A Guide to MiFID Investment Services in Ireland
Contents

A Guide to MiFID Investment Services in Ireland

MiFID Background
Applications of MiFID in Ireland
Does your Business come within the Scope of the MiFID Regime?
Is Authorisation under the MiFID Regulations in Ireland the correct option?
Authorisation under the MiFID Regulations – Application Procedure
Conditions for Authorisation
Passporting Provisions
Ongoing Organisational Requirements
Conduct of Business Requirements
Capital Requirements
MiFID II – Proposed Changes
How can Dillon Eustace assist?
Appendix A
Contact us
MIFID BACKGROUND

Pan-European Regime for the Financial Services Industry

The Markets in Financial Instruments Directive (“MiFID”) came into force on 1 November 2007. It comprises three main pieces of legislation; the Level 1 “MiFID Directive” being Directive (2004)/39/EC) and the Level 2 measures implementing the MiFID Directive being the Commission Directive (2006/73/EC) and Commission Regulation 1287/2006 (collectively referred to as “MiFID I”). MiFID marked the introduction by the European Union of a new and broad ranging, pan European regime for the financial services industry. MiFID represented one of the key elements of the EU’s Financial Services Action Plan, a set of EU legislation which was introduced with the objective of producing an effective single financial services market in the EU. MiFID establishes a regulatory framework for the provision of investment services by investment firms. It imposes obligations on investment firms relating to conduct of business rules and their organisational structure.

The European Commission’s objectives in terms of MiFID are to open up trading in securities to competition so as to reduce transaction costs for investors, to apply equivalent regulatory rules to different market models which perform similar functions and to enhance, standardise and harmonise investor protection across the EU. These objectives give effect to the broader EU Treaty objective of creating a single market in financial services in the EU.

In December 2010, the European Commission published a consultation paper relating to proposed amendments to MiFID I. Following that consultation process, the European Commission published draft legislative proposals in the form of a draft Directive and a draft Regulation, referred to together as the “draft MiFID II Legislation” in October 2011. The draft MiFID II Legislation includes potentially comprehensive reforms to the existing regulatory regime. The proposals introduce a range of measures which seek to address deficiencies in the MiFID I regime exposed by the financial crisis. It focuses in particular on addressing problems that have arisen from the expansion in OTC trading in comparison with trading on exchanges and the related issue of transparency of such trading. MiFID II carries fundamental implications for the nature and shape of financial markets by shifting trading from the more opaque OTC market to more transparent organised markets. Please see section entitled “MiFID II – Proposed Changes” for further information.

Investment firms which provide investment services to third party clients or conduct, on a professional basis, investment activities in relation to certain financial instruments may be within the scope of MiFID.
Broadly speaking, the types of firm likely to fall within MiFID’s scope include:

- retail banks;
- investment banks;
- portfolio managers (excluding firms acting as managers of collective investment schemes);
- stockbrokers and broker-dealers;
- many futures and options firms;
- corporate finance firms;
- wholesale market brokers;
- operators of Regulated Markets (“RMAs”) and Multilateral Trading Facilities (“MTFs”);
- providers of custody services, and
- commodities and venture capital firms.

**Regulation of Investment Firms**

MiFID requires that member states of the EEA¹ (“Member States”) must license and regulate investment firms carrying out investment services in their jurisdiction.

It also establishes high-level organisational and conduct of business standards that apply to all investment firms. These standards include managing conflicts of interest, best execution, customer classification, suitability requirements for customers and pre-trade and post-trade transparency requirements. The draft MiFID II Legislation contains proposals to enhance these high level organisational and conduct of business standards.

**Passporting**

MiFID also requires that Member States recognise investment firms licensed in other Member States and permit such investment firms to operate within their jurisdiction without imposing any further requirements on them.

The access rights of third country firms (i.e. non-Member States) is not harmonised under MiFID and is therefore subject to national laws; currently national regulators impose equivalency requirements on third country firms operating in their territories. The draft MiFID II Legislation contains proposals to permit third country firms that wish to provide cross border investment services across the EEA to do so on the basis of a passport. Please see section entitled ‘MiFID II – Proposed Changes’ for further information.

---

¹ European Economic Area (members comprised of EU member states, Iceland, Norway and Liechtenstein)
APPLICATION OF MIFID IN IRELAND

Irish MiFID Regulations

MiFID has been transposed into Irish law by the European Communities (Markets in Financial Instruments) Regulations, 2007 as amended (the ‘MiFID Regulations’) with effect from 1 November, 2007.

Central Bank Authorisations

Regulation 4 of the MiFID Regulations provides that the Central Bank of Ireland (the “Central Bank”) is the competent authority in Ireland for the purposes of MiFID.

The Central Bank is therefore responsible for the authorisation of entities under the MiFID Regulations. Such authorisation may be unconditional or subject to such conditions or requirements as the Central Bank sees fit.

Withdrawal/Suspension/Revocation of Authorisation

The Central Bank also has the power to withdraw or suspend an authorisation in certain circumstances or apply to the High Court for an order revoking the authorisation of an investment firm.

Register of Authorised Investment Firms

The Central Bank is required to maintain a publicly accessible register of authorised investment firms and investment firms authorised in other Member States passporting into Ireland. This register appears on the Central Bank’s website.

Who is Affected?

Investment firms offering financial services to clients or customers located within the EEA are potentially affected by MiFID, either directly or indirectly.

Acting as an Investment Firm in Ireland

Regulation 7(1) of the MiFID Regulations provides that any party that proposes to act as an investment firm (or claim to be an investment firm or represent itself to be an investment firm) in Ireland must be either:
- authorised by the Central Bank in Ireland to do so, or
- authorised to do so under MiFID by the competent authority in another Member State.
Does your business come within the scope of the MiFID regime?

Are you acting or proposing to act as an “Investment Firm”?

If your regular occupation or business is the provision of one or more investment services to third parties on a professional basis, or the activity of dealing on own account on a professional basis, relating to financial instruments then you will be considered an investment firm for the purposes of the MiFID Regulations.

The definition of investment firm is set out in Regulation 3(1) of the MiFID Regulations. The key elements of this definition are examined in more detail below.

Are you providing or do you propose to provide “Investment Services”?  

The investment services covered by the MiFID Regulations are as follows:

- the reception and transmission of orders in relation to one or more financial instruments;
- execution of orders on behalf of clients;
- dealing on own account, meaning the activity of trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments;
- portfolio management;
- investment advice;
- underwriting of financial instruments or placing of financial instruments on a firm commitment basis;
- placing of financial instruments without a firm commitment basis;
- operation of MTF.
What “Financial Instruments” are covered?

For MiFID to apply, the investment services provided have to relate to one or more of the following financial instruments:

- transferable securities;
- money-market instruments;
- units in collective investment undertakings;
- derivative contracts that relate to securities, currencies, interest rates, yields, other derivative instruments, financial indices which may be settled physically or in cash;
- derivative contracts relating to commodities that may be settled in cash other than on default or other termination event;
- derivative contracts relating to commodities that can be physically settled if traded on a RM and/or MTF;
- derivative contracts relating to commodities, physically settled, but not for commercial purposes which have characteristics of other derivative financial instruments having regard to whether they are cleared and settled through recognised clearing houses or are subject to margin calls;
- derivative instruments for the transfer of credit risk;
- financial contracts for differences;
- derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash as well as derivative contracts relating to assets, rights, obligations, indices etc.

Are the services to be provided “on a professional basis”?

MiFID applies when you are providing investment services relating to financial instruments to third parties on a professional basis.
Unfortunately, there is no Irish guidance as to what is meant by providing services “on a professional basis”. UK FSA guidance indicates that one needs to consider the overall commercial nature and scale of the activity but we consider that a commonsense approach is needed.

**What is covered by “Investment Advice”?**

The provision of investment advice is an investment service under the MiFID Regulations and covers the provision of personal recommendations to a client in respect of one or more transactions relating to financial instruments. It does not include recommendations issued exclusively through distribution channels or to the public. The draft MiFID II Legislation provides that firms providing the investment service of investment advice must provide information to clients or potential clients of the basis upon which they provide this advice, i.e. whether this advice is provided on an independent basis and whether it is based on a broad or a more restricted analysis of the market and shall indicate whether the firm will provide the client with the ongoing assessment of the suitability of the financial instruments recommended to clients.

Detailed definitions of “investment advice” and “personal recommendations” are set out in Regulation 3(1) of the MiFID Regulations.

**Are you automatically exempt if providing such services “on your own account”?**

Any entity which carries out own account dealing on its own behalf may fall within the scope of the MiFID Regulations unless one of the exemptions apply or alternatively its investment positions are not held with trading intent, i.e. if investments are held for long term gain as opposed to short term resale and/or with the intention of benefiting from actual or expected short term price differences between buying and selling prices or from other price or interest rate variations.

**Is your business exempt?**

Regulation 5 of the MiFID Regulations exempts a variety of entities from the requirement to obtain authorisation under the MiFID Regulations, (insurers, entities who provide services exclusively to group entities, administrators of employee participation schemes, investment funds and pension funds and their managers and depositories, various public bodies etc.)

There are other exemptions for investment firms which carry on own account dealing activities (provided not a market maker or dealing outside a RM or a MTF in certain
circumstances) and other exemptions specific to persons whose main business consists of dealing on own account in commodities and/or commodity derivatives.

Importantly, note that Regulation 5(3) of the MiFID Regulations also exempts investment firms that meet the following three criteria:

- they are not allowed to hold clients’ funds or securities and therefore are not allowed at any time to place themselves in debit with their clients;

- they are not allowed to provide any investment service except as follows: (i) receiving and transmitting orders in transferable securities and units in collective investment undertakings; (ii) providing investment advice in relation to those securities and units; and

- they are only transmitting those orders to certain specified entities.

**Is your business “operating within the State”?**

If you are not “operating within the State” or deemed to be “operating within the State” you do not need an Irish authorisation or to effect a passport notification.

Under Regulation 8(1) of the MiFID Regulations, an investment firm shall not be regarded as operating within the State, if—

- the investment firm has no branch in the State;

- the investment firm’s head or registered office is: (i) in a state other than a Member State, or (ii) in a Member State outside the State, and the investment firm does not provide any investment services in respect of which it is required to be authorised in its home Member State for the purposes of MiFID; or

- the investment firm is authorised in a Member State outside the State, under MiFID, but provides only investment services of a kind for which authorisation under MiFID is not available during the provision of the investment services.

Importantly, Regulation 8(2) of the MiFID Regulations clarifies that notwithstanding paragraph (1), an investment firm, for the purposes of Regulation 7, shall be regarded as operating within the State if the investment firm provides investment services to individuals in
the State who do not themselves provide one or more investment services on a professional basis.

**Do you provide or intend to provide any of the “Ancillary Services”?**

Where an investment firm is authorised to carry out investment services, it can also apply for its authorisation to cover the following ancillary services (authorisation under the MiFID Regulations cannot be granted solely for ancillary services):

- safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management;

- granting credits or loans to an investor to allow the investor to execute a transaction in one or more financial instruments, where the investment firm granting the credit or loan is involved in the transaction;

- advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings;

- foreign exchange services where these are connected to the provision of investment services;

- investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments; and

- services relating to underwriting.

**Implications of draft MiFID II Legislation**

The draft MiFID II Legislation proposes to extend the application of MiFID to more firms; for example to certain commodity firms, data providers and third country firms. The draft MiFID II Legislation also proposes to bring additional instruments such as structured deposits and emissions allowances within the scope of MiFID. Please see section entitled ‘MiFID II – Proposed Changes’ for further information.
IS AUTHORISATION UNDER THE MiFID REGULATIONS IN IRELAND THE CORRECT OPTION?

Initial 4 Step Check

The following steps should be taken by an investment firm to determine if its business is within the scope of the MiFID Regulations and, if so, what actions this may require.

Step 1 – Determine whether the investment firm requires authorisation under the MiFID Regulations?

Step 2 – Determine if the presence in Ireland requires authorisation by the Central Bank or if the business can passport its authorisation from another Member State.

Step 3 – If authorisation is to be sought in Ireland, the investment firm should consider the Central Bank’s authorisation requirements fully to ensure that these can be met.

Step 4 – As part of this process, the investment firm should also consider the ongoing operational and conduct of business requirements that will be imposed to ensure that these can be adhered to.

An investment firm should not proceed to make an application for authorisation under the MiFID Regulations until it has given full consideration to each of the steps above.

It may be the case that a firm will be deemed to be carrying out an IIA service only (see below) and not a MiFID service (e.g. acting as a deposit broker or deposit agent).

Investment Intermediaries Act may still apply

The Investment Intermediaries Act, 1995 as amended (the “IIA”), has not been repealed and a firm therefore has to consider the potential application of both the MiFID Regulations and the IIA to its business.

A different regulatory regime will apply to a firm depending on whether it offers an IIA service or a MiFID service and it is most important to note that the definitions of “investment services” and “financial instruments” under the MiFID Regulations are of “investment business services” and “investment instruments” under the IIA.
If your business involves the provision of “investment business services” or provision of services relating to “investment instruments” under the IIA, you may need to obtain authorisation as an investment business firm under section 10 of the IIA.

MiFID/IIA Hybrid

If your business involves the provision of investment services under the MiFID Regulations and also covers investment business services and/or investment instruments under the IIA, it will be necessary to seek authorisation under the MiFID Regulations with a specific extension to cover the additional IIA investment business services/investment instruments. Such an authorisation is referred to as a “hybrid” authorisation.
AUTHORISATION UNDER THE MIFID REGULATIONS - APPLICATION PROCEDURE

Preliminary Meeting with the Central Bank

The Central Bank requires each proposed investment firm to meet with them at a preliminary stage to discuss the firm’s business and the proposal to seek authorisation. The Central Bank has issued a MiFID agenda document which is attached hereto at Appendix A. This agenda document is to be used for the purposes of the initial meeting with the Central Bank to discuss a proposed MiFID application. The MiFID agenda document places increased focus on:

- the Board of Directors;
- Staffing and Organisation Structure; and

Only on satisfying the Central Bank’s preliminary enquiries can the application proceed.

Next Step - Documents Submission

The application process requires the following documentation to be submitted to the Central Bank:

- completed Application Form (standard form);
- detailed Business Plan;
- drafts of all policies and procedures manuals;
- certified copy of Memorandum and Articles of Association or equivalent;
- Individual Questionnaire (electronic version) for each director and key individuals (ie. senior managers);
full ownership (direct and indirect) details, group structure chart (highlighting all regulated group entities) and accounts of all entities in ownership chain;

- audited annual accounts for the previous 3 years (or since establishment, if less than 3 years in existence);

- quarterly management accounts since the last audited accounts (highlighting all regulated group entities).

Application Form and Business Plan

The Application Form and Business Plan submitted to the Central Bank need to provide full and sufficient details about the firm and its business to enable the Central Bank to make a determination as to whether the investment firm meets the conditions for authorisation, discussed in more detail below.

This must also include details inter alia on officers responsible for compliance, finance, anti-money laundering and internal audit.

Draft Policies and Procedures Manuals

Draft Policies and Procedures Manuals will need to submitted to the Central Bank for review evidencing how the firm proposes to manage its business in compliance with the ongoing organisational and conduct of business requirements, discussed in more detail below.

Timing

The process for authorisation will usually take between 4 and 6 months from the date of original submission of complete application.

Better prepared, more detailed submission documents tend to reduce the timing of authorisation process.
CONDITIONS FOR AUTHORISATION

Constitution

The proposed investment firm must be constituted in one of the following forms:

- a company incorporated by statute or under the Companies Acts 1963 to 2012;
- a company incorporated outside Ireland;
- a company made under Royal Charter;
- constituted under a partnership agreement as an unincorporated body of persons;
- an industrial provident society, or
- a sole trader.

Normally, a private limited liability company is the chosen vehicle.

Capacity to Provide Investment Services

The proposed investment firm’s constitutional documents must give the investment firm sufficient capacity to conduct investment services.

Sufficient Capital

The proposed investment firm must have sufficient capital in line with the Capital Requirements Directive.

Suitability of Qualifying Shareholders

The Central Bank must be satisfied as to the suitability of each of the qualifying shareholders of the proposed investment firm. Full details need to be provided, including group structure charts, details of all regulated entities in the group, accounts for all entities in ownership chain and evidence showing ownership of each entity in that chain.
**Structure, Skill, Staffing**

The Central Bank must be satisfied as to the organisational structure and management skills of the proposed investment firm and that adequate levels of staff and expertise will be employed to carry out the investment firm’s proposed activities.

The MiFID Regulations also apply high level organisational and conduct of business standards to all investment firms – please see below the section titled “Ongoing Organisational Requirements” for further information.

**Fitness and Probity**

The Central Bank published new fitness and probity standards for persons performing a Pre-Approval Controlled Function (“PCF”) or a Controlled Function (“CF”) on a professional basis in a regulated firm. The fitness and probity standards are built on requirements of competence, capability, honesty, integrity and financial standing. In relation to an investment firm authorised under the MiFID Regulations, the following would be regarded as performing a PCF:

- director (executive and non executive);
- chair of the board or of any of a number of significant committees of the board;
- chief executive;
- the head of finance, compliance, internal audit, risk and anti-money laundering compliance.

Any person who performs a PCF in a MiFID authorised firm must be approved by the Central Bank in advance of his / her appointment. In this regard, a detailed questionnaire must be completed and submitted electronically to the Central Bank.

**Minimum Competency Code**

The Central Bank issued its new Minimum Competency Code (the “Code”) on 1 September 2011 replacing the Minimum Competency Requirements (the “Requirements”) which came into effect on 1 January 2007. The Code took effect on 1 December 2011 and replaces the Requirements from that date.
The Code applies to persons carrying out a PCF or a CF on a professional basis in a regulated firm, the exercise of which includes:

(a) providing advice to consumers on retail financial products;
(b) arranging or offering to arrange retail financial products for consumers; and
(c) carrying out one of the specified functions set out in Appendix 2 of the Code, for example assisting a consumer in making an insurance claim, determining the outcome of an insurance claim or adjudicating on a complaint which relates to advice about a retail financial product or the arranging or offering to arrange a retail financial product for a consumer.

The Code contains categories of products which are considered to be retail financial products which are set out in Appendix 1 of the Code and include savings, investments, collective investment schemes, life assurance products, tracker bonds, shares in a company listed on the Stock Exchange, pensions, insurance and housing loans. The Code sets out the minimum level of knowledge and competence required for each category of retail financial product in Appendix 3 of the Code.

**Remuneration Policy**

The Capital Requirements (Amendment) Directive 2010/76/EU of the European Parliament and of the Council of 24 November 2010 (the “CRD III rules” and which amended the Capital Requirements Directive 2006/49/EC) were transposed into Irish law with effect from 1 January 2011 by the European Union (Directive 2010/76/EU) Regulations 2010. The CRD III rules require investment firms to adopt remuneration policies and practices that promote sound and effective risk management and apply to senior managers, risk takers, staff engaged in control functions and any employee whose total remuneration (including discretionary pension provisions) takes them into the same bracket as senior managers and risk takers. In particular the CRD III rules limit the size of bonuses that may be paid as a proportion of salary, provide for compulsory deferral of bonuses in certain cases, provide that all upfront bonuses be capped and limit the circumstances where guaranteed bonuses can be paid.

Depending on the nature of activities of the investment firm it may be possible to dis-apply certain of the remuneration requirements.
PASSPORTING PROVISIONS

Passporting into Ireland of Authorised Investment Services

An investment firm authorised in another Member State may provide, within Ireland, investment services and any ancillary services, if the services are permitted under the investment firm’s authorisation in its home Member State.

Passporting into other Member States

An Irish investment firm authorised to provide investment and ancillary services in Ireland can passport into other Member States.

No Branch

An investment firm providing services on a cross border basis (without the establishment of a branch) need only comply with the conduct of business rules of its home Member State.

Branch

When operating on a branch basis, the organisational requirements of its home Member State regulation will continue to apply but it will also be required to comply with the conduct of business rules of its host Member State for activities within the host Member State.

The passporting regime under the MiFID Regulations is set out in Part 9 of the MiFID Regulations.

Implications of draft MiFID II Legislation

The draft MiFID II Legislation contains proposals to permit third country firms (i.e. non-Member States) that wish to provide cross border investment services across the EEA to do so on the basis of a passport. Please see section entitled “MiFID II – Proposed changes” for further information.
ONGOING ORGANISATIONAL REQUIREMENTS

The MiFID Regulations apply high-level organisational and conduct of business standards to all investment firms. The organisational requirements include the following:

General Compliance Procedures

The firm must establish adequate policies and procedures sufficient to ensure its compliance with its obligations.

Conflicts of Interest Procedures

The firm must maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to identify potential conflicts of interest and take steps to prevent these conflicts adversely affecting the interests of its clients.

If a conflict of interest cannot be prevented, the investment firm must disclose the nature and/or sources of the conflict of interest to the client before undertaking the business.

Business Continuity Procedures

The firm must ensure continuity and regularity in the performance of investment services and activities by implementing and carrying out appropriate and proportionate systems, resources and procedures.

Operational Risk Control Procedures

The firm must take reasonable steps to avoid undue additional operational risk when relying on third parties for the performance of certain operational functions.

Outsourcing Procedures

The firm must ensure that any outsourcing of important operational functions is not undertaken in such a way as to impair materially: (i) the quality of the firm’s internal control, or (ii) the ability of the Central Bank to monitor the firm’s compliance with all of the investment firm’s obligations.
Where a firm outsources critical or important operational functions or any investment services or activities, the firm remains fully responsible for discharging all of the firm’s obligations under the MiFID Regulations.

**Administrative and Accounting Procedures and Systems Control Procedures**

The firm must have in place and use (i) sound administrative and accounting procedures and internal control mechanisms, (ii) effective risk assessment procedures, and (iii) effective control and safeguard arrangements for information processing systems.

**Record Retention Procedures**

The firm must keep records of all services and transactions undertaken and ensure that the records are sufficient to enable the Central Bank to monitor the firm's compliance with the MiFID Regulations and, in particular, to ascertain whether the firm is complying with its obligations with respect to clients or potential clients. This requirement will also apply to passporting entities with branches in Ireland.

**Procedures for Safekeeping of Financial Instruments held on behalf of clients**

When holding financial instruments belonging to clients, the firm must make adequate arrangements to (i) safeguard clients’ ownership rights, especially in the event of the firm’s insolvency, and (ii) prevent the use of a client’s instruments on own account, except with the client’s express consent.

**Procedures for Safekeeping of client money**

When holding funds belonging to clients, the firm must make adequate arrangements to safeguard the clients’ rights and, except in the case of credit institutions, prevent the use of client funds for the investment firm’s own account.

**Business, Procedures, Internal Controls and Reporting**

Each firm must establish, implement and maintain:

- decision-making procedures and an organisational structure relevant for its business;
- internal control mechanisms to ensure compliance with these procedures;
records of the business and internal organisation;

- security and confidentiality procedures to safeguard this information.

**Monitoring and Evaluating Systems Control Mechanisms**

Regulation 35 of the MiFID Regulations requires that firms must monitor and evaluate the adequacy and effectiveness of their systems and internal controls on a regular basis and take appropriate measures to address deficiencies. This must include maintaining a permanent, independently operating compliance function.

**Risk Management Function**

A firm is required under Regulation 36 to establish, implement and maintain adequate risk management policies and procedures, to adopt processes and arrangements to manage those risks and to monitor compliance with those risk policies and procedures.

An independent risk management function is envisaged where it is proportionate and appropriate in light of the nature, scale and complexity of the investment firm’s business.

**Internal Audit Function**

Regulation 37 of the MiFID Regulations envisages that a separate internal audit function be established and maintained where it is proportionate and appropriate in light of the nature, scale and complexity of the investment firm’s business.

**Reports to Senior Management**

Regulation 37 of the MiFID Regulations also requires reports on internal controls and risk management to be provided to senior management on a frequent basis (and at least annually).

**Complaints Procedures**

A firm is required under Regulation 38 of the MiFID Regulations to maintain effective and transparent procedures for the reasonable and prompt handling of complaints and keep records of such complaints and their resolution.
Implications of draft MiFID II Legislation

The draft MiFID II Legislation contains proposals to enhance these high level organisational standards. Please see section entitled “MiFID II – Proposed Changes” for further information.
CONDUCT OF BUSINESS REQUIREMENTS

The MiFID Regulations contain certain conduct of business requirements which apply to the activities of an investment firm which include:

Client Classification

All clients must be classified as either; (i) retail clients; (ii) professional clients; or (iii) eligible counterparties and must receive specific information depending on such classification.

Clients must receive prior notification of the nature and degree of risk involved, details of fees and expenses etc and subsequent information about the status of execution of the instruction and must also receive regular statements and reports on the products and services acquired via the investment firm.

Retail Clients: By default, clients who are neither eligible counterparties nor professional clients are considered to be retail clients. This means most natural persons. Retail clients enjoy the highest level of protection.

Professional clients: These are large businesses which conform to criteria of size in terms of their balance sheet, turnover and/or share capital. The definition of “professional client” is set out in Schedule 2 to the MiFID Regulations. Obligations to such clients in terms of information are, consequently, limited.

Eligible Counterparties (“ECPs”): These are professional clients (e.g. investment companies, credit institutions, pension funds, central banks, etc.) who operate in the financial sector. The definition of “ECPs” is set out in Regulation 3 to the MiFID Regulations. Certain obligations concerning information provision, best execution requirements, prompt, fair and expeditious execution of client orders etc will not apply to transactions with ECPs.

An investment firm is required (under Regulation 81(1)(b)) to notify clients about the right to request a different categorisation in certain circumstances and about any limitations on the level of client protection that different categorisations would entail.

Best Execution

Investment firms must take reasonable steps when executing orders to ensure the best possible result for their clients, taking account of price, cost, speed, likelihood of execution
and settlement, size, nature and any other consideration relevant to the execution of an order.

Investment firms must establish and implement an ‘order execution policy’ that will ensure the best possible result for the client. This policy must include information on different venues where the investment firm executes its client orders and the factors affecting the choice of the venue. Firms must also provide appropriate information to their clients on the order execution policy and are required to obtain the prior consent of their clients to the execution policy.

If the order is executed outside a RM or an MTF, the investment firm must inform their clients of this possibility in the policy. Prior ‘express’ consent must be obtained by the investment firm before proceeding to execute orders outside a RM or an MTF. This consent may be obtained in the form of an agreement or in respect of an individual transaction.

A firm will need to monitor the effectiveness of its order execution arrangements including execution venues and execution policy to achieve best execution opposed to any alternatives at least on an annual basis. Firms are required to advise customers of any material changes to their order execution policy or arrangements.

**Execution-Only Services**

If an investment firm is only providing execution-only services and/or the reception and transmission of client orders, it will not be required to assess the suitability of the product or service if it relates to certain instruments, namely: shares admitted to trading on a RM (includes equivalent markets outside the EU); money market instruments, bonds, or securitized debt (excluding bonds or securitized debt that embed a derivative); and non-complex financial instruments.

Execution-only services can be provided only at the initiative of the client. The client must be clearly informed that as there is no requirement to assess the suitability of the instrument or service offered, the client will not benefit from the full conduct of business rules. The firm must also warn the client that it has not assessed the suitability of the product/service.

The firm must also ensure that it complies with the conflict of interest rules set out in Regulation 74 and 75 of the MiFID Regulations when providing execution-only services.
Client Order Handling

Investment firms are required to take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order.

Order Allocation Policy - This is required to ensure the fair allocation of aggregated orders and transactions and to address how the volume and price of orders relates to how they will be allocated in each case.

This policy must:

- provide for the prompt, fair and expeditious execution of client orders by that investment firm, and
- provide for the execution of comparable client orders in accordance with the time of their receipt by the investment firm.

Implications of draft MiFID II Legislation

The draft MiFID II Legislation contains proposals to enhance these high level conduct of business standards. Please see section entitled “MiFID II – Proposed Changes” for further information.
CAPITAL REQUIREMENTS

The Capital Requirements Directive sets out the level of regulatory capital which an investment firm must maintain. The Capital Requirements Directive introduced a pillar approach to capital requirements. The Capital Requirements Directive was transposed into Irish law via the European Communities (Capital Adequacy of Investment Firms) Regulations 2006 (S.I. No. 660 of 2006) and European Communities (Capital Adequacy of Credit Institutions) Regulations 2006 (S.I. No. 661 of 2006). The amount of regulatory capital depends on a number of factors such as the size of the investment firm and the investment services which it provides.

If the proposed investment firm is considered to be small and non-complex then a lower initial capital requirement will apply and will be either €50,000 or €125,000. If the investment firm wants to carry out the investment service of dealing on own account then the initial capital requirement is increased to €730,000. The minimum capital requirement will be the greater of the initial capital requirement or 25% of projected fixed overheads as set out in the financial projections. The Central Bank also has discretion to impose a buffer under Regulation 19(3) of S.I. 660 of 2006, which would be equal to the total of the firm’s fixed overheads for the first 3 months of operation. This figure would be added to the higher of the firm’s initial capital requirement or fixed overhead requirement to produce a figure for the firm’s capital requirements. Pillar 2 of the Capital Requirements Directive provides that investment firms would also need to consider whether they need to hold additional capital against firm-specific risks which are not covered by Pillar 1 of the Capital Requirements Directive.

Each investment firm is required to formulate an Internal Capital Adequacy Assessment Process (ICAAP) as a means of determining an adequate level of capital required to cover the business’s risks.

The Central Bank distinguishes between “small, non-complex firms” and “large and/or complex firms” when assessing and applying capital requirements.

The Central Bank has outlined guideline criteria to identify which category is appropriate for investment firms. The criteria under which an investment firm will be considered large/complex includes: (i) if it is authorised to trade for its own account; (ii) if it is authorised to underwrite issues on a firm commitment basis; (iii) if it uses models to determine regulatory capital; (iv) if it describes itself as large or complex; (v) if it has a significant presence in the local market and/or has large international activities; or (vi) if it is a member...
of the Irish Stock Exchange. Firms that fall outside this criteria would generally considered to be small, non-complex firms.

Small, non-complex firms will be required to prepare an ICAAP on the basis of the Central Bank’s ICAAP Questionnaire. Large and/or complex firms will be required to prepare an ICAAP on the basis of the Central Bank’s ICAAP Portal.

The ICAAP Portal requires a more detailed and sophisticated level of risk calculation appropriate for more complex businesses. In practice, it will typically require an investment firm to maintain a higher level of capital to cover risk than that required for small, non-complex firms under the ICAAP Questionnaire.
MiFID II – PROPOSED CHANGES

Introduction

The proposals contained in the draft MiFID II Legislation are comprehensive and represent significant changes to the regulatory regime currently in place in Ireland. The purpose of this section is to summarise the key changes which the draft MiFID II Legislation proposes to introduce to the current regulatory framework. The draft MiFID II Legislation is divided into two parts;

(i) a revised Directive which will be an amendment and restatement of MiFID, (the “MiFID II Directive”); and

(ii) a new Regulation which will set out requirements relating to trade transparency and the mandatory trading of derivatives on organised venues, (the “MiFID II Regulation”). EU Regulations take effect as soon as they are published by the European Commission and are binding on all EU Member States as soon as they become effective. EU Regulations do not require any implementing measures. It is hoped that the MiFID II Regulation will minimise any scope for divergences in the interpretation of transparency and transaction reporting provisions.

The European Securities and Markets Authority (“ESMA”) has been asked to draft accompanying technical standards, (the “Technical Standards”) which as yet have not been published. Therefore it will not be possible to assess the full extent of the proposed changes until the Technical Standards are published. Furthermore it is likely that additional changes will be made to the draft MiFID II Legislation as it is negotiated between the European Commission, European Parliament and the European Council.

Implications of MiFID II

The draft MiFID II Legislation will have implications for existing investment firms which are authorised under the MiFID Regulations and for firms that will be brought within the scope of the regulatory regime as a result of the proposed changes contained in the draft MiFID II Legislation. The proposals expand the scope of MiFID as follows:

- At Firm level – a larger number of investment firms will now fall within the scope of MiFID for the first time; e.g. a broader range of commodities firms, certain data providers and third country firms;
At Product level – a larger number of products will be covered; e.g. structured deposits and emission allowances;

At Service level – Custody services, (safekeeping and administration of financial instruments for the account of clients) which were previously classified as ancillary services, will now become a core investment service instead of an ancillary service, which will bring standalone custodians in Ireland within scope of the MiFID Regulations (as opposed to falling to be regulated under the Investment Intermediaries Act 1995 as is currently the case).

Third Country Firms

Presently the rules relating to the access rights of third country firms who wish to provide cross-border investment services into the EEA are not harmonised, i.e. discretion is left to Member States as to how they want to treat third country firms who wish to provide cross border investment services. Currently the only stipulation is that national law must not treat third country firms more favourably than firms in Member States who are subject to the requirements contained in MiFID.

The draft MiFID II Legislation proposes to allow third country firms to passport their services into the EEA on the basis of a “passport”. The passport can be exercised by:

- establishing an EEA branch and seeking authorisation for the branch (if a third country investment firm wants to provide services to retail clients it will need to establish a branch in an EEA country);

- by becoming registered in the register of third country firms kept by ESMA to provide services from outside the EEA on a cross-border basis (this option is only available to investment firms who want to provide services to eligible counterparties).

In each case, the third country investment firm will need to pass an equivalency test (i.e. the European Commission will need to make a determination about whether the home jurisdiction of the third country firm provides equivalence to the requirements set out in MiFID and the Capital Requirements Directive). Furthermore proper co-operation arrangements must be put in place between the firm’s third country regulator and the “home” EEA regulator. In addition, the third country 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 draft MiFID II Legislation does not deal with how the new rules relating to third country firms will apply to investment firms who want to provide services to professional clients. It is hoped that this will be clarified by the European Commission in due course.

The draft MiFID II Legislation permits persons within the EEA to receive cross border services from third country firms that are not registered with ESMA, but only where the person requests services from the third country firm at its own initiative, i.e. on a non-solicited basis.

**Conduct of Business Requirements**

*Investment Advice*

The draft MiFID II Legislation provides that firms providing the investment service of investment advice must provide information to clients or potential clients of the basis upon which they provide this advice, i.e. whether this advice is provided on an independent basis and whether it is based on a broad or a more restricted analysis of the market and shall indicate whether the firm will provide the client with the ongoing assessment of the suitability of the financial instruments recommended to clients.

*Best Execution*

The current requirements relating to best execution will be extended and investment firms will need to provide more information about execution. Investment firms will need to provide sufficient information regarding their execution policy and in particular will need to ensure that they explain clearly how orders will be executed. Investment firms will be required to disclose their top five execution venues for each class of financial instrument in the preceding year. It is likely that the Technical Standards will provide greater details on these requirements.

*Inducements*

The draft MiFID II Legislation proposes to restrict inducements for investment firms which provide portfolio management and investment advisory services.
Appropriateness

Regulations 76 and 94 of the MiFID Regulations provide that an investment firm (when providing investment services other than investment advice and portfolio management) must assess its clients' experience and knowledge and ultimately assess the appropriateness of the investment firm's investment services and activities for the client. Sufficient information includes an assessment of the types of service and financial instrument with which the client is familiar, the nature, volume and frequency of the client's transactions and the client's level of education and profession. This obligation does not apply where the service is (i) an execution only service (e.g. it consists of execution and/or the reception and transmission of client orders) and relates to a non-complex financial instrument only or (ii) where a firm is providing a service to a professional client, on the basis of a presumption that professional clients have the necessary level of experience and knowledge in order to understand a particular product or a transaction.

The draft MiFID II Legislation proposes to limit the exemptions outlined above by amending the categories of non-complex financial instruments such that it will be more difficult for an instrument to be regarded as a non-complex financial instrument. Broadly speaking financial instruments which contain an embedded derivative or contain a structure “which makes it difficult for the client to understand the risk involved” will be regarded as complex financial instruments. It is hoped that the Technical Standards will provide further guidance on the meaning of financial instruments that contain a structure which makes it difficult for a client to understand.

It should be noted that the Commission originally indicated that it would abolish the presumption that professional clients have the necessary level of experience and knowledge to understand a particular product or a transaction in its entirety. It appears that the Commission has not abolished this presumption in its entirety, however, it is unclear whether the draft MiFID II Legislation will limit the presumption to less complex financial instruments. It is hoped that this issue will be addressed in the Technical Standards.

From a UCITS perspective, there is a concern that the proposals to re-classify certain financial instruments as complex financial instruments will lead to a UCITS split. To date all UCITS have been classified as non-complex financial instruments and therefore have not been subject to appropriateness tests. However if the new proposals are adopted in their current draft form, investment firms will need to apply the appropriateness tests when selling structured UCITS to retail investors.
Suitability

The MiFID Regulations provide that when providing investment advice or portfolio management services to professional clients, a firm can assume that the client has the necessary level of knowledge and experience for the product or service. Similar to the position outlined above, it is not clear whether the draft MiFID II Legislation will limit the presumption to less complex financial instruments. It is hoped that this issue will be addressed in the Technical Standards.

On 6 July 2012, ESMA published guidelines on certain aspects of the MiFID suitability requirements. The purpose of the guidelines is to clarify the application of certain aspects of the current MiFID suitability requirements. Accordingly, before providing investment advice or portfolio management services, investment firms must obtain the necessary information to be able to understand the essential facts about the client in order to assess the suitability of any investment for that client. This necessarily encompasses information about the client (a) investment objectives, (b) financial situation and (c) knowledge and experience.

The guidelines apply to investment firms who provide (a) investment advice or (b) portfolio management. The term suitability assessment is understood as meaning the whole process of collecting information about a client, and the subsequent assessment of a given financial instrument for that client. The guidelines are summarised below:

- Investment firms should provide information to their clients about the suitability assessment process. In particular they should explain that the underlying reason for assessing suitability is to enable a firm to act in the client’s best interests;

- Investment firms should have adequate policies and procedures in place to enable them to understand the essential facts about their clients and the characteristics of the financial instruments available for those clients;

- Investment firms should ensure that staff involved in the suitability process should have the skill necessary to be able to assess the needs and circumstances of a particular client. Staff should also have the necessary skills in financial markets to understand the financial instruments to be recommended;

- Investment firms should determine the extent of information to be collected from clients in light of all the features of the investment advisory or portfolio management services to be provided to those clients. The extent of the information that needs to be collected will vary. If an investment firm provides complex or higher risk financial instruments,
then it will need to collect more in-dept information about the client in order to ensure the client understands and can financially bear the risks associated with that product. In determining the information to be collected, investment firms should also have regard to the types of services that they are providing:

- Investment firms should ensure that the information collected about clients is reliable. This implies, amongst other things, that when collecting information about a client, investment firms should take care to ensure that the questions asked are likely to be understood;
- Where an investment firm has an ongoing relationship with a client, it should establish policies and procedures in order to maintain adequate, relevant and updated information about that client;
- If a client consists of a group of two or more natural persons or a natural person represented by another natural person, the investment firm’s procedures should provide how the relevant client information will be determined. In particular the financial situation and investment objectives of the underlying client should be looked at in order to determine the suitability of an investment product;
- Investment firms should take appropriate measures to match clients with suitable investments;
- Investment firms should maintain adequate record keeping arrangements to ensure orderly record keeping regarding all stages of the suitability process.

**Client Classification**

(1) Eligible Counterparties

Currently investment firms must act honestly, fairly and professionally in accordance with the best interests of its client when dealing with professional clients and when dealing with retail clients. The draft MiFID II Legislation proposes to extend this obligation to investment firms when they are dealing with eligible counterparties.

The draft MiFID II Legislation prevents local authorities from being automatically classed as a professional client, i.e. they will be assumed to be a retail client, although they may request to be treated as a professional client. Local authorities may not be treated as eligible counterparties in any circumstances.
There are also proposals in the draft MiFID II Legislation which require investment firms to provide more information to eligible counterparties in relation to all types of business, for example it is proposed to extend the information reporting requirements to transactions with eligible counterparties.

(2) Professional Clients

Currently an investment firm can assume that a professional client has the necessary knowledge and experience to understand the risks involved in relation to a particular product, service or transaction. As detailed above this means that investment firms do not need to undertake appropriateness/suitability tests when selling non-complex financial products to professional clients. The draft MiFID II Legislation proposes to narrow the categories of non-complex instruments to which the presumption applies.

(3) Retail Clients

The draft MiFID II Legislation proposes to ban title transfers arrangements in the case of retail clients.

Trading Venues

Organised Trading Facilities ("OTFs")

The draft MiFID II legislation proposes to introduce a new regime to regulate OTFs. An OTF is any system or facility, which is not a RM or a MTF, in which multiple third-party buying and selling interests in financial instruments are able to interact in the system in a way that results in a contract. OTFs are broadly intended to capture broker crossing systems and inter dealer broker systems. It is intended that facilities on which no trade execution or arranging takes place, such as order routing systems and pure OTC trading (direct trades between counterparties on an ad hoc basis) will be excluded from this definition.

The operator of an OTF may not execute client orders against its proprietary capital, and this is a key factor in distinguishing an OTF from a Systematic Internalise ("SI").

The operation of an OTF under the draft MiFID II Legislation will require authorisation under the legislation. A request for authorisation must include a detailed explanation as to why the system does not correspond to and cannot operate as an RM, MTF or SI. This requirement implicitly recognises the scope for overlap between the categories. It is also intended that OTFs will be subject to conduct of business requirements, transparency and reporting.
requirements, best execution requirements and client order handling obligations applicable to RMs and MTFs.

**Multilateral Trading Facilities**

An MTF is defined in MiFID as a “multilateral system, operated by an investment firm or a market operator, and which brings together multiple third-party buying and selling interests in financial instruments in the system and in accordance with non-discretionary rules in a way that results in a contract”.

The draft MiFID II Legislation proposes to align the organizational requirements for MTFs and RMs so that an RM and an MTF will be subject to equivalent organizational standards and regulatory oversight, provided that the RM and MTF are of a similar size and are operating a similar business.

**Systematic Internaliser**

An SI is defined as “an investment firm which, on an organised, frequent and systematic basis, deals on own account by executing client orders outside of an RM or an MTF”. Currently there are only a handful of SIs in Europe. The draft MiFID II Legislation proposes to extend the definition of “SI” and it is intended that riskless trading will be caught by the new definition.

The draft MiFID II Legislation proposes to amend the current legislation to clarify qualifying criteria for SIs.

**Automated Trading**

The European Commission proposes to place controls on firms that engage in algorithmic trading. The term algorithmic trading appears to target situations where a computer algorithm determines the timing, price or quantity of an order with limited or no human intervention.

Investment firms engaged in algorithmic trading will have to put effective procedures and controls in place to reduce the risk of rogue algorithms and potential systems errors. The proposals seek to ensure that systems are resilient and include appropriate risk controls such as preventing systems from sending erroneous instructions. In certain circumstances investment firms involved in algorithmic trading will be required to notify their regulators (at
least annually) of the computer algorithms that they employ, including an explanation of the design, purpose and functioning of algorithms.

High frequency trading is a subcategory of algorithmic trading, and persons involved in high frequency trading who are direct members of a trading venue will need to be authorised as an investment firm(s). An important component of the new legislation will be the requirement to have a “circuit breaker” in place. A circuit breaker is designed to temporarily halt trading or reject orders exceeding pre-set volume and price thresholds. Circuit breakers have already been introduced in the United States and aim to prevent the creation of unusual market conditions or bubbles by persons engaged in high frequency trading.

**Derivatives**

*On-exchange trading requirement*

The draft MiFID II Legislation proposes wide ranging reforms to the regulation of derivatives in the EU. The proposed amendments will require certain derivatives to be traded on an RM, an MTF, OTF or on third country trading venues which the European Commission has confirmed meet an equivalency test. The provisions leave to the European Commission and to ESMA the task of determining through Technical Standards which classes of derivatives will be subject to the “on-exchange trading” requirement. The recitals to the MiFID II Regulation explicitly provide that clearing eligibility and liquidity will be the criteria to be considered when determining whether a derivative will be subject to trading requirements. The obligation will apply to financial counterparties and certain non-financial counterparties exceeding the clearing threshold as set out in the European Markets Infrastructure Regulation (“EMIR”). Furthermore the amendments require that all derivatives subject to the trading obligation should also be subject to a clearing obligation.

**Commodity Derivatives**

The draft MiFID II Legislation proposes to bring a wider range of commodity derivatives trades within the scope of MiFID by narrowing the scope for exemptions such that persons dealing on own account with clients of the main business would not fall within the current exemption. As a result certain businesses (including energy firms) will need to show that any trading activities are ancillary to their main business.

The draft MiFID II Legislation proposes to classify emission allowances as financial instruments so as to bring them within the scope of MiFID.
European Markets Infrastructure Regulation

The proposals relating to the regulation of derivatives contained in MiFID II should be read alongside EMIR which provides for mandatory clearing and reporting of OTC derivatives. EMIR implements the G20 commitments on OTC derivatives markets. Both the US (Dodd Frank Act) and Japan have passed OTC derivatives legislation earlier this year. EMIR aims to improve the functioning of OTC derivative markets in the EU by (i) reducing counterparty risks, (ii) increasing transparency via trade repositories and (iii) ensuring safe and resilient central counterparties.

Organisational Requirements

Compliance Function

On 6 July 2012, ESMA published a paper entitled “Guidelines on certain aspects of the MiFID compliance function requirements”. The guidelines are aimed at helping investment firms to increase the effectiveness of the compliance function and on providing further clarification of the compliance function as set out in MiFID. The guidelines are summarised below:

- Compliance risk assessment – investment firms should adopt a risk based approach to the compliance function in order to allocate the function’s resources efficiently;

- Monitoring obligations of the compliance function – investment firms should ensure that the compliance function establishes a monitoring function that covers all relevant areas of the investment firm’s investment services and ancillary services so as to ensure that compliance risk is comprehensively monitored;

- Reporting obligations of the compliance function – investment firms should ensure that detailed written compliance reports are sent to senior management on a regular basis. The reports should contain a description of the implementation and effectiveness of the firm’s compliance monitoring programme and of the overall control environment for investment services and activities;

- Advisory obligations of the compliance function – the compliance function should ensure that the all staff is adequately trained on (i) internal policies and procedures of the investment firm and (ii) MiFID, relevant national laws, the applicable standards and guidelines set out by ESMA and competent authorities. Furthermore the compliance
function should be involved in all significant modifications of the organisation in the area of investment services, activities and ancillary services;

- **Effectiveness of the compliance function** – investment firms should ensure that appropriate human and other resources are allocated to the compliance function taking into account the scale and types of investment services, activities and ancillary services undertaken by the investment firm. Compliance staff should have the necessary experience and knowledge to perform the tasks assigned to them. Compliance staff should have the necessary authority to exercise their duties effectively;

- **Permanence of the compliance function** – investment firms are required to ensure that the compliance function performs its tasks on an ongoing, permanent basis;

- **Independence of the compliance function** – investment firms should ensure that the compliance officer and other compliance staff act independently when performing their tasks;

- **Exemptions** – an investment firm should assess whether the effectiveness of the compliance function will be compromised if it avails of the exemptions contained in Article 6(3) of the MiFID Implementing Directive. Article 6(3) of the MiFID Implementing Directive provides amongst other things that (i) persons involved in the compliance function must not be involved in the performance of services or activities that they monitor and (ii) the method of determining the remuneration of the relevant persons involved in the compliance function must not compromise their objectivity and must not be likely to do so. Article 6(3) provides that an investment firm need not comply with these requirements if it is able to demonstrate that in view of the nature, scale and complexity of its business, and the nature and range of investment services and activities, the requirements are not proportionate to the firms business and the compliance function continues to be effective.

- **Combining the compliance function with other functions** – the overlap of the compliance function with other control functions should be documented, including the reasons for any overlap. An investment firm should generally not combine the compliance function with the internal audit function;

- **Outsourcing of the compliance function** – if the compliance function is outsourced, investment firms must ensure that all applicable compliance requirements are fulfilled. All the conditions for outsourcing which are set out in Article 14 of the MiFID
Implementing Directive must be met if an investment firm outsources the compliance function;

- Review of the compliance function by the competent authorities – a competent authority should assess whether the measures implemented by the investment firm are adequate at authorisation and on an on-going basis.

**Transparency**

*Pre-trade and post-trade transparency requirements*

Currently, the pre-trade transparency regime in MiFID only applies to shares admitted to trading on a RM including where those shares are traded on an MTF or over-the-counter. This means that operators of RMs and MTFs must publish in real time current orders and quotes relating to shares admitted to trading on a RM (unless certain exemptions apply). The draft MiFID II Legislation proposes to extend the current pre-trade requirements beyond equities to cover equity like instruments (such as depository receipts, exchange traded funds and certificates issued by companies and other similar financial instruments admitted to trading or trading on an MTF or OTF). The draft MiFID II Legislation also proposes to extend the current pre-trade trade requirements to cover non-equity instruments including bonds and structured finance products admitted to trading on a RM or for which a prospectus has been published, emission allowances and for derivatives admitted to trading or which are traded on an MTF or an OTF. The draft MiFID II Legislation also proposes to remove many of the existing pre-trade transparency waivers.

Under the current MiFID regime a firm must make public specified information about transactions in shares admitted to trading on a RM including where those shares are traded on an MTF or over-the-counter. Typically this must be done within three minutes of the transactions taking place, however, deferred publication is permissible for very large trades. The draft MiFID II Legislation proposes to make similar changes to the post-trade transparency regime such that it will be extended to cover equity like instruments (such as depository receipts, exchange-traded funds, certificates and other similar financial instruments admitted to trading or which are trading on an MTF or OTF). The draft MiFID II Legislation also proposes to extend the post-trade requirements to cover non-equity instruments including bonds and structured finance products admitted to trading on a RM or for which a prospectus has been published, emission allowances and for derivatives admitted to trading or which are traded on an MTF or an OTF.

---

2 Articles 18 and 20 of the Commission Regulation EC No 1287/2006
The draft MiFID II Legislation is further proposing certain changes to post trade transparency requirements in equity markets such that post trade information must be published as close to the real time as is possible. It is hoped that the Technical Standards will clarify the scope and content of the information that will need to be published and the conditions under which deferred publication will be allowed.

All of the transparency rules will be moved from MiFID Directive to the MiFID II Regulation, so as to become directly applicable throughout Europe.

Transaction Reporting

It is proposed to extend that transaction reporting regime to:

- All financial instruments admitted on an RM, an MTF or an OTF;
- Financial instruments whose value depends on the value of a financial instrument traded on an RM, an MTF or an OTF;
- Financial instruments which have, or are likely to have, an effect on a financial instrument admitted to trading or traded on a MTF or OTF.

National Regulators

As widely anticipated the draft MiFID II Legislation confers additional powers on national regulators across the EU. National regulators will have powers to temporarily ban or restrict products or practices where there is a threat to investor protection, a threat to the orderly functioning and integrity of the markets, or a threat to the stability of the financial system. The draft MiFID II Legislation will confer similar powers on ESMA.

National regulators will have the power to limit the ability of a person from entering into a commodity derivative to ensure the integrity and orderly functioning of the markets. They will also have powers to demand information regarding exposures entered into via a derivative from any person.

The European Commission has concerns that the levels of sanctions vary too widely across EU Member States and has inserted measures into the draft MiFID II Legislation which will mean that the sanctions will be more harmonised across the EU. The draft MiFID II Legislation makes provisions for the imposition of the following fines:
Natural persons – fines of up to €5 million;

Investment firms – fines of up to 10% of the total annual turnover in the preceding year.

**Time Line**

The time line for implementation of MiFID II is still not clear. The proposals will need to pass through both the European Parliament and to the European Council, following which the proposals will be published in the Official Journal. In this regard, it is expected that the draft MiFID II Legislation will be proposed by the Commission and adopted by the EU Council and European Parliament in 2012. Some of the proposals will apply immediately after publication in the Official Journal and others will not be effective until they have been transposed into the national law of the Member States.

More detailed implementing measures to be prepared by the European Commission (i.e. Level 2 measures) which will serve to supplement the Level 1 draft MiFID II Legislation are expected to be finalised in early 2014. It is expected that the deadline for enacting legislation in Member States implementing the draft MiFID II Directive will be subsequent to this. In addition the draft implementing Technical Standards (i.e. Level 3 measures) which are to be submitted to the European Commission by ESMA are expected to be finalised in 2016.
HOW CAN DILLON EUSTACE ASSIST?

Our Experience

Dillon Eustace's Financial Services Department acts for asset managers and advisers, broker/dealers, investment banks, fund administrators, CFD providers and spread betting firms, pension consultancies, placing agents and intermediaries looking to use Ireland as a strategic base from which to serve a wider European client base or seeking to export their European based business to Ireland.

Recent Transactions

Recent transactions include:

- advising clients on authorisations under the MiFID Regulations;
- advising clients on extensions to their current MiFID Authorisation;
- advising clients on revisions to their MiFID Authorisation to include both extensions to their MiFID Authorisation and revocation of certain aspects of their MiFID Authorisation;
- outward foreign branch passporting provisions on (i) a freedom of services basis and (ii) establishment of a foreign branch;
- advising investment firms who are authorised under MiFID in a Member State on the establishment of a branch in Ireland;
- development of procedures to comply with the MiFID Regulations to include; best execution, conflict of interest, transaction reporting and client asset reporting procedures;
- advices in respect of the Capital Requirements Directive and in particular in respect of the level of regulatory capital which an investment firm needs to maintain under the Capital Requirements Directive; and
- review of consolidated supervision requirements under the Capital Requirements Directive to include applying for a waiver from such requirements.

Services

The Financial Services Department can advise on all aspects of the MiFID Regulations and its application to investment firms providing investment services in Ireland such as:

- the establishment and authorisation of new investment business in Ireland – including advising on high level strategic matters, scope and application of the MiFID Regulations,
co-ordination of application for authorisation including assistance/guidance in completion of the Central Bank’s Application Form and the investment firm’s Business Plan, advice on implementation of policies and procedures for compliance with ongoing organisational and conduct of business requirements;

- cross-border passporting;
- capitalisation and capital adequacy requirements;
- drafting/reviewing all contracts, terms of business, policies and procedures manuals etc.;
- liaising with the Central Bank on client’s behalf on all aspect of MiFID-related business and applications for authorisation;
- ongoing legal, regulatory and tax advice.

Date: 5th October 2012
APPENDIX A

Documentation to be submitted in advance of Meeting

1.0 Biographies for key personnel.

2.0 Clarification whether these individuals are previously approved by the Central Bank or have had previous contact with the Central Bank.

3.0 Clarification whether the firm has had previous contact with the Central Bank.

4.0 Proposed business model/investment services.

5.0 Group structure chart (if applicable).

6.0 Planned staffing organisation chart.
Meeting Agenda

1.0 Introduction to firm.

2.0 Proposed
   a) Investment (Business) Services;
   b) Ancillary Services (if applicable);
   c) (Investment) Financial Instruments; and

   Description of activities:
   d) MiFID Services;
   e) MiFID Ancillary Services;
   f) IIA;
   g) Other (unregulated – nature and extent);
   h) Client Assets.

3.0 Group Structure (if applicable).

4.0 Shareholders.

5.0 Clients.

6.0 Board of Directors
   a) Executives;
   b) Non Executives;
   c) Independent, non executive, directors (and criteria used in determining independence);
   d) Committees.

7.0 Staffing and Organisational Structure
   a) Organisation Chart;
   b) Number of staff and functions/departments;
   c) Identification of PCFs;
   d) Identification of Other staff (including control functions);
   e) Working arrangements of these staff, e.g. full time, part-time;
   f) Segregation of front/back office activities.

8.0 Minimum Competency Requirements (if applicable).
9.0 Outsourcing (if applicable).

10.0 Financial Information and Capital Requirements Directive
   a) Current financial position (if already trading);
   b) Initial Capital Requirements:
      a. Amount;
      b. Anticipated Composition;
   c) Minimum Capital Requirements (based on projections) –
      a. Anticipated amount;
      b. Anticipated Composition;
   d) Pillar II Calculation;
   e) ICAAP/SREP;
   f) Remuneration Policy (in particular Annex V, section 11, paragraphs 23 and 24 of Directive 2006/48/EC);
   g) Large Exposures (if applicable);
   h) Consolidated supervision (if applicable);
   i) Capital Requirements Directive IV.

11.0 Business Continuity Arrangements.

12.0 Regulatory Background (reference Section 10 of the application form).

13.0 Tied Agent(s) (if applicable).

14.0 Proposed Passporting (if applicable).

15.0 Conflicts of Interest (if applicable).

16.0 Any other relevant Information.

17.0 Application Documentation (in particular Sections 7 and 8 of the Application Form).
Contact Points

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

Andrew Bates  
e-mail: andrew.bates@dilloneustace.ie  
Tel: +353 1 667 0022  
Fax: +353 1 667 0042

Breeda Cunningham  
e-mail: breeda.cunningham@dilloneustace.ie  
Tel: +353 1 667 0022  
Fax: +353 1 667 0042

Brian Kelliher  
e-mail: brian.kelliher@dilloneustace.ie  
Tel: +353 1 667 0022  
Fax: +353 1 667 0042

Donnacha O’Connor  
e-mail: donnacha.oconnor@dilloneustace.ie  
Tel: +353 1 667 0022  
Fax: +353 1 667 0042

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

Copyright Notice:  
© 2012 Dillon Eustace. All rights reserved.