supervisory reporting under the Capital Requirements Regulation (Regulation 575/2013), ("**CRR**").

The EBA explains that the XBRL taxonomy presents the data items, business concepts, relations, visualisations and validation rules described by the EBA's data point model contained in the ITS on supervisory reporting.

The taxonomy defines uniform data formats relating to reporting of own funds, financial information, losses stemming from lending collateralised by immovable property, large exposures, leverage ratio, liquidity ratios and asset encumbrance.

The new taxonomy will be used for reports with reference dates as of 31 December 2014 and beyond.

(iii) European Commission adopted text of Delegated Regulation on passport notifications under CRD IV

On 28 August 2014, the European Commission Implementing Regulation (Regulation 926/2014), (the **"Regulation**") was published in the Official Journal of the EU. The Regulation entered into force on 17 September 2014.

The Regulation provides for implementing technical standards with regards to standard forms, templates and procedures for notifications relating to the exercise of the right of establishment and the freedom to provide services under Articles 35, 36 and 39 of the CRD IV Directive.

(iv) European Commission writes to EBA about concerns that CRD IV bankers' bonus requirements are being circumvented

On 7 September 2014, the European Commission published a letter (dated 4 September 2014) from Michel Barnier, Commission Vice-President, to Andrea Enria, EBA on possible circumvention of the EU rules on bankers' bonuses (the "**Letter**").

In the Letter, Mr. Barnier refers to a previous letter from Jonathan Faull, Commission Director General for Internal Market and Services, in which Mr Faull voiced concerns relating to the reported plans of banks in certain Member States to introduce so-called allowances for key staff.

These have been characterized in the press as a means of circumventing the legal framework for variable remuneration under the CRD IV Directive.

Mr. Barnier states that he has strong concerns about the continuing use of such allowances. In addition, Mr. Barnier refers to the fact finding exercise that has been initiated by the EBA and offers his full support to this politically important matter.

(v) Interactive Single Rulebook

The Interactive Single Rulebook is an on-line tool that provides a comprehensive compendium of the level one text for both the Capital Requirements Regulation ("**CRR**") and the Capital Requirements Directive ("**CRD IV**"), the corresponding technical standards developed by the EBA and adopted by the European Commission ("**RTS**" and "**ITS**"), as well as the EBA guidelines and related Q&As. This tool will also include the Bank Recovery and Resolution Directive ("**BRRD**") as soon as it enters into force.

The purpose of the Single Rulebook is to ensure the consistent application of the regulatory banking framework across the EU.

A link to the Interactive Single Rulebook can be found at:

https://www.eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook/-/interactive-single-rulebook/toc/504

(vi) EBA updates single rulebook Q&A's (the "Q&A")

The Q&A contains answers to various questions posed by stakeholders on the practical implementation of the Single Rulebook (the "**Rulebook**"). The Q&A allows users to search the database for guidance relating to particular aspects of the Rulebook. Users of the Q&A can search the database by Q&A ID, legal reference, date submitted or keyword.

On 26 September 2014, the EBA updated its Q&A's on the Rulebook, publishing 21 new answers to questions largely relating to supervisory reporting. The Q&A is updated on a regular basis by the EBA.

In addition, on 30 September 2014, the EBA introduced an additional improvement to its Q&A tool which is intended to facilitate the review of Q&A's. In the 'Search for Q&As' section, users now have the possibility to export all or a sub-set of Q&As into a PDF format.

Users can search the Q&A at this link; http://www.eba.europa.eu/single-rule-book-qa

Credit Rating Agencies Regulation

(i) IOSCO publishes Responses to Consultation on Code of Conduct Fundamentals for Credit Rating Agencies

The International Organization of Securities Commissions (IOSCO) updated the publications section of its webpage on 15 July 2014 in order to provide links to the public responses that have been received to its consultation, which was published in February 2014, on revisions to the code of conduct fundamentals for credit rating agencies ("**CRAs**") (CR01/2014). Some of the respondents included The European Association of Credit Rating Agencies (EACRA), FitchRatings, Moody's Investor Service and Standard & Poor's Ratings Services.

(ii) ESMA Consults on Guidelines on Periodic Information Submitted to it by CRAs

ESMA has commenced a consultation in respect of new supervisory guidelines concerning the material periodically submitted by CRAs to ESMA. The objective of the consultation paper is to make certain that the information that CRAs are asked to submit aids ESMA's supervisory work in terms of identifying the key risks in the CRA sector. The final date for comments is 31 October 2014.

Registered CRAs must periodically report to a Central Repository ("**CEREP**") and the Supervision of CRAs Tool ("**SOCRAT**"). All registered and certified CRA must make available information on the historical performance of their ratings on CEREP while SOCRAT will facilitate the processing of data in a standard and automatic manner and support ESMA CRA Unit in the conduct of the supervisory activities. Additionally CRAs must notify ESMA of amendments to their original conditions for registration and submit periodically to ESMA information in compliance with ESMA's Guidance on the enforcement practices and activities. CRAs must also submit annually information regarding their revenues for the calculation of the supervisory fees and market share to ESMA. Finally, CRAs submit to ESMA periodically other information that is used for on-going supervisory purposes.

As part of the supervision mandate conferred to ESMA by the Regulation, ESMA will also request CRAs to submit ongoing information on their ratings activity. To support an efficient, standardised and secure treatment of this data, ESMA is developing, for the sole purpose of internal supervision, the Supervision of CRAs Tool (SOCRAT). The tool will facilitate the processing of such data in a standard and automatic manner and support ESMA CRA Unit in the conduct of the supervisory activities.

Article 16 of EU No 1095/2010 of the European Parliament and of the Council of 24 November 2010 proposes the guidelines, and enables ESMA to publish guidelines addressed to financial

market participants with the aim of creating reliable, capable and effective supervisory procedures. These proposed guidelines will substitute CESR's Guidance on the enforcement practices and activities to be conducted under Article 21.3(a) of the Regulation (ESMA/2010/944) of 30 August 2010.

The consultation paper should be by read by CRAs (as defined in Article 3(1)(b) of the CRA Regulation), companies which have applied for registration or are considering applying for registration, competent authorities, and consumer groups.

The consultation paper can be viewed via the following link:

http://www.esma.europa.eu/system/files/2014-845_cp_on_periodic_information_to_be_submitted_to_esma_by_credit_rating_agencies.pdf

(iii) ESMA Publishes Technical Advice on Creditworthiness Assessment for Sovereign Debt under CRA Regulation

ESMA published technical advice (ESMA/2014/850) to the European Commission on the development of an EU creditworthiness assessment for sovereign debt on 18 July 2014.

The Commission is required by Article 39b(2) of the CRA Regulation (Regulation 1060/2009) (as amended by the CRA III Regulation (Regulation 462/2013)) to adopt a report on this issue by 31 December 2014.

In its request for advice, the Commission had asked ESMA to provide input on the issue of sovereign ratings and rating processes, including an overview of the market for sovereign ratings, information on operational issues relating to sovereign ratings, information on sovereign rating processes, as well as lessons drawn from ESMA's supervisory experience.

ESMA identifies a number of key points that it believes are important when considering the appropriateness of the development of a creditworthiness assessment for sovereign debt. These include:

- The rating process should be a fully independent assessment;
- The review function responsible for the annual review of rating methodologies must be independent of the business lines that are responsible for credit rating agencies (CRAs);
- Confidentiality of all rating sensitive information is critical. Also, access to pre-rating information should only be available to people involved in rating activities and all necessary steps should be taken to ensure this information is adequately protected; and

- Sufficient resources must be available for the conduct of both a rigorous rating process and ongoing monitoring.

(iv) ESMA Report on Staffing and Resource Needs Arising from Regulatory and Supervisory Responsibilities under CRA

ESMA published a report on 5 August 2014 to the European Parliament, Council of the EU and European Commission on ESMA's staffing and resource needs arising from the assumption of its powers and duties under the CRA Regulation.

The regulatory and supervisory duties that ESMA utilises to meet its responsibilities under the CRA Regulation are outlined in Section III of the report. For each task, the report assesses the implications in respect of both the processes and activities to be carried out and ESMA's resources and budget.

The other supervisory duties to be carried out by ESMA resulting from CRA III are addressed in Section IV of the report. These include the provision of reports, guidelines and technical advice on a range of topics.

The report addresses the fact that ESMA encountered a sharp increase of resources in the initial years subsequent to the entry into force of the CRA Regulation. It expects that incremental growth in staff numbers in 2015 and 2016 will allow it to cope successfully with the additional tasks resulting from CRA III.

(v) European Commission Adopts Three Delegated Regulations on CRA III Regulatory Technical Standards

The European Commission published a press release on 30 September 2014, stating that it has adopted the following three Delegated Regulations containing regulatory technical standards (RTS) required by the CRA III Regulation (*Regulation 462/2013*):

- *Commission Delegated Regulation (EU) No …/.. supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards on disclosure requirements for structured finance instruments* (C(2014) 6939 final). The Commission also published the *annexes* to this delegated Regulation.
- *Commission Delegated Regulation (EU) No …/.. supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards for the presentation of the information that credit rating agencies make available to the European Securities and Markets Authority* (C(2014) 6840 final). The Commission also published the *annexes* to this Delegated Regulation.

- *Commission Delegated Regulation (EU) No …/.. supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards for the periodic reporting on fees charged by credit rating agencies for the purpose of on-going supervision by the European Securities and Markets Authority* (C(2014) 6871 final). The Commission also published the *annexes* to this Delegated Regulation.

On the condition that no objection is raised by either the European Parliament or the Council of the EU within the relevant time period specified in the European Banking Authority (EBA) Regulation (*Regulation 1093/2010*), the Delegated Regulations will be published in the OJ. The Delegated Regulations will enter into force twenty days after publication in the OJ.

The provisions will be directly applicable from the following dates:

- Reporting on fees charged by CRAs: date of entry into force.
- European Rating Platform: 21 June 2015.
- Disclosure on structured finance instruments: 1 January 2017.

Regulation on Securities Settlement and on Central Securities Depositaries in the EU

(i) CSDR Published in the Official Journal

The text of the Regulation on improving securities settlement and regulating central securities depositories ("**CSDs**") (Regulation 909/2014) ("**CSDR**" or "**CSD Regulation**") was published in the Official Journal ("**OJ**") on 28 August 2014.

The Regulation was adopted by the European Parliament on 15 April 2014 and by the Council of the EU on 15 April 2014.

The CSDR came into force on 17 September 2014 (20 days after publication in the OJ). Article 3(1) of the Regulation will apply from 1 January 2023 to transferable securities issued after that date and from 1 January 2025 to all transferable securities. Article 5(2) will apply from 1 January 2015 except in the case of a trading venue that has access to a CSD referred to in Article 30(5), where it will apply at least six months before such a CSD outsources its activities to the relevant public entity, and in any event from 1 January 2016. Other measures will apply from the date that the relevant delegated and implementing acts adopted by the European Commission enter into force.

(ii) European Commission makes Provisional Request to ESMA for Technical Advice on Possible Delegated Acts under CSDR

The European Commission published a letter to ESMA on 23 June 2014 outlining a provisional request for technical guidance in relation to potential delegated acts regarding various settlement discipline procedures and aspects concerning supervisory co-operation under the proposed Regulation on enhancing securities settlement and regulating central securities depositories (CSDs) (CSD Regulation or CSDR).

Two formal mandates for technical guidance are appended to the letter to aid the Commission in formulating delegated acts, which are necessary as a result of the following provisions of the CSDR:

Settlement fails: Article 7 of the CSDR provides for a set of stringent procedures to deal with settlement fails. These include cash penalties for a participant of a securities settlement system operated by a CSD that fails to settle on the agreed date. The Commission is required to adopt a delegated act to specify the parameters for the calculation of a deterrent and proportionate levels of cash penalties for settlement fails under Article 7(13) of the CSDR.

Co-operation Measures: Article 24(7) of the CSDR allows for certain co-operation measures between home and host member states where a CSD delivers services on a cross-border basis, thereby utilising passport rights. They must initiate formal co-operation arrangements in respect of the supervision of a CSD where the CSD's activities have become "of substantial importance for the functioning of the securities markets and the protection of the investors" in the host member state. Under Article 24(7) of the CSDR the Commission is obliged to adopt delegated acts regarding procedures for creating criteria under which the significance of the operations of the CSD may be deemed to amount to this. In this regard, the Commission requests guidance, specifically on the meaning of "substantial importance".

The Commission has asked ESMA to deliver its technical guidance nine months after the CSDR enters into force. As noted above the CSDR came into force on 17 September 2014. Therefore ESMA will be required to deliver its technical guidance within 9 months, on or before 17 June 2015.

Market Abuse

(i) Opinion on ESMA's Discussion Paper on Policy Orientations on Possible Implementing Measures under the Market Abuse Regulation

On 21 April 2014, the Securities and Markets Stakeholder Group (the "**SMSG**") published a report in order to provide an opinion to ESMA on its Discussion Paper on policy orientations on possible implementing measures under the Market Abuse Regulation (the "**MAR**") (see ESMA/2013/1649). The SMSG welcomed ESMA's Discussion Paper. It outlines that the Discussion Paper is very detailed and will remain a reference for future interpretation.

The SMSG's opinion is focused on some specific topics which are the following: buy-back and stabilisation, market soundings, accepted market practices, public disclosure of inside information and delay, insider list, managers' transactions. There are no specific comments on investment recommendations but the SMSG thinks that their content is a very important element in order to ensure the fair and correct information provision to the client: sometimes the recommendation does not contain clear information about the interests and thus potential conflicts of interest, or it is hidden or found somewhere way back in the related documents. Increased transparency should be ensured in order to define exactly what would be the elementary sales approach when making use of the investment recommendation. The SMSG opinion is rendered both with some general remarks and with some specific answers to ESMA's questionnaire, following the numbering in the ESMA paper.

(ii) ESMA Consults on New Market Abuse regime

ESMA published a consultation paper on its draft technical advice on possible delegated acts concerning the MAR on 15 July 2014. It should be noted that the title of the consultation paper states that it is a "draft". However, due to the fact that it has an ESMA reference number it would appear to be the final version of the consultation paper. ESMA also produced a consultation paper relating to draft regulatory technical standards (RTS) and implementing technical standards (ITS) on MAR (ESMA/2014/809). Any comments relating to the consultation papers must be submitted by 15 October 2014. The new MAR framework will become applicable in July 2016.

(iii) Open Hearing on the Consultation Papers on Technical Advice and Technical Standards under the Market Abuse Regulation

ESMA will hold an open hearing in Paris on 8 October 2014 on the issues raised in the two recently published Consultation papers on technical advice and technical standards under the MAR. The itinerary in respect of the discussion of each of the respective consultation papers is as follows:

- Consultation Paper on ESMA draft technical standards:

  a. Arrangement and procedures required for market soundings;
  b. Technical means for Public disclosure of inside information and for delaying disclosure of inside information;
  c. Arrangements for objective presentation of investment recommendations and for disclosure of particular interests or indication of conflict of interests;
  d. Format for Insider lists and for notification of managers' transactions; and
  e. Others.

- Consultation Paper on ESMA technical advice to the Commission on possible delegated acts:

  a. Minimum thresholds for the purpose of exempting certain emission allowance market participants for duty to disclose inside information;
  b. Reporting of violations and related procedures;
  c. Determination of the competent authority for notification of delays in disclosure of inside information;
  d. Managers' transactions: type of transaction to report and trading during closed period; and
  e. Non exhaustive list of indicators of market manipulation.

(iv) Implementation of 2014 Market Abuse Regulation

In September 2014, a representative of the Central Bank was requested to provide their view of how the full regime of the 2014 Market Abuse Regulation will look once fully implemented.

The items discussed were as follows:

- The new developments in the text of the Market Abuse Regulation itself;
- The sizable Level II legislative agenda under MAR; and
- A discussion of what, in an ideal world, market abuse regulation will look like in Europe when all of these regulatory measures are in place.

The speaker's concluding remarks concerned an exploration of what market abuse regulation will look like in Europe when all of the measures outlined were in place and indeed are operationalized by market participants and National Competent Authorities. In this regard, the observations of the speaker can be grouped into three headings, namely:

- the disclosure environment and the transparency architecture;
- enhanced pan-European detection of Market Abuse; and
- a reduction of regulatory arbitrage by the application of similar sanctions across the European Union.

This speech can be accessed via the following link:

https://www.centralbank.ie/regulation/marketsupdate/Documents/20140908%20MAR%202020%20M%20Moloney.pdf

Transparency Directive

(i) ESMA Releases its Final Guidelines on the Enforcement of Financial Information Published by Listed Entities in the EU

On 10 July 2014, ESMA published its final Guidelines on the enforcement of financial information published by listed entities in the European Union (the "**Guidelines**") under the Transparency Directive. Furthermore, the document includes ESMA's feedback on the responses to its consultation on these draft guidelines as launched in July 2013.

As stated in the press release published by ESMA, the aim of the guidelines is to strengthen and promote greater supervisory convergence in existing enforcement practices amongst EU accounting enforcers.

These Guidelines set out the principles to be followed by accounting enforcers throughout the enforcement process by defining the objectives, the characteristics of the enforcers, and some common elements in the enforcement process. They will strengthen the development of coordinated views on accounting matters prior to national enforcement actions, the identification of common enforcement priorities and common responses to the accounting standard setter to ensure consistent application of the financial reporting framework. It is also clarified that the Guidelines will apply to all national securities regulators and other bodies responsible for enforcing financial information requirements in the EU.

According to the words of the ESMA Chair, "one of the key objectives of accounting enforcement is to contribute to the consistent application of the financial reporting standards and ensure the disclosure of high quality financial information relevant to investors' decision-making processes, thus strengthening investor protection and confidence in financial markets. And also: "these Guidelines constitute a key step in strengthening supervisory convergence across Europe, by further building a common approach to the enforcement of financial information and reinforcing coordination among European enforcers".

The Guidelines provide a common approach in several areas as follows:

- Enforcement objectives and scope;
- The enforcement process at national level, such as selection methods, examination procedures and enforcement actions; and
- Coordination of enforcement activities at European level, such as setting up European common enforcement priorities, defining criteria for selecting accounting matters for further discussion at European level and their reporting.

In relation to the next steps of these Guidelines, ESMA affirms they will now be translated into the official languages of the EU and national securities regulators will then have two months from the date of the publication of the translations on ESMA's website, to confirm to ESMA whether they comply or intend to comply with the Guidelines by incorporating them into their supervisory practices.

A copy of the Guidelines is available at the following link:

http://www.esma.europa.eu/system/files/2014-807_-_final_report_on_esma_guidelines_on_enforcement_of_financial_information.pdf

(ii) ECB Publishes Opinion on Proposed Regulation for Reporting and Transparency of Securities Financing Transactions

On 10 July 2014, the European Central Bank ("**ECB**") published an opinion (dated 24 June 2014) in respect of the European Commission's proposal for a Regulation on reporting and transparency of securities financing transactions ("**SFTs**"). The opinion was released in response to requests from the European Parliament and from the Council of the EU on 18 March 2014 and on 27 March 2014, respectively.

As stated in the opinion, the ECB broadly welcomes the proposed Regulation, which is aimed to increase the safety and transparency of the financial market. It also makes specific observations on several matters as follows:

- Exemption for central bank transactions from transparency and reporting obligations;
- Clarification of the Commission's power to amend the list of exemptions;
- Rehypothecation; and
- Modalities for the reporting of data on SFTs.

In addition, the ECB drafting proposals are provided in an annex included in the opinion.

The opinion released by the ECB may be accessed via the following link:

https://www.ecb.europa.eu/ecb/legal/pdf/en_con_2014_49_f_sign.pdf

Prospectus Directive

(i) ESMA Launches Consultation on Draft Regulatory Technical Standards on Prospectus Related issues under Omnibus II Directive

ESMA launched a consultation on draft Regulatory Technical Standards ("**RTS**") on prospectus related issues under the Omnibus II Directive on 26 September 2014.

As stated by ESMA, the proposed draft RTS addresses four topics within the prospectuses regime as follows:

- Procedures for approval of prospectuses – The draft RTS outlines the manner in which to submit requests for prospectus approval to the competent authority, procedures for submitting information in connection with the first draft of the prospectus, rules for communication regarding subsequent versions of the prospectus as well as requirements concerning submission of the final version for approval;

- Information which may be incorporated into prospectuses by reference – The draft RTS establishes an exhaustive list of information which complies with the conditions for incorporation by reference set out in Article 11(1) of the Prospectus Directive;

- Publication of prospectuses. The draft RTS addresses issues of availability to potential investors in terms of accessing prospectuses on websites and publication of final terms to base prospectuses and information incorporated by reference and requires issuers, offerors and persons asking for admission to trading on a regulated market to provide competent authorities with a hyperlink to the prospectus for minimum 12 months when competent authorities have decided to publish a list of approved prospectuses along with hyperlinks to such under Article 14(4) of the Prospectus Directive; and

- Dissemination of information relating to offers to the public and admissions to trading on a regulated market outside the prospectus, including advertisements. The draft RTS sets out a list of categories of dissemination of advertisements, clarifies that inaccurate or misleading advertisements must be amended and specifies what is to be understood by the requirement in the Prospectus Directive's Article 15(4) that the content of information

disclosed about an offer or admission to trading outside the prospectus is to be consistent with information in the prospectus.

The consultation is open for feedback until 19 December 2014. All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

ESMA is required to submit the draft RTS to the European Commission by 1 July 2015.

More information is available at the following link:

http://www.esma.europa.eu/consultation/Consultation-draft-RTS-prospectus-related-issues-under-Omnibus-II-Directive

Financial Conglomerates

(i) Report on supervisory colleges for financial conglomerates

On 3 September, the Joint Forum (that is the Basel Committee on Banking Supervision, IOSCO and the International Association of Insurance Supervisors) issued a report on supervisory colleges for financial conglomerates.

In the report, the Joint Forum sets out findings from a recent self-assessment survey of its members on supervisory colleges for financial conglomerates. The questionnaire used is set out in Annex I to the report.

The aim of the survey was to show how far cross-sectoral issues and specific questions relating to financial conglomerates are effectively addressed within supervisory colleges. The survey also provides information on the Joint Forum's principles for the supervision of financial conglomerates, in particular, principle 6 relating to co-operation, co-ordination and information sharing.

The Joint Forum notes the general progress that has been made in this area since the previous study in 2011, however the present report identified several gaps and issues in relation to the implementation of Principle 6, such as:

- Not all jurisdictions have in place a specific supervision framework for financial conglomerates or coordination agreements with other supervisors of financial conglomerates on a cross-sectoral level. Gaps also exist in the coordination of on-site and off-site supervision with other domestic or international supervisors, and in arrangements or processes for taking enforcement actions with other domestic or international authorities; and

- There appear to be insufficient specific mechanisms for supervisory cooperation and coordination in periods of crisis/stress, thereby possibly hindering effective intervention in times of crisis.

A copy of the report can be found at this link:

http://www.bis.org/publ/joint36.htm

(ii) EBA, ESMA and EIOPA consult on technical standards for financial conglomerates risk concentration and intra-group transactions.

The Joint Committee of the three European Supervisory Authorities (EBA, ESMA and EIOPA) launched a consultation on draft Regulatory Technical Standards ("**RTS"**) on risk concentration and intra-group transactions within financial conglomerates on 24 July 2014. The technical standards aim at enhancing supervisory consistency in the application of the Financial Conglomerates Directive ("**FICOD"**). The consultation runs until 24 October 2014.

The objective of the draft RTS is to clarify which risk concentrations and intra-group transactions within a financial conglomerate should be considered as significant.

In addition, the RTS provide some supervisory measures for coordinators and other relevant competent authorities when identifying types of significant risk concentration and intra-group transactions, their associated thresholds and reports, where appropriate.

The consultation paper is available at this link:

https://eiopa.europa.eu/consultations/consultation-papers/index.html

Central Bank of Ireland

(i) Handbook of Prudential Requirements for Investment Intermediaries

The Handbook of Prudential Requirements for Investment Intermediaries (the "**Handbook**") is replacing the Handbook of Prudential Requirements for Authorised Advisors and Restricted Intermediaries introduced in July 2006 with effect from 1 October 2014.

The Central Bank has imposed a requirement on all retail investment intermediaries to comply with the Handbook as a condition of their authorisation. This requirement was imposed pursuant to Section 14 of the Investment Intermediaries Act, 1995 (as amended) (the "**IIA**").

The requirements set out in the Handbook are imposed on investment intermediaries under Section 14 of the Investment Intermediaries Act 1995 (the "Act"), defined as:

"investment business firms authorised by the Central Bank under the Act to provide only the investment business services defined in this Handbook and investment advice, and who provide those investment business services and investment advice to:

(i) product producers; and/ or
(ii) non-product producers (e.g. Lloyd's broker)".

Some of the main changes in the Handbook include:

- Multi-agency intermediaries and authorised advisors will now be defined as investment intermediaries. The rationale behind this is that the terms MAI and AA are largely redundant, having been replaced by the term "broker";
- An investment intermediary must at all times be in a position to meet its financial obligations in full as they fall due;
- Goodwill and other intangible assets are to be excluded from the calculation of a firm's balance sheet assets for regulatory reporting purposes. A transitional period of 5 years is allowed here so that goodwill currently included can be written down by firms;
- A requirement to submit an online Annual Return replaces the requirement to submit annual audited accounts within 6 months after the end of the relevant reporting period. They must prepare these accounts within the 6 months after the end of the relevant reporting period and provide them to the Central Bank if requested;
- The requirement to hold Professional Indemnity Insurance has been imposed directly on investment intermediaries (this mirrors the requirement for insurance intermediaries set out under the Insurance Mediation Regulations, 2005); and,
- An investment intermediary shall notify the Central Bank in advance where it proposes to outsource any important operational function.

All firms that fall within the scope of the "investment intermediary" definition should immediately familiarise themselves with the Handbook.

A copy of the Handbook is available at this link:

http://www.centralbank.ie/regulation/industry-sectors/retailintermediaries/Documents/Handbook%20of%20Prudential%20Requirements%20for%20Investment%20Intermediaries.pdf

(ii) Central Bank releases recommendations on regulatory returns

On 12 September 2014, the Central Bank released a letter in respect of the Thematic Review of data integrity of regulatory returns submitted to the Central Bank by investment firms, fund service providers and stockbrokers (the "**Firms**") as a mechanism to provide feedback in relation to the findings and outcomes of those thematic reviews.

As clarified in the letter, the reviews were conducted by Authorised Officers of the Central Bank and focused on data contained in the regulatory returns of a selected sample of Firms. The returns reviewed included FINREP accounts, annual audited financial statements and regulatory capital returns.

The letter outlines that the Central Bank found that not all Firms apply the same level of control and oversight over the production of regulatory returns leading to omissions, discrepancies and misclassifications. The Central Bank emphasises that each Firm and its Board must fully appreciate and understand its obligations to ensure that all regulatory reporting to the Central Bank is complete, timely, accurate and in compliance with relevant legislation and Central Bank guidance.

Specifically, the Central Bank has set out a number of recommendations that Firms will need to take into account in relation to the production, oversight and reporting of all regulatory returns. These recommendations are outlined in the schedule enclosed to the Central Bank's letter.

The Central Bank also advises that, where there is non-compliance with relevant regulatory requirements, it will have regard to these recommendations, when exercising its regulatory and enforcement powers.

The Central Bank's letter and the enclosed schedule of recommendations may be accessed at the following link:

http://www.centralbank.ie/regulation/industry-sectors/fund-service-provider/administrators/Documents/Thematic%20Review%20of%20data%20integrity%20of%20regulatory%20returns.pdf

Fitness and Probity

(i) Guidance on the Fitness and Probity Amendments 2014

On September 2014, the Central Bank published the Statutory Instrument No. 394 of 2014 (the "**Amending Regulation**") prescribing a further six pre-approval controlled functions ("**PCFs**") according to the Fitness and Probity regime.

Part 3 of the Central Bank Reform Act 2010 (the "**Act**") prescribes that a certain person performing a controlled function ("**CF**") in a regulated financial service provider must have a level of fitness and probity appropriate to the performance of that particular function. Furthermore, the Central Bank has the power to prescribe a subset of CFs as functions for which the prior approval of the Central Bank is required in order to appoint the person.

The PCFs affected by the amendments are the functions 42 to 47 as follows:

- The office of Chief Operating Officer (PCF-42) for all regulated financial service providers;
- Head of Claims (PCF-43) for Insurance Undertakings;
- Signing Actuary (PCF-44) for Non-Life Insurance Undertakings and Reinsurance Undertakings;
- Head of Client Asset Oversight (PCF-45) for Investment Firms;
- Head of Investors Money Oversight (PCF-46) for Fund Service Providers; and
- Head of Credit (PCF-47) for Retail Credit Firms.

The Amending Regulation, besides prescribing the above six new PCFs, serves to update other parts of the Fitness and Probity regulations which deal with the following matters:

- Clarification on the exclusion of Certified Persons – It is specified that regulated financial service providers cannot avail of the outsourcing exemption when outsourcing PCFs or CFs to certified persons;
- PCF Title Changes – The title of PCF-14 has been changed from "Head of Risk" to "Chief Risk Officer" and the title PCF-26 has also been changed from "Head of Markets Supervision" to "Head of Regulation";
- Stock Exchange Amendment – the Amending Regulations reflect the fact that on 11 April 2014 the Irish Stock Exchange ("**ISE**") Ltd was demutualised and it became a public limited company;

- Alternative Investment Fund Managers – The Amending Regulation incorporates the AIFMs as introduced by the AIFM Directive into the scope of the fitness and probity regime.

The Central Bank issued Guidance on the Fitness and Probity Amendments 2014 (the "**2014 Guidance**"), the purpose of which is to assist regulated financial providers in complying with their obligations under the Amending Regulation.

As clarified in the 2014 Guidance, the Amending Regulation will come into effect on 31 December 2014. It is also clarified that persons in situ in any of the six new PCFs on 31 December 2014, may continue in those positions and do not require the approval of the Central Bank to continue to perform that PCF.

The full Guidance is available at the following link:

http://www.centralbank.ie/regulation/processes/fandp/serviceproviders/Documents/Guidance%20on%20Fitness%20and%20Probity%20Amendment%202014.pdf

(ii) Central Bank Publishes Fitness and Probity Services Standards Performance Report

On July 2014, the Central Bank published its Regulatory Transactions Service Standards Performance Report (the "**Report**"), covering the period January – June 2014.

As stated in the Report, this document sets out the Central Bank's performance against Service Standards it has committed to in relation to the processing of Fitness and Probity PCF Individual Questionnaire ("**IQ**") applications and the authorisation on new entities.

These authorisation service standards are being introduced on a phased basis from January 2014 for a number of entities as follows:

- Credit Institutions;
- Insurers;
- Investment Firms; and
- Regulated Markets.

It is also clarified by the Central Bank that there are now a total of seven Service Standards and the performance against the targets was exceeded in six of the seven cases for the period from January to June 2014.

This Report consists of two Sections and an Appendix as follows:

- Section 1 outlines performance against the fitness and probity service standards;
- Section 2 highlights performance against authorisation service standards for the relevant period; and
- Appendix A sets out the reasons why an IQ application may be returned as incomplete.

The full report is available through the following link:

http://www.centralbank.ie/regulation/processes/fandp/serviceproviders/Documents/Service%20Standards%20Performance%20Report%20July%202014.pdf

(iii) Central Bank Issues CP83 on Fitness and Probity Regime for Credit Unions that are also Authorised as Retail Intermediaries

On 1 August 2014, the Central Bank published a consultation paper ("**CP83**") namely Fitness and Probity regime for Credit Unions that are also authorised as Retail Intermediaries.

As recalled in the paper, on December 2012, the Central Bank had published a previous consultation paper concerning Fitness and Probity regime for Credit Unions ("**CP62**"). CP62 also proposed that credit unions that are authorised as retail intermediaries would become subject to the Fitness and Probity regime which applies to all regulated financial service providers, with the exception of credit unions, from 1 July 2015 for the retail intermediary portion of their business.

Following the initial implementation of the Fitness and Probity regime for credit unions, the Central Bank has reviewed the proposed approach on applying fitness and probity requirements to credit unions that are also authorised as retail intermediaries and is now proposing a renewed tailored approach.

The CP83 sets out the Central Bank's proposals in respect of this revised approach and is seeking feedback on the same proposals. The structure of the paper is as follows:

- Section 1 – Introduction;
- Section 2 – Background;
- Section 3 – Overview of the revised approach;
- Section 4 – Implementation of the Fitness and Probity regime for credit unions that are also authorised as retail intermediaries;
- Section 5 – Making Submission; and
- Appendix 1 – CFs and PCFs in the general Fitness and Probity regime.

The CP83 can be viewed via the following link:

http://www.centralbank.ie/regulation/poldocs/consultation-papers/Documents/CP83%20Fitness%20and%20Probity%20regime%20for%20Credit%20Unions%20that%20are%20also%20authorised%20as%20Retail%20Intermediaries/CP%2083%20Fitness%20and%20Probity%20regime%20for%20Credit%20Unions%20also%20authorised%20as%20Retail%20Intermediaries.pdf

Data Protection

(i) Minister for Justice Commences Additional Sections of Data Protection Act

On 18 July 2014, three sections of the Irish Data Protection Acts 1988 and 2003 (the "**DPA**") that had not yet been enacted were commenced by the Minister for Justice, thereby bringing the remaining sections of the DPA into force with effect from that date. As a result, data controllers now have a broader duty to notify third party recipients of personal data when that data has been changed or deleted. Employers are also restricted from requiring certain individuals in the employment context from making an access request for their personal data.

Section 6 of the DPA outlines that a data controller must rectify, block or erase personal data that is collected, processed or otherwise dealt with in contravention of the DPA and to notify the data subject accordingly. Following the commencement of section 6(2)(b), the data controller is also now required to notify any person to whom the personal data was disclosed during the preceding 12 months unless such notification proves impossible or involves a disproportionate effort. The data controller is obliged to make the notification within 40 days of receipt of the request from the data subject to rectify, block or erase personal data that was collected, processed or otherwise dealt with in contravention of the DPA.

Section 10(7) of the DPA provides that a data controller is obliged to notify the data subject where it blocks, rectifies, erases, destroys or adds a statement to personal data in compliance with an enforcement notice issued by the Data Protection Commissioner. Following the commencement of section 10(7)(b), the data controller is now also required to notify any person to whom the personal data were disclosed during the preceding 12 months unless such notification proves impossible or involves a disproportionate effort. The data controller is obliged to make the notification within 40 days of compliance with the enforcement notice.

Furthermore, following the commencement of section 4(13) of the DPA, an employer is prevented from "*requiring*" an individual (i.e. the data subject), in the context of their role as an employee, potential employee or contractor, to make an access request under section 4 of the DPA to another data controller or to provide data received in response to such a request. The changes introduced in respect of certain employment situations may be directed at employers who utilise

the right of access as a means to inspect a person's background. An employer must ensure to take extra care if suggesting that an individual use their right of access. A breach of this section incurs criminal penalties. This could result in fines of up to €100,000 in serious cases.

Statutory Instrument 337 of 2014 and Statutory Instrument 338 of 2014, which enact the abovementioned sections of the Act, can be accessed via the following links, respectively:

http://www.betterregulation.com/rulebooks.php?T=http://www.betterregulation.com/doc/1/77054

http://www.betterregulation.com/rulebooks.php?T=http://www.betterregulation.com/doc/1/77054

(ii) New Guide to Audit Process Published

In August 2014, the Office of the Data Protection Commissioner issued new guidance on its powers under Sections 10(1A) and (1B) of the Data Protection Acts to carry out investigations into organisations' data protection compliance.

As clarified in the preface, this guidance was originally published in 2009 and its revised version has been updated to take into account legislative developments as well as reflect any changes in the approach of the Office of the Data Protection Commissioner to the audit process. This guidance is designed to assist organisations selected for audit by the Office of the Data Protection Commissioner. It is also stated in the guide that it is hoped that this resource will provide organisations holding personal data with a simple and clear basis to conduct a self-assessment of their compliance with their obligations under Irish Data Protection Law.

The updated guide to audit process consists of the sections set out below:

- Introduction (concerning Compliance Audits; Audit Focus and Potential Benefits for Organisations);
- Audit Model;
- Legal Basis for Audits/Inspections;
- Pre-Audit Procedures;
- Audit Methodology;
- Inspection Day;
- Audit Report; and
- Appendices.

The new guide to audit process is available through the following link:

http://www.dataprotection.ie/docimages/documents/GuidetoAuditProcessAug2014.pdf

(iii) EU Justice Commissioner's Speech on the Right to be Forgotten and the EU Data Protection Reform

On 18 August 2014, the European Commission published a press release in relation to the speech of EU Justice Commissioner, named "The right to be forgotten and the EU data protection reform: Why we must see through a distorted debate and adopt strong new rules soon", held at the IFLA World Library and Information Congress in Lyon, France.

According to the words of the EU Justice Commissioner, since the business is moving faster than the political machine, it is high time for Member States to catch up. Negotiations on the data protection reform have been on-going for more than two and a half years and they have made good progress. But there is more work to be done. Heads of State and Government have committed themselves to a swift conclusion of negotiations several times. At the European Council at the end of June, they affirmed the importance of adopting "a strong EU General Data Protection framework by 2015".

The EU Justice Commissioner urges Member States to stick to this goal, exhorting them to be ambitious and help to give Europe the data protection rules it needs since they "cannot afford to delay such significant opportunities for growth and run the risk of having others' standards imposed on them by others". It is also underlined that EU needs a strong, modern data protection framework, and they need it soon.

The press release including the EU Justice Commissioner's speech may be accessed via the following link:

http://europa.eu/rapid/press-release_SPEECH-14-568_en.htm

Whistleblowing

The Protected Disclosure Act 2014

On 15 July 2014, the Protected Disclosures Act 2014 (the "**Act**") became operational.

As clarified by the Minister for Public Expenditure and Reform, the legislation meets the commitment included in the Programme for Government to introduce comprehensive whistleblower protection legislation. The commencement of the Act also addresses the recommendation contained in the Final Report of the Mahon Tribunal advocating the introduction of pan-sectoral whistleblower protection legislation. Furthermore, the legislation closely mirrors international best practice recommendations on whistleblower protection made by the G20/OECD,

the UN and the Council of Europe and draws on recent developments in legislative models adopted or being put in place in other jurisdictions.

The key features of the legislation are as follows:

- Comprehensive coverage, including all employees, contractors, agency workers, members of the Garda Siochana and the Defence Forces;
- The absence of any good faith or public interest test which could otherwise act as a significant deterrent to making a protected disclosure;
- The scope for protection of a disclosure made prior to the legislation coming into effect;
- The availability of interim relief if an employee is dismissed for having made a protected disclosure;
- Access to the State's industrial relations machinery for securing redress against penalisation for having made a protected disclosure;
- Compensation of up to five years remuneration; and
- Strong protections against the disclosure of a whistleblower's identity.

The legislation is also particularly focused on seeking, as much as possible, to protect the identity of a whistleblower and identifies a number of distinct disclosure channels for potential whistleblowers.

A protected disclosure is the disclosure of "relevant information". To qualify as relevant information:

- A worker must reasonably believe that the information disclosed tends to show one or more "relevant wrongdoings";
- The wrongdoing must come to the worker's attention in connection with his/her employment. For example, a disclosure will not be protected if it relates to matters in someone's personal life outside and unconnected to the workplace.

"Relevant wrongdoings" are defined in an exhaustive list and include the following:

- The commission of an offence;
- A miscarriage of justice;
- Non-compliance with a legal obligation;
- Health and safety threats;
- Misuse of public monies;
- Mismanagement by a public official;
- Damage to the environment; or
- Concealment or destruction of information relating to any of the foregoing.

Special arrangements are also put in place for disclosures regarding law enforcement matters and to disclosures which may adversely affect Ireland's security, defence or international relations.

The Protected Disclosures Act 2014 and the related Commencement order may be accessed via the following link:

http://www.per.gov.ie/protected-disclosures-i-e-whistleblowing/

Companies Bill Update

(i) Implementation of the Companies Bill

The Companies Bill 2012 is currently being reviewed by the Oireachtas but given the number of amendments that have been introduced it is expected that the Companies Bill will not be enacted until December 2014 at the earliest. Notwithstanding the date of enactment of the Bill, the commencement date of the Act will be 1 June 2015.

Some of the key changes under the Companies Bill include:

- The Codification of Directors' Common Law Fiduciary Duties

The Companies Bill gives statutory recognition to the current common law and equitable principles regarding director's duties which will ensure greater clarity for directors.

- New Model Company – Private Company Limited by Shares

The new model private company limited by shares is intended to replace the existing private company limited by shares. There are many similarities between these legal entities, however there are some important changes such as:

- A model company limited by shares can be formed with just one director; and
- A model company limited by shares will have unlimited legal capacity and the "ultra vires" rule, whereby a company's legal capacity is limited to the objects set out in its memorandum of association, will be abolished.

- Elective Regime

All private companies will be obliged to either register as a designated activity company or adopt a new form of constitution and be registered as a private company limited by shares within the 18

month transition period. Otherwise, the private company will be deemed to be a private company limited by shares and a default form of constitution deemed to have replaced its memorandum and articles of association.

- Summary Approval Procedure

The new summary approval procedure will authorise activities that might otherwise require High Court sanction or approval to be approved by the shareholders of a company. In certain circumstances, a reduction of capital or a merger may be effected without the need for High Court approval once the process set out under the Companies Bill is complied with.

- Directors' Compliance Statements

Directors of the following companies will be obliged to sign a compliance statement acknowledging responsibility for compliance with company law obligations:

- Public Limited Companies; and
- "Large" private companies limited by shares, designated activity companies and guarantee companies (i.e. which have a balance sheet total exceeding €12.5 million and a turnover exceeding €25 million).

Directors of unlimited companies and investment companies are excluded from these obligations.

- Changes to the Insolvency and Corporate Recovery Regimes

The Companies Bill proposes a welcome consolidation and modernisation of the law relating to liquidations, receiverships and examinerships. The Companies Bill seeks to reduce the Court's supervisory role in Court liquidations such that it is more closely aligned to creditors' voluntary liquidations and introduces greater consistency between the three types of liquidations, being members' voluntary, creditors' voluntary and Court liquidations. The Companies Bill also proposes more extensive powers of intervention and scrutiny over liquidators for the Director of Corporate Enforcement. While the changes in relation to examinerships are relatively modest, the Companies Bill does also reform and consolidate the law relating to receivers including, for example, providing that receivers' powers will be enumerated in a non-exhaustive list, that list being without prejudice to powers which may be granted by a debenture.

- Re-classification of all Company law offences

All company law offences have been allocated into four categories of offences with penalties attaching to each offence.

- Priority of charges and registration of charges

Where security is taken over assets which do not require specific registrations for priorities in registries other than the Companies Registration Office (such as the Land Registry), the current law provides that the priority rests with the creditor who has taken the security first in time. It is proposed under the Companies Bill that this will no longer be the case and instead where security is taken over such assets, the priority will rest with the creditor who has been the first to register the security interest with the Companies Registration Office. In addition, whilst the existing procedure for the registration of the particulars of charges with the Companies Registration Office within a 21 day period will remain (the "**one stage procedure**"), a new "two stage procedure" will also be introduced for the registration of the particulars of charges.

Anti-Money Laundering/Counter-Terrorism Financing

On 25 February 2014, the Central Bank published its planned series of Themed Reviews and Inspections for 2014, as well as its 2014 Enforcement Priorities. It is clear from these publications that a key focus of the Central Bank is the area of anti-money laundering and counter terrorist financing ("**AML/CTF**") and the controls which designated persons are required to put in place to mitigate against the risk of AML/CTF. It is also clear from these publications that the Central Bank expects regulated entities to have appropriate systems, controls and procedures in place to meet with their regulatory obligations.

The following is a summary of the information which may be requested by the Central Bank as part of the themed AML/CTF inspections;

List of documentation to be submitted to the Central Bank in advance of inspection

1. An up-to-date organisation chart, which includes the names of directors and senior managers and the date of their respective appointments, together with a breakdown of those with day-today management of AML/CTF responsibilities of the entity;
2. A copy of the entity's current AML/CTF policy and procedures;
3. A copy of the entity's customer due diligence procedures if separate to the AML/CTF procedures requested at point 2 above;
4. A copy of the entity's current AML/CTF Risk Management Strategy, policies and procedures, including details of the risk based approach employed;
5. A copy of any relevant outsourcing or similar agreements;

6. Copies of all board minutes (where they relate to AML/CTF) from inception date to date of Central Bank letter advising entity of proposed themed inspections (the "**Central Bank Letter**");
7. A copy of the entity's suspicious transaction reporting procedures.
8. An outline from end to end of the process which has been put in place to deal with suspicious transactions reporting;
9. An outline of the entity's transaction monitoring procedure/system;
10. Details and results of any AML/CTF testing and/or internal or external audits carried out between inception date and date of the Central Bank letter;
11. Details of number of suspicious transactions received by the MLRO together with details of how many suspicious transaction reports ("**STRs**") were submitted to An Garda Síochána and the Revenue Commissioners between inception date and date of the Central Bank letter;
12. Copies of AML/CTF training provided to persons involved in the conduct of the business from inception date to date of the Central Bank letter;
13. A list of all customers, in the form of a spread-sheet, categorised into natural and legal persons, since 15 July 2010, including date of entry and date of verification;
14. A list of any customers on which redemptions were placed prior to the identity of the customer having been verified; and
15. A list in the form of a spread-sheet of all transactions (including new subscriptions, additional subscriptions, transfers and partial or full redemptions) processed by the entity for one week as per the date specified in the notification letter.

List of documentation to be available to the Central Bank for inspection on the first day of the onsite visit

1. Access to AML/CTF training records for period from inception date to date of the Central Bank letter, including copies of training material and staff training records;
2. The current list of all Politically Exposed Persons and high risk customers in the entity;
3. Access to customer due diligence records and transaction/service records;
4. Access to STRs information, including sight of original information provided to An Garda Siochana and the Revenue Commissioners and details of suspicious transactions received by the MLRO but not reported; and
5. Access to the entity's transaction monitoring system (where applicable).

Investment Funds and their service providers should be aware that the Central Bank has recommenced its themed AML/CTF inspections. In this regard, such entities should ensure that they have robust AML/CTF controls in place. In particular, in accordance with section 54 of the Acts, an entity which falls within the description of designated person is required to have its own standalone AML/CTF policy. This means that in the case on an Investment Fund, it is required to

have its own AML/CTF policy, notwithstanding that it outsources the day to day AML/CTF responsibilities to a separately appointed Administrator.

Irish Taxation Update

In the last Quarterly Legislative Update we advised that, on 27 June 2014, the Irish Revenue Commissioners (in conjunction with the Department of Finance) finalised the relevant Regulation (S.I. No. 292 of 2014) with respect to FATCA (the "**FATCA Regulations**"), which came into operation on 1 July 2014.

On 1 October 2014 the Irish Revenue Commissioners issued finalised Guidance Notes with respect to Ireland's implementation of FATCA.

The FATCA Regulations along with the Irish IGA, Section 891E of the Taxes Consolidation Act 1997 and finalised Guidance Notes set out the framework for Irish Financial Institution to implement and comply with the provisions of FATCA.

A copy of the finalised Guidance Notes is available at the following link:

http://www.revenue.ie/en/practitioner/ebrief/2014/no-882014.html

Dillon Eustace

This Funds Quarterly Legal and Regulatory Update is for information purposes only and does not constitute, or purport to represent, legal advice. It has been prepared in respect of the current quarter ending 30 September 2014, and, accordingly, may not reflect changes that have occurred subsequently. If you have any queries or would like further information regarding any of the above matters, please refer to your usual contact in Dillon Eustace.

CONTACT US

Our Offices

Dublin

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

Cayman Islands

Landmark Square
West Bay Road, PO Box 775
Grand Cayman KY1-9006
Cayman Islands
Tel: +1 345 949 0022
Fax: +1 345 945 0042

Hong Kong

604, 6/F, Printing House
6 Duddell Street
Central
Hong Kong
Tel: +852 35210352

New York

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

Tokyo

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

e-mail: enquiries@dilloneustace.ie

website: www.dilloneustace.ie

Contact Points

Authors: Breeda Cunningham / Michele Barker

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

Breeda Cunningham
E-mail: breeda.cunningham@dilloneustace.ie
Tel : + 353 1 673 1846
Fax: + 353 1 667 0042

Michele Barker
E-mail: michele.barker@dilloneustace.ie
Tel : + 353 1 673 1886
Fax: + 353 1 667 0042

DILLON EUSTACE

DUBLIN CAYMAN ISLANDS HONG KONG NEW YORK TOKYO