Funds Quarterly Legal and Regulatory Update

Period covered:
1 April 2014 – 30 June 2014

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FUNDS QUARTERLY LEGAL AND REGULATORY UPDATE

UCITS, Non-UCITS & Hedge Funds

(i) UCITS V

Having reached political agreement with the European Commission in February 2014, the European Parliament formally approved the proposed UCITS V Directive ("**UCITS V**") on 15 April 2014**.**

The following are the key elements of UCITS V:

- Remuneration policies for all risk takers involved in managing UCITS funds so that remuneration practises do not encourage excessive risk-taking and instead promote sound and effective risk management and enhanced transparency of remuneration practices. The UCITS V remuneration policy provisions are similar to those in the Alternative Investment Funds Directive ("**AIFMD**");
- Depositary liability has been strengthened and a list of entities that are eligible to act as a UCITS depositary has been set out;
- UCITS assets will be protected in the event of the insolvency of the depositary through clear segregation rules and safeguards provided by Member States' insolvency law; and
- The existing UCITS regime has been strengthened in order to ensure effective and harmonised administrative sanctions, by setting down an exhaustive list of breaches which require sanctions by competent authorities and specifying a minimum list of administrative sanctions and measures which may be applied in the event of such a breach, including prescriptive limits on fines which may be imposed by competent authorities.

Formal adoption of UCITS V is now subject to formal approval by the Council of the EU.

Once approved, Member States will have 18 months to transpose the UCITS V Directive into national law. Following the transposition into national law, depositaries will be given a 24 month transitional period to implement the required changes.

ESMA is due to publish guidelines on the scope of UCITS V, including guidelines regarding identified staff to whom the remuneration rules will apply.

The European Commission has published a set of FAQs on UCITS V, which are available via the following link:

http://europa.eu/rapid/press-release_MEMO-14-298_en.htm?locale=FR.

In addition, Dillon Eustace has prepared an update on UCITS V which is available via the following link:

http://www.dilloneustace.ie/download/1/Publications/Financial%20Services/UCITS%20V%20Directive%20-%20Update.PDF.

(ii) Central Bank publishes UCITS Questions and Answers ("UCITS Q&A") – 2nd edition

On 30 May 2014, the Central Bank of Ireland (the "**Central Bank**") published the second edition of their UCITS Q&A. The 2nd edition UCITS Q&A contains two new questions, ID1009 and ID1010, which relate to **Permitted markets for UCITS**:

ID 1009

Q. Pending the outcome of the Central Bank's consultation on the publication of the UCITS Rulebook (CP 77), will the Central Bank consider the inclusion of additional Regulated Markets in Appendix 1 to Guidance Note 1/96 (Permitted Markets for Retail Collective Investment Schemes)?

A. As set out in Consultation Paper CP 77 the Central Bank intends to withdraw Guidance Note 1/96. Pending the issue of a final UCITS Rulebook we are not undertaking to review any submissions in relation to proposed markets. In the interim, UCITS which wish to refer to a regulated market in a prospectus should carry out the appropriate assessments to ensure compliance with the statutory requirements. Regard should continue to be had to the standards referred to in the Guidance Note. The Central Bank may seek sight of such assessments at any time and UCITS should be in a position to explain their decisions in relation to these matters.

ID 1010

Q. The UCITS Regulations and the AIF Rulebook provide for investment by UCITS and Retail Investor AIF respectively of up to 100% of their net assets in the securities of certain issuers, details on which are set out in the investment fund application forms. Will this list include securities and instruments issued by the government of the People's Republic of China?

A. The Central Bank will not object if UCITS and AIFs provide for investment of up to 100% of their net assets in securities and instruments issued or guaranteed by the government of the People's Republic of China. This position has been reflected in the investment fund application forms.

The first edition of UCITS Q&A was published in February 2014. The document sets out answers to queries deemed likely to arise in relation to UCITS and is intended to assist in limiting uncertainty. The UCITS Q&A will be updated from time to time by the Central Bank.

The 2nd edition UCITS Q&A is available at the following link:

http://www.centralbank.ie/regulation/industry-sectors/funds/ucits/Documents/UCITS%20QA%20NO%202_%20FINAL%2030%20MAY%202014.pdf

(iii) New Central Bank Investment Manager Application Form

There is a new Central Bank Investment Manager Application Form for investment managers or sub-investment managers which **do not** fall within one of the following categories:

- UCITS management companies authorised under Directive 2009/65/EC;
- Investment firms authorised under Directive 2004/39/EC (MiFID) to provide portfolio management;
- Credit institutions authorised under Directive 2006/48/EC having the approval to provide portfolio management under MiFID;
- Externally-appointed AIFMs authorised under the AIFMD.

The new application form is available via the following link:

http://www.centralbank.ie/regulation/industry-sectors/funds/rulebook/Pages/THIRDPARTYAPPROVALANDFUNDAUTHORISATIONPROCESSES.aspx.

European Market Infrastructure Regulation (“EMIR”)

(i) ESMA informs European Commission of its intention to ease certain frontloading requirements under EMIR

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.

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 the letter, ESMA observes that the frontloading procedure creates uncertainties for OTC derivatives end-users because counterparties will not know whether the notified class of derivatives will be subject to the clearing obligation; i.e. an OTC derivative contract entered into after the authorisation of a CCP might become subject to the clearing obligation during Period A. ESMA informed the European Commission that it intends to establish the frontloading requirement in a manner that will minimise uncertainty. At the start of Period B these uncertainties will no longer be present.

ESMA has 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. ESMA has stated that further details on this rule will be outlined later this summer.

ESMA's letter to the European Commission is available at this link:

http://www.esma.europa.eu/content/Letter-European-Commission-Frontloading-requirement-under-EMIR

(ii) Updated EMIR implementation Q&As

On 21 May and 23 June 2014, ESMA published an updated version of its questions and answers ("**Q&A**") document on the implementation of EMIR. The updated version of the Q&A includes a table detailing which questions and answers have been added or updated and also includes a table which indicates the relevant Article in EMIR to which the questions relate.

Areas covered by the updated Q&A (whether as a new question or as a revision to an existing question) include:

- Whether an umbrella fund or its sub-funds should be treated as a counterparty under EMIR;
- Status of counterparties under EMIR as defined by reference to AIFMD;
- Intra-group exemptions;
- Calculation of the clearing threshold;
- Public register;
- Treatment of non-EU non-exempt central banks;
- Segregation and portability and CCP organisational requirements;
- Risk committee requirements for a CCP;
- Prudential requirements of a CCP;
- Reporting of collateral; and
- Reporting of valuations.

The latest set of EMIR implementation Q&As can be found here:

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

(iii) Treatment of FX Forwards under EMIR

As reported in our previous Legal and Regulatory Update, 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; i.e. different transpositions of the MiFID Directive across Member States mean that there is no single, commonly adopted definition of a derivative or a derivative contract in the European Union.

Concerns have been expressed about the lack of consistency between EU Member States with regards to the definition of an FX Forward. Indeed, ESMA published a letter (dated 14 February 2014) which it wrote to the European Commission whereby it asked the European Commission to clarify the exact definition of what constitutes a forward for EMIR purposes, in particular for FX

Forwards with a settlement date up to 7 days and FX Forwards concluded for commercial purposes.

In light of this letter, the European Commission launched a short consultation paper on FX Forwards regarding the delineation between FX Forward contracts and FX spot contracts under MiFID (the "**Consultation Paper**"). Ten questions were raised in the Consultation Paper as follows:

1. *Do you agree that a clarification of the definition of an FX spot contract is necessary?;*
2. *What are the main uses for and users of the FX spot market? How does use affect considerations of whether a contract should be considered a financial instrument?;*
3. *What settlement period should be used to delineate between spot contracts? Is it better to use one single cut-off period or apply different periods for different currencies? If so, what should those settlement periods be and for which currencies?;*
4. *Do you agree that non-deliverable forwards be considered financial instruments regardless of their settlement period?;*
5. *What have been the main developments in the FX market since the implementation of MiFID?;*
6. *What other risks do FX instruments pose and how should this help determine the boundary of a spot contract?;*
7. *Do you think a transition period is necessary for the implementation of harmonised standards?;*
8. *What is the approach to this issue in other jurisdictions outside the EU? Where there are divergent approaches, what problems do these create?;*
9. *Are there additional implications to those set out above of the delineation of a spot FX contract for these and other applicable legislation?; and*
10. *Are there any additional issues in relation to the definition of FX as financial instruments that should be considered?*

The European Commission received 79 responses to the Consultation Paper including responses from the Investment Management Association ("**IMA**"), ESMA's Securities and Markets Stakeholder Group ("**SMSG**") and the Financial Markets Law Committee ("**FMLC**"). The complete list of the responses received can be found at this link:

http://ec.europa.eu/internal_market/consultations/2014/foreign-exchange/contributions_en.htm

It is interesting to note that the Alternative Investment Management Association ("**AIMA**") in its response suggests a definition of FX spot contracts which include any instruments with a settlement period of T+7 or less. This is because the Central Bank have indicated on their website that all FX transactions with settlement beyond the Spot date are to be considered Forward contracts and therefore are subject to the requirements of EMIR. In this regard the Central Bank has stated that for the vast majority of currency pairs the market convention for settling spot transactions is T+2, accordingly the Central Bank have stated that any trade with settlement T+3 should be treated as a Forward transaction ((except in those rare cases where the market convention for the specific currency pair is unequivocally different from T+2).

It is hoped that the responses received by the European Commission will help formulate the European Commission's formal proposal on this area.

(iv) European Commission extends CRR transitional period to 15 December 2014

Under the Capital Requirements Regulation (Regulation 575/2013) ("**CRR**"), exposures to qualifying central counterparties ("**QCCPs**") attract a lower charge than exposures to CCPs that do not have QCCP status. While many third country CCPs obtained QCCP status under a transitional provision in the CRR, that transitional period is due to expire on 15 June 2014. In order to achieve such QCCP status, third country CCPs must register with ESMA in accordance with EMIR. In order to register with ESMA, the European Commission must have adopted a positive equivalence determination in respect of the clearing rules of the CCP's home jurisdiction. As yet, no third country CCPs has registered with ESMA because the European Commission has not adopted a positive determination in respect of any jurisdiction.

On 4 June 2014, the European Commission updated its webpage to announce that on 3 June 2014, it adopted the implementing Regulation (Regulation 591/2014), (the "**Regulation")** on the extension of transitional periods related to own funds requirements for exposures to CCPs. In this way the European Commission extended the deadline relating to QCCP status until 15 December 2014. This extension now permits institutions to consider a CCP as a QCCP for an additional period up to 15 December 2014.

The text of the Regulation was published in the Official Journal of the European Union on 4 June 2014.

Alternative Investment Fund Managers Directive ("AIFMD")

(i) Central Bank Publishes AIFMD Reporting Date Matrix

The Central Bank has published an AIFMD reporting date matrix, which outlines details of the first reporting periods for authorised AIFMs, Non-EU AIFMs and Registered AIFMs and their AIFs. It can be found at:

http://www.centralbank.ie/regulation/industry-sectors/funds/Documents/AIFMD%20Reporting%20Date%20Matrix.pdf.

(ii) Central Bank Publishes its 9th Edition of Q&A on AIFMD

On 2 May 2014, the Central Bank updated its AIFMD Q&A document ("**Q&A**"). The 9th edition Q&A clarifies two points relating to funds originally authorised under the pre-AIFMD Non-UCITS regime which are in the process of transitioning to the AIF Rulebook as QIAIFs.

This 9th edition of the Q&A document contains both an amendment to an existing question and the addition of a new question.

The following question was amended to now read:

ID 1054

Q. I am a Qualifying Investor Fund which will transition to the AIF Rulebook as a QIAIF. I have been approved to invest in a linked AIF under the provisions of Section D of Annex 1 to Guidance Note 1/01. Can I continue with this investment?

A. Notwithstanding that the derogation mentioned in Section D, Annex 1 to Guidance Note 1/01 is no longer available, you can continue to operate in accordance with the derogation previously given. You are not required to apply to the Central Bank for approval to do so.

The following question was added to the Q&A:

ID 1071

Q. *I am an existing QIF/Retail Fund which must comply with the AIF Rulebook on authorisation of the AIFM. As a QIF/Retail Fund I previously sought and was granted certain derogations under the Non-UCITS regime. Will these derogations cease to have validity once the AIF Rulebook is imposed on the QIF/Retail Fund?*

A. Yes. Once an AIF becomes subject to the AIF Rulebook, derogations which have been granted to the AIF under the NU Series of Notices will no longer be valid or relevant, other than in the case outlined in ID 1054.

Any requests for derogations from the AIF Rulebook will be considered on a case-by-case basis, but will only be considered where the proposal includes a detailed and comprehensive rationale supporting the request.

The 9th edition Q&A may be accessed via the following link:

http://www.centralbank.ie/regulation/industry-sectors/funds/aifmd/Documents/FINAL%20CLEAN%20-%209th%20edition%20Q_A.pdf.

(iii) Central Bank Guidance – Delegate Investment Managers and Waiving Redemption Charges

The Central Bank has advised in relation to the interpretation of Paragraph 9 of Chapter 2 of the AIF Rulebook and whether this provision is intended to be observed by the delegate investment manager of an AIFM in addition to being observed by the AIFM or management company itself.

Paragraph 9 of Chapter 2 of the AIF Rulebook provides as follows:

"The Qualifying Investor AIF shall only invest in units of an investment fund managed by its Management Company or AIFM or by an associated or related company of either of these, where the management company of the investment fund in which the investment is being made has waived the preliminary/initial/redemption charge which it would normally charge"

The Central Bank has advised that the purpose of the above provision is to avoid "double charging" and to ensure that transactions are always in the best interests of the unit-holders. It stated that while it is not expressly set out that a delegate must ensure that the preliminary/initial/redemption charge has been waived, AIFMD is very clear that an AIFM (and consequently its delegate investment manager) must act in the best interests of the unit-holder and ensure that the AIFs they manage or the unit-holders in these AIFs are not charged undue costs. The Central Bank also noted that when delegating, the delegation structure must not be altered to allow for the circumvention of the AIFM's responsibilities or liability and that the AIFM's obligations towards its unit-holders must not be altered as a result of such delegation.

(iv) ESMA Issues Technical Advice to the European Commission on the Information that Competent Authorities Should Provide to ESMA Pursuant to Art 67 (3) AIFMD

On 26 March 2014, ESMA published technical advice in response to a mandate received from the European Commission for advice on the possible content of the delegated act required by Article 67(5) AIFMD, concerning the information that EU competent authorities have to provide quarterly to ESMA pursuant to Article 67(3) AIFMD ("**Technical Advice**"). This information is needed in order to allow ESMA to produce the opinion and the advice required in Article 67(1) of the AIFMD, in relation to the possible extension of the AIFMD passport to non-EU AIFs and non-EU AIFMs.

The Technical Advice specifies the timing for the provision of the information to ESMA and lists the information that the competent authorities should provide quarterly to ESMA. The list of information is divided into three parts: the first refers to the information about the functioning of the passport for EU AIFMs; the second deals with the functioning of the national private placement regime for non-EU AIFs and non-EU AIFMs; and the third refers to the issues arising from the functioning of both systems.

The Technical Advice may be viewed via the following link:

http://www.esma.europa.eu/system/files/2014-esma-312_-_l2_advice_to_com_article_675_aifmd.pdf.

(v) Central Bank Publishes Feedback Statement on CP68 Consultation on Types of Alternative Investment Funds under AIFMD and Unit Trust Schemes under the Unit Trusts Act 1990 (including EUTs, REITS etc.)

The Central Bank has published its Feedback Statement on CP68 - Consultation on types of alternative investment funds under AIFMD and unit trust schemes under the Units Trusts Act 1990 (including EUTs, REITS, etc).

In addition to commenting on the responses received as part of CP68, the Central Bank issued certain guidance, which will be reflected in the Central Bank's AIFMD Q&A in due course. The Central Bank advises that while there may be exempt unit trusts ("**EUTs**") which can have only a single investor, other EUTs fall within the scope of the AIFM Regulations. For the single investor EUT to fall outside of AIFMD, the EUT must be constitutionally limited to one investor.

Guidance on the application process issued by the Central Bank is also included in the Feedback Statement. It provides that AIFs which market to retail investors in Ireland, if not authorised by the Central Bank, must be authorised by a supervisory authority and subject to an equivalent level of investor protection to that provided under Irish laws, regulations and conditions governing Retail Investor AIF. In that light:

i. From 1 May 2014, new unit trust schemes made available to beneficiaries in Ireland should seek authorisation from the Central Bank under the Unit Trusts Act 1990, where they are alternative investment funds under AIFMD, notwithstanding that they hold an exemption from tax obtained from the Revenue Commissioners, given on the basis that the investors in such trusts have a tax-exempt status as either pension vehicles or charities.

ii. As an exemption from the generality of i) above, new unit trust schemes should not seek authorisation if the eligible investors are confined to charities and/or regulated occupational pension schemes where the occupational pension scheme has multiple beneficiaries and is not a Small Self-Administered Scheme ("**SSAS**"). A unit trust scheme which has a tax exemption from the Revenue Commissioners, while allowing PRSAs, ARFs/AMRFs, PRBs and/or RAC schemes to invest, does not meet the requirements for this exemption and should seek authorisation in accordance with i) above. A unit trust scheme which is exempt from the requirement to seek an authorisation because it meets the grounds for this exemption may, nevertheless, meet the conditions for being an AIF as defined in the AIFMD. In that eventuality, the manager (alternative investment fund manager under AIFMD) must register under the EU (AIFM) Regulations 2013 or, if the AIFM exceeds the relevant AIFMD thresholds, seek authorisation.

iii. As an exemption from the generality of i), a unit trust scheme which is constitutionally confined to one ultimate beneficiary should not seek authorisation. However, where there are multiple sub-trusts, the constitutional documents for the master trust and the sub-trusts must be organised so that each sub-trust can have only one beneficiary and there is no sharing of benefits between sub-trusts. A beneficiary which is a vehicle for investment by multiple ultimate beneficiaries does not count as a single beneficiary for the purpose of calculating whether this exemption applies. Also, where an EUT could have more than one investor, but turns out only to have one, the conditions for availing of this exemption are not met as there must be a constitutional prohibition on more than one beneficiary for this exemption to be met.

iv. Unit trust schemes which are already in existence and which, had they come into existence after 1 May 2014, would have required authorisation under i) above, must apply for authorisation by 1 October 2014, unless they have, in the interim, restructured to avail of one of the exemptions listed at ii) and iii) above.

v. As an exemption to iv), unit trust schemes which are closed-ended schemes and the AIFM of which can avail of the grandfathering arrangement set out in Regulation 60(3) of the EU (AIFM) Regulations 2013 are recommended not to seek authorisation. For the purposes of Regulation 60(3) 'closed-ended schemes' can be read to include EUTs which have an appropriate formal plan in place in relation to their termination.

<u>REITS and SPVs</u>

CP 68 also covered other types of undertakings such as Real Estate Investment Trusts ("**REITs**") and Special Purpose Vehicles ("**SPVs**") as categories of undertakings which have been mentioned as possible AIFs. The Feedback Statement includes the Central Bank's guidance in relation to SPVs which has already been issued in the AIFMD Q&A, namely -

Q. I am an SPV. Should I now seek authorisation as, or appoint, an AIFM?

A. As a transitional arrangement, entities which are either:

a) Registered Financial Vehicle Corporations within the meaning of Article 1(2) of the FVC Regulation (Regulation (EC) no 24/2009 of the European Central Bank), or

b) Financial vehicles engaged solely in activities where economic participation is by way of debt or other corresponding instruments which do not provide ownership rights in the financial vehicle as are provided by the sale of units or shares

are advised that they do not need to seek authorisation as, or appoint, an AIFM, unless the Central Bank of Ireland issues a Q&A replacing this one advising them to do so. The Central Bank of Ireland does not intend to do that at least for so long as ESMA continues its current work on this matter. If entities which believe they fall under (b) but not (a) wish to write to the Central Bank of Ireland in this regard, they may email AIFMDsecuritisation@centralbank.ie.

With regard to REITs, the Feedback Statement provides that two of these have listed on the Irish Stock Exchange to-date, while others may be proposed, and that those that have been established have indicated that they are likely to be AIFs. The Central Bank provides that they have not encountered a REIT structure in Ireland which they do not believe to be an AIF and therefore consider that the onus remains on any REIT to demonstrate otherwise. The Central Bank also advises that this position can be reviewed in the light of future ESMA work.

The Feedback Statement may be accessed via the following link:

http://www.centralbank.ie/regulation/poldocs/consultation-papers/Documents/CP68/Feedback%20Statement%20on%20CP%2068-%20FINAL%2028%20MAR%2014.pdf

(vi) ESMA Publishes a Table Showing Compliance with its Guidelines relating to Global Supervisory Co-operation on AIFs

On 20 June 2014, ESMA published a table showing which competent authorities comply or intend to comply with its guidelines on the model MoU concerning consultation, cooperation and the exchange of information related to the supervision of AIFMD entities.

The table indicates that all member states have complied or intend to comply with its guidelines, with the exception of Slovenia. The guidelines are not applicable to Slovenia because, as a consequence of the late transposition of the AIFMD, no competent authority has yet been designated for Slovenia under Article 44 of the AIFMD.

The table published by ESMA may be accessed via the following link:

http://www.esma.europa.eu/system/files/2014-esma-264_compliance_table_-_guidelines_esma_2013-998_aifmd_mou_200614.pdf

(vii) ESMA Issues Updated Q&A on the Application of AIFMD

On 27 June 2014, ESMA updated its Q&A paper on the application of the Alternative Investment Fund Managers Directive ("**AIFMD**").

A key new addition is a question on whether AIFMs can exclude portfolio managers from the scope of "identified staff" for the purpose of the Remuneration Guidelines because they are bound by investment limits set out by law and/or internal risk limits set out in the investment restrictions of the AIF. While portfolio delegates may not be excluded purely on this basis, ESMA provides certain questions to assess whether a portfolio manager can exert material influence on the AIFM/AIF's risk profile. Depending on these indicators, a portfolio delegate may fall outside the scope of "identified staff".

The Q&A also clarifies that competent authorities can accept passport notifications for the range of MiFID activities that can be provided by an AIFM under Article 6(4) of AIFMD. This had been a point of discussion for some time and follows the modification under Article 92 of Directive 2014/65/EU (MiFID II) to allow for the passporting of certain MiFID services by AIFMs.

In particular, the updated Q&As are as follows:

- Question 5 within Section I regarding "Remuneration";
- Questions 19, 20 and 21 in Section III, which deals with "Reporting to national competent authorities under Articles 3, 24, and 42";
- Questions 1 and 2 included in Section IV referred to "Notification of AIFMs"; and
- Question 1 within Section V ("MiFID services under Article 6(4) of the AIFMD").

The aim of the Q&A is to promote common supervisory approaches and practices in the application of the AIFMD and its implementing measures. The answers are also intended to help AIFMs by providing clarity on the content of the AIFMD rules.

The Q&A paper is available at the following link:

http://www.esma.europa.eu/system/files/esma_2014-714_-_qa_on_aifmd_june_update_for_publication.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**").

On 12 June 2014, the text of MiFID II was published in the Official Journal of the European Union. This means that MiFID II entered into force on the 2 July 2014. MiFID II was previously approved by European Parliament and the Council of the EU on the 23 April and 13 May 2014 respectively.

The MiFID II Directive will require national implementation within a 30 month timeframe after its entry into force; (i.e. January 2017). The MiFID Regulation will not require national implementation and will apply from 2 January 2017. The MiFID II Regulation will be directly applicable in all Member States and it is hoped that this will minimise the scope for divergences in the interpretation of its requirements.

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

The European Securities Markets Authority ("**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. This is the first step with regards to the preparation of the Level 2 Measures and represents an important part of the process of translating the MiFID II requirements into practically applicable rules and regulations.

The Consultation Paper covers 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. As ESMA is required to deliver its technical advice to the European Commission by December 2014, it is therefore subjected to a condensed consultation process. 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.

In advance of this deadline, ESMA will host three public hearings in relation to secondary markets, investor protection and commodity derivatives which are scheduled for 7 and 8 July 2014. The deadline for responses to the Consultation Paper and the Discussion Paper is 1 August 2014.

(iii) Request for technical advice from the European Banking Authority ("**EBA**")

The European Commission has published a letter which it sent to the EBA requesting technical advice on possible delegated acts concerning product intervention by competent authorities. Under MiFID II, the European Commission is empowered to adopt delegated acts specifying criteria and factors to be taken into account by ESMA, EBA and competent authorities in determining when there is a significant investor protection concern and threat to the orderly functioning and integrity of the financial system of the European Union.

The European Commission has already asked ESMA to provide advice on measures specifying the criteria and factors to be taken into account by competent authorities in determining when there is a significant investor protection concern or a threat to the orderly functioning and integrity of the financial system of the European Union. As the MiFID II Regulation establishes an identical framework for EBA intervention powers in respect of structured deposits, the factors and criteria to be taken into account for the exercise of such powers for structured deposits should be similar (if not identical) to those set for ESMA with respect to financial instruments.

The EBA has been requested to provide its technical advice within six months of MiFID II coming into force; i.e. the EBA has until January 2015 to provide its technical advice.

A copy of this letter can be found at the link below;

http://ec.europa.eu/internal_market/securities/docs/isd/mifid/140516-request-for-eba-technical-advice-concerning-mifid-2_en.pdf

European Long Term Investment Funds

(i) Council of EU Publishes Compromise Proposal on ELTIF Regulation

The Proposal for a Regulation on European Long Term Investment Funds ("**ELTIFs**") is currently under negotiation by the European Institutions. The European Parliament adopted amendments to the proposed ELTIF Regulation on 17 April 2014, while the Council of the EU published a compromise proposal on the proposed ELTIF Regulation, along with various amendments to same in April, May and June 2014.

Once the proposed ELTIF Regulation has been finalised and formally adopted, it will be directly applicable in each Member State. Under the European Commission's proposals, ELTIFs will operate within the AIFMD regime as a new category of authorised closed-ended fund and are intended for investment in long-term assets.

The European Commission has defined long-term investment as investment that enhances the productive capacity of the economy. This can include energy, transport and communication infrastructures, industrial and service facilities, climate change and eco-innovation technologies, as well as education and research and development.

In order to qualify as an ELTIF, funds would have to meet certain requirements, some of which are proposed to be:

- A requirement that managers of ELTIFs be authorised as AIFMs;
- No mandatory minimum investment of €100,000, opening ELTIFs to retail investors;
- A requirement that at least 70% of the ELTIF's portfolio must be composed of investments in long-term assets and not more than 30% in assets eligible for investment by a UCITS;
- ELTIFs must be closed-ended with a fixed term, and the length of the fixed term is to be determined by the nature of the assets the ELTIF targets to acquire and hold.

(ii) Council of EU Publishes a Note Setting Out its General Approach on ELTIF Regulation

On 20 June 2014, the Council of the EU published a note from the General Secretariat to the Permanent Representatives Committee ("**COREPER**") setting out its general approach on the proposed Regulation on ELTIF.

The note reports on the state of play on the ELTIF Regulation. It has been examined by the Council's working party on financial services who through their deliberations have prepared the latest compromise proposal for a general approach, which is set out in the Annex to the note.

The Presidency recommends that COREPER:

- Agrees the general approach on the ELTIF Regulation (as clarified in the Annex);

- Invites the incoming Italian Presidency to start negotiations with the European Parliament on the basis of the general approach with a view to reaching an agreement at first reading.

A copy of the note is available below:

http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011105%202014%20INIT

European Venture Capital Funds Regulation and European Social Entrepreneurship Funds Regulation

On 4 June 2014, the following was published in the Official Journal of the EU ("**OJ**"):

- The text of the Regulation laying down implementing technical standards ("**ITS**") to determine the format of notification under Article 16 of the European Venture Capital Funds Regulation ("**EuVECA Regulation**");
- The text of the Regulation laying down ITS to determine the format of notification under Article 17 of the European Social Entrepreneurship Funds Regulation ("**EuSEF Regulation**").

Both Regulations entered into force on 7 June 2014.

ESMA had published the draft ITS in February 2014.

The texts of the EuVECA and the EuSEF Regulations may be accessed at the following links, respectively:

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.165.01.0041.01.ENG

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.165.01.0044.01.ENG

Proposal for a Regulation on Money Market Funds

On 4 June 2014, the European Central Bank ("**ECB**") published an opinion (dated 21 May 2014) on the European Commission's proposed Regulation on Money Market Funds ("**MMFs Regulation**"). This opinion was published further to a request from the Council of the EU in November 2013.

The ECB's opinion deals with the following matters:

- The similarity between the proposed Regulation and the legal frameworks for UCITS and AIFMs;
- Financial stability;
- The constant net asset value of MMFs;
- The provision of external support;
- Risk management of MMFs;
- The role of MMFs intermediation;
- Internal rating systems; and
- Reporting requirements for MMFs.

In March 2014, the European Parliament's Economic and Monetary Affairs committee ("**ECON**") had abandoned a vote on the European Commission's proposal for a Regulation on MMFs.

The most controversial aspect of the proposed Regulation is the requirement for all short term money market funds with a constant net asset value ("**CNAV**") to provide for a 3% capital buffer. This requirement amounts to a divergence from the US MMF regime, where the US SEC has focused on liquidity and transparency in order to protect investors and the market.

It is interesting to note that, while the ECB's opinion notes that the NAV buffer required by the MMFs Regulation is intended to improve the resilience of CNAV MMFs and their ability to repay investors requesting withdrawals at short notice, it also recognises that there are some aspects of the buffer that may warrant further assessment.

(a) With regard to the calculation of the buffer, the MMFs Regulation states that the buffer for CNAV MMFs would have to amount to at least 3% of the total value of assets, i.e. it is a non-risk-based buffer. The fact that this rule does not take into account the MMF's risk profile while facilitating its application may have undesired consequences on the investment policies of CNAV MMFs. Market pressure to rapidly build up or replenish the buffer may incentivise low-risk profile CNAV MMFs to step up their profitability objectives.

(b) With regard to the period granted to replenish the NAV buffer to its required minimum level, it should ideally be contingent on the extent of the NAV buffer's depletion as well as on the general market conditions hampering the replenishment. In the light of the short period of time provided in the MMFs Regulation, the ECB would suggest considering more flexible means for maintaining the NAV buffer, including an extension of the replenishment period.

The opinion released by the European Central Bank may be viewed at the following link:

https://www.ecb.europa.eu/ecb/legal/pdf/en_con_2014_36_f_sign_2.pdf

Credit Rating Agencies Regulation

(i) FSB Published Thematic Review of its Principles for Reducing Reliance on CRA Ratings

On 12 May 2014, the Financial Stability Board ("**FSB**") published its results from the thematic review of the FSB Principles for Reducing Reliance on CRA Ratings.

This final report focuses on the action plans developed by national authorities to implement the Roadmap which was agreed in October 2012. The first stage of the review, published in August 2013, comprised a structured stock-taking of references to CRA ratings in national laws and regulations. The final report found that, although good progress has been made toward removing references to CRA ratings from laws and regulations, mechanistic reliance can also come from market practices and contracts.

The FSB want authorities to encourage market participants to review provisions within their private contracts which represent mechanistic reliance on CRA ratings (e.g. ratings triggers).

The Review published by the FSB is available at the link set out below:

http://www.financialstabilityboard.org/publications/r_140512.pdf

(ii) ESMA Published Updated Q&A on CRA Regulation

On 2 June 2014, ESMA published its second updated questions and answers ("**Q&A**") on the Credit Rating Agencies Regulation ("**CRA Regulation**"). The update affects the following Q&As:

- Question 2, relating timing of publication of sovereign ratings;
- Question 3, referred to deviations from the sovereign ratings calendar; and
- Question 4, regarding investments in credit rating agencies.

The purpose of this document is to provide clarity on the requirements and practice in the application of the CRA Regulation.

All the Q&As may be viewed at the following link:

http://www.esma.europa.eu/system/files/2014-578_qas_on_cra3.pdf

(iii) ESMA Publishes Final Report on Draft Regulatory Technical Standards Under CRA III

On 24 June 2014, ESMA published its Final Report on draft Regulatory Technical Standards ("**RTS**") required under the CRA Regulation, which covers the following areas:

- Disclosure requirements on structured finance instruments;
- The European Rating Platform; and
- The periodic reporting on fees charged by credit rating agencies ("**CRAs**").

The draft RTS focuses on the information that the issuer, originator and sponsor of a structured finance instrument must publish. The draft RTS incorporates, where possible, existing disclosure and reporting requirements adopted by the European Central Bank and Bank of England to avoid duplication and overlap. The disclosure obligations also provide for standardised investor reporting and disclosure of transaction documents.

The draft RTS on the new European Rating Platform defines the content and presentation of rating information, including structure, format, method and timing of reporting that credit rating agencies should submit to ESMA for credit ratings that are not exclusively produced for and disclosed to investors for a fee. The European Rating Platform website will be set up and run by ESMA.

The draft RTS on fees charged by CRAs to their clients defines the content and the format of periodic reporting on such fees for the purpose of on-going supervision by ESMA. The information collected under this RTS will allow ESMA to undertake effective oversight of fees charged by CRAs. This will enable ESMA to verify whether pricing practices are discriminatory and ensure compliance with the principle of fair competition and further mitigate conflicts of interest.

A copy of the Final Report is available here:

http://www.esma.europa.eu/system/files/2014-685_draft_rts_under_cra3_regulation.pdf

Packaged Retail Investment Products

On 15 April 2014, the European Parliament approved the proposed Regulation on key information documents for packaged retail investment products ("**PRIPs**"). The Regulation on key information documents for PRIPs (the "**KID Regulation**") forms part of a PRIPs legislative package which it is hoped will help rebuild investor confidence in retail investment products.

The KID Regulation will require all investment funds, structured products and some insurance products to put a key information document ("**KID**") in place. The KID will have to indicate what the product invests in, the risks and potential rewards of investing in a PRIP and the costs that the consumer will have to pay. It can be no longer than 3 pages in length and must be written in easily comprehensible language. The KID will be required to be provided to retail investors only, prior to purchasing a PRIP from a bank, an insurance company or an investment fund.

The legislative package consists of the following:

- The proposed extension of MiFID rules;
- The proposed revision of the Insurance Mediation Directive;
- The proposed amendment to the UCITS Directive; and
- This proposed introduction of a regulation on KIDs for PRIPs.

For the investment funds industry this will be relevant particularly for non-UCITS funds which are sold to retail investors. The KID Regulation, when implemented, will require non-UCITS retail funds to produce a short form KID in a standardised format, summarising the main terms of the product and to provide the KID document to prospective investors generally before a contract is concluded.

UCITS funds are exempt from the new KID requirements for a transitional period of five years. The ultimate aim is however for the documents for all investments products to be as comparable as possible. Consequently, it is likely that refinements will be made to the UCITS key investor document in due course.

The KID Regulation will be formally adopted by the Council of the EU before its publication in the Official Journal of the EU. The European Commission has advised that the KID requirement could be in place for PRIPs by as early as the end of 2015.

The European Commission has published FAQs on the KID Regulation, which may be viewed via the following link:

http://europa.eu/rapid/press-release_MEMO-14-299_en.htm.

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

(i) European Commission Adopts Regulation on Securities Settlement and Central Securities Depositories

On 15 April 2014, the European Parliament adopted in plenary session a Regulation on Securities Settlement and Central Securities Depositories (the "**CSD Regulation**").

The CSD Regulation aims to harmonise both the timing and conduct of securities settlement in Europe and the rules governing Central Securities Depositories ("**CSDs**") which operate the infrastructures enabling settlement. With regard to settlement, the CSD Regulation harmonises timing and discipline of securities settlement in the EU. It creates, for the first time at European level, a common authorisation, supervision and regulatory framework for CSDs. Among other matters it provides for:

- Shorter settlement periods;
- Deterrent settlement discipline measures (mandatory cash penalties and 'buy-ins' for settlement fails);
- Strict prudential and conduct of business rules for CSDs;
- Strict access rights to CSD services; and
- Increased prudential and supervisory requirements for CSDs and other institutions providing banking services ancillary to securities settlement.

The CSD Regulation must now be formally approved by the Council of the EU. The publication of the new rules in the Official Journal of the European Union is expected to take place in the third quarter of 2014.

(ii) European Commission Publishes FAQs on Regulation on Securities Settlement and on Central Securities Depositories

On 16 April 2014, the European Commission published a press release including the Frequently Asked Questions ("**FAQs**") related to the Regulation on Securities Settlement and on Central Securities Depositories.

A copy of the European Commission's press release with the FAQs is available at the following link:

http://europa.eu/rapid/press-release_MEMO-14-312_en.htm

Prospectus Directive

(i) Delegated Regulation on Supplementary Prospectuses published in Official Journal

On 15 April 2014, a Delegated Regulation setting out regulatory technical standards (“**RTS**”) for the publication of supplementary prospectuses (the “**Delegated Regulation**”) was published in the Official Journal of the EU. The Delegated Regulation supplements the Prospectus Directive, which applies to closed-ended funds only. The Delegated Regulation is substantially the same as the draft instrument published by the Commission in March 2013 (and covered in our previous Legal and Regulatory Update).

Currently the Prospectus Directive requires publication of a supplement to the prospectus mentioning every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public, or as the case may be, the time when trading on a regulated market begins, whichever occurs later. The primary goal of these provisions is the protection of investors.

The Preamble of the Delegated Regulation states that is not possible to identify all the situations in which a supplement to the prospectus is required as this may depend on the issuer and securities involved. It is therefore appropriate to specify the minimum situations where a supplement is required. To this end, Article 2 of the Regulation sets out circumstances when a supplement is mandatory, i.e.:

- Where new annual audited financial statements are published (by any of the issuers specifically identified by the Delegated Regulation);
- Where an amendment to a profit forecast or a profit estimate already included in the prospectus is published (by any of the issuers specifically identified by the Delegated Regulation);
- Where there is a change in control in respect of any of the issuers specifically identified by the Delegated Regulation;
- Where in relation to shares and other transferable securities equivalent to shares and convertible or exchangeable debt securities, there is a change in the working capital statement included in a prospectus when the working capital becomes sufficient or insufficient for the issuer's present requirements;
- Where there is any new public takeover bid by third parties as defined in the Takeover Bids Directive (Directive 2004/25/EC);

- Where an issuer is seeking admission to trading on (an) additional regulated market(s) in (an) additional Member State(s) or is intending to make an offer to the public in (an) additional Member State(s) other than the one(s) provided for in the prospectus;
- Where a new significant financial commitment is undertaken which is likely to give rise to a significant gross change within the meaning of the Prospectus Regulation (Regulation (EC) No 809/2004) and the prospectus relates to shares and other transferable securities within the meaning of the Prospectus Regulation and other equity securities complying with certain conditions as set out in the Prospectus Regulation; and
- Where the aggregate nominal amount of the offering programme is increased.

The Delegated Regulation became effective on the 5 May 2014.

A copy of the Delegated Regulation on Supplements may be accessed through the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0382&from=EN

(ii) Central Bank Publishes Updated Prospectus Handbook

In May 2014, the Central Bank published a Prospectus Handbook – "A Guide to Prospectus Approval in Ireland" – which has been updated to refer to the new RTS on Supplements contained in the Delegated Regulation as detailed in **(i)** above.

The Prospectus Handbook contains the following:

- Section 1 offers an overview of the requirements referred to in the content of a prospectus;
- Section 2 concerns details of the procedures to be followed by a relevant person, or their agent, in respect of the drawing up, approval and publication of a prospectus when an offer is made and/or securities are admitted to trading;
- Section 3 provides guidance in relation to certain additional aspects of the prospectus such as its review, approval and publication.

In addition, the Prospectus Handbook includes the following annexes:

- Annex 1: Prospectus Rules;
- Annex 2: Prospectus Fees;
- Annex 3: Submission Timelines; and
- Annex 4: Template emails, Letters, and Forms.

Annex 5 (Checklist) has been removed so that a more user-friendly version might be provided, although it remains available (as a reference) in the 2013 Prospectus Handbook. Annex 6 (ESMA

Common Positions) has also been removed in its entirely because it is no longer current. The ESMA Q&A on Prospectuses (which replaced the ESMA Common Positions document) is not reproduced in this Prospectus Handbook because it is subject to frequent updates.

The Prospectus Handbook is available via the following link:

http://www.centralbank.ie/regulation/securities-markets/prospectus/Documents/Prospectus%20Handbook%202014%20PDF.pdf.

(iii) Central Bank Publishes and Subsequently Updates FAQs on Prospectus Regulation in Ireland

On May 2 2014, the Central Bank published its Frequently Asked Questions ("**FAQs**") on the Prospectus Directive. Shortly afterwards, the FAQs were updated in order to include some new questions and to reflect changes in some answers.

The FAQs cover:

- Introductory questions;
- Publication of Prospectuses;
- Employee Share Scheme Prospectuses;
- Formal Notice;
- Document Equivalent to a Prospectus;
- Exemption from Publishing a Prospectus;
- Administrative Sanctions;
- Central Bank Guidance; and
- Contacts.

A copy of the last edition of the FAQs on the Prospectus Directive is available below:

http://www.centralbank.ie/regulation/marketsupdate/Documents/FAQ%2023%20May%202014.pdf

Transparency Directive

On 30 May 2014, the European Fund and Asset Management Association ("**EFAMA**") issued its comments in response to questions raised in ESMA's Consultation for Draft Regulatory Technical Standards on major shareholdings and indicative list of financial instruments subject to notification requirements under the revised Transparency Directive.

Aside from providing specific comments on the questions of the ESMA's Consultation, EFAMA also highlights two aspects that should be taken into account in the implementation of the revised Directive as follows:

- Firstly, the application of the Directive must be harmonised throughout all Member States. EFAMA supports the use of Regulatory Technical Standards as an appropriate mechanism to ensure that all Member States implement similar obligations.
- Secondly, proportionate standards are necessary in order to deliver the desired level of transparency and avoid the imposition of undue burden on market participants.

The specific remarks provided by EFAMA, in relation to the questions raised by ESMA, may be accessed through the following link:

http://www.efama.org/Publications/Public/Corporate_Governance/EFAMA_ESMA_Consultation_TD.pdf

Market Abuse

(i) Council of EU Adopts the Market Abuse Regulation and the Directive on Criminal Sanctions for Insider Dealing and Market Manipulation

On 14 April 2014, the Council of the European Union announced that it has adopted the Market Abuse Regulation ("**MAR**") and Directive on Criminal Sanctions for Insider Dealing and Market Manipulation ("**CSMAD**") (together "**MAD II**").

The European Commission has issued a press release welcoming the Council of the European Union's adoption of the MAD II legislative package and setting out the consequences of the adoption of MAD II.

The adoption of the MAR means that:

- Existing market abuse rules will be broadened to include abuse on the electronic trading platforms that have proliferated in recent years;
- Abusive strategies enacted through high frequency trading will be clearly prohibited;
- Those who manipulate benchmarks such as LIBOR will be guilty of market abuse and face tough fines;
- Market abuse occurring across both commodity and related derivative markets will be prohibited, and cooperation between financial and commodity regulators will be reinforced;

- The deterrent effect of the legislation will be far greater than today, with the possibility of fines of at least up to three times the profit made from market abuse, or at least 15% of turnover for companies. Member-States could decide to go beyond this minimum.

The effects of the adoption of the CSMAD are as follows:

- There will be common EU definitions for market abuse offences such as insider dealing, unlawful disclosure of information and market manipulation;
- There will be a common set of criminal sanctions including fines and imprisonment of at least four years for insider dealing/market manipulation and two years for unlawful disclosure of inside information;
- Legal persons (companies) will be held liable for market abuses;
- Member States need to establish jurisdiction for these offences if they occur in their country or the offender is a national;
- Member States need to ensure that judicial and law enforcement authorities dealing with these highly complex cases are well trained.

On 12 June 2014, both MAR and CSMAD were published in the Official Journal of the EU.

Member States are required to have transposed the provisions of the Directive by 3 July 2016, while the Regulation will apply for the most part from 3 July 2016 with the remaining provisions relating to MiFID II provisions to apply from 3 January 2017.

The press release issued by the Council of EU may be accessed via the following link:

http://europa.eu/rapid/press-release_IP-14-424_en.htm

The press release published by European Commission is available here:

http://europa.eu/rapid/press-release_IP-14-424_en.htm?locale=en

(ii) ESMA Published a Request for Technical Advice from the European Commission on Implementing Acts relating to MAR

On 2 June 2014, ESMA published a request for technical advice from the European Commission on implementing acts relating to the Market Abuse Regulation ("**MAR**").

Article 32 of MAR addresses the reporting of infringements of MAR. Under Article 32(5) of MAR, the Commission is empowered to adopt implementing acts relating to this.

The Commission invited ESMA to provide technical advice on the specification of procedures to enable reporting of actual or potential infringements of MAR to competent authorities. This includes:

- The arrangements for reporting and for following up reports;
- Measures for the protection of persons working under a contract of employment; and
- Measures for the protection of personal data.

The request also provides guidance on what information the technical advice should take into account.

ESMA is requested to deliver the advice within eight months of MAR entering into force.

A copy of the request for technical advice is available at the link below:

http://ec.europa.eu/internal_market/securities/docs/abuse/140528-esma-mandate_en.pdf

Directive on the Disclosure of Non-financial and Diversity Information by Large Companies and Groups

On April 15 2014, the European Parliament adopted a Directive on disclosure of non-financial and diversity information by large companies and groups which will require such companies to disclose information in their management report on policies, risks and results on matters such as respect for human rights, environmental matters, diversity, social and employee related issues, anti-corruption and bribery issues and diversity on boards of directors. The Directive amends Directive 2013/34/EU, which addresses the disclosure of non-financial information but which in that respect has proved to be unclear and ineffective and applied in different ways in different Member States.

The objective of the new proposed Directive is to increase companies' transparency on environmental and social matters and therefore, to contribute to long term economic growth and employment. The European Commission believes that transparent companies perform better over time, have lower financing costs, have better employee retention levels and are more successful in the long run.

The Directive will apply to large public-interest entities with more than 500 employees. Public interest entities include listed companies and some unlisted companies, such as banks, insurance companies and other companies that are designated as such by Member States because of their activities, size or number of employees.

The Directive gives companies significant flexibility to disclose relevant information in the way that they consider most useful, or in a separate report. Companies may use international, European or national guidelines which they consider appropriate.

The Directive provides for further work by the European Commission to develop guidelines in order to facilitate the disclosure of non-financial information by companies, taking into account current best practice, international developments and related EU initiatives.

As regards diversity on company boards, large listed companies will be required to provide information on their diversity policy, such as, age, gender, educational and professional background. Disclosures will have to set out the objectives of the policy, how it has been implemented, and the results. Companies which do not have a diversity policy will have to explain why not. This approach is in line with the general EU corporate governance framework and is described by the European Commission as complementing its recent initiative on improving gender balance among non-executive directors of listed companies, referred to in our April 2014 edition of Legal and Regulatory Update.

In order to become law, the Commission's proposal needs to be adopted jointly by the European Parliament and by the EU Member States in the Council. The Council of EU is expected to formally adopt the proposal in the coming weeks.

Shareholder's Rights Directive

On 9 April 2014, the European Commission published a proposal to amend the Shareholders' Rights Directive (Directive 2007/36/EC), (the "**Directive**"). The proposals aim to tackle corporate governance shortcomings related to listed companies and their boards, shareholders (institutional and asset managers), intermediaries and proxy advisors (i.e. firms providing services to shareholders, notably voting advice). The overall aim of the Directive is to enhance the long term sustainability of EU companies. The measures proposed in the Directive can be summarised as follows:

- Proposals to increase transparency on executive pay;
- Proposals to increase transparency on transactions between a company and its management, directors, controlling shareholders or companies of the same group;
- Proposals which would enable listed companies to identify their investors; e.g. intermediaries holding shares on behalf of investors would be required to disclose the contact details of investors to companies if requested; and
- Proposals to impose rules on proxy advisors such that they must adopt and implement adequate measures to guarantee that their voting recommendations are accurate and

reliable and are not affected by any existing or potential conflict of interest or business relationship.

The Department of Jobs, Enterprise and Innovation sought the views of interested parties on the measures proposed in the Directive and in this regard the closing date for submissions was 13 June 2014.

The Directive is due to be submitted to the European Council and the European Parliament for their consideration and adoption. Once adopted, Member States would be obliged to transpose the Directive into national law.

Statutory Audit Directive and Regulation

On 27 May 2014, the Directive of the European Parliament and of the Council (dated 16 April 2014) amending the Directive on statutory audits of annual accounts and consolidated accounts and the Regulation of the European Parliament and the Council (dated 16 April 2014) on specific requirements concerning statutory audit of public-interest entities were published in the Official Journal.

The revised Directive includes measures to strengthen the independence of statutory auditors, to make the audit report more informative and to strengthen audit supervision throughout the European Union. The Regulation introduces stricter requirements on the statutory audits of public-interest entities, such as listed companies, credit institutions, and insurance undertakings, to reduce risks of excessive familiarity between statutory auditors and their clients and to limit conflicts of interest.

The Directive and the Regulation will apply to 'public-interest entities', which will include listed entities (including listed AIFs, listed AIFMs and listed UCITS), undertakings the business of which is to take deposits or other repayable funds from the public and to grant credit for its own account and entities designated by individual Member States as public-interest entities.

The key provisions of the package include:

- A prohibition on audit firms providing certain non-audit services (such as tax services, valuation services, services relating to the internal audit function and services promoting, dealing in, or underwriting shares) to their audit clients;
- Where an audit firm has provided permitted non-audit services to an audit client for three years or more, a limit on the total fees to no more than 70 per cent of the average of the fees paid by the audit client in the previous three years;
- A prohibition on restrictive 'Big Four only' auditor clauses in certain circumstances; and

- Increased responsibilities for the Audit Committee.

Both the Directive and the Regulation shall be applicable as of 17 June 2016. While the Regulation shall be directly effective, the Directive will need to be transposed into national law in each Member State. Given the new regime will not be applicable until mid-2016 it is expected that Member States have sufficient time to put in place the necessary provisions to comply with the Directive.

The texts of the same are available below, respectively:

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0056

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R0537

The press release published by the European Commission on the 16 June 2014, announcing the entering into force of these new rules is available below:

http://europa.eu/rapid/midday-express-16-06-2014.htm?locale=en

Financial Services Ombudsman ("FSO")

On 4 April 2014, a Council Regulation was published by the Financial Services Ombudsman ("**FSO**") which amends and clarifies the definition of a consumer to include a natural person when acting in the course of or in connection with the carrying on of a business and (ii) sole traders. Only consumers are entitled to complain to the FSO.

Reform of the Client Asset Regime

In April 2014, the Central Bank addressed the Association of Compliance Officers in Ireland ("**ACOI**") on the proposed changes to the Client Asset Regime. The speech covered:

- The background to the consultation on Client Assets – CP71;
- The extension of the scope of the Client Asset Regime to include Fund Service Providers;
- The seven key principles underpinning the Client Asset Regime;
- Industry's response to the proposed Client Asset Regime; and
- Next steps.

In particular, it was clarified that:

- References to Collection Accounts mean the bank accounts that are used to receive subscription monies and remit redemption proceeds;
- Once money is invested in a fund it no longer constitutes client money subject to the Client Asset Regime. In this instance the assets belong exclusively to the fund and are entrusted to the trustee for safe-keeping.

The Central Bank has held a number of workshops with representatives from the Funds industry to work through the practical challenges posed by the new Client Asset Regime and to assist in understanding the refinements that need to be made to the Client Asset Regulations and Central Bank's Guidance

It is expected that the Client Asset Regulations and the Central Bank's Guidance relating to same will be finalised later this year.

The Central Bank's speech may be viewed via the following link:

http://www.centralbank.ie/regulation/marketsupdate/Documents/ACOI%20Address%2020140401.pdf.

Central Bank

(i) Central Bank Publishes Annual Report 2013 and Annual Performance Statement Financial Regulation 2013-2014

On 30 April 2014, the Central Bank published its Annual Report 2013 and Annual Performance Statement Financial Regulation 2013-2014.

The Annual Report documents the activities and presents the annual accounts of the Central Bank for the year ended 31 December 2013. It provides that in 2013 the Central Bank's profit was €1.5 billion, of which €1.2 billion would be paid over to the Exchequer. According to the Governor Patrick Honohan, the main focus of the Central Bank for 2013 remained restoring financial stability and supporting domestic economic recovery.

The 2013 key activities and developments are set out as follows:

- Stability of the financial system;
- Proper and effective regulation of financial institutions and markets;
- Resolution of financial difficulties in credit institutions;
- Protection of consumers of financial services;

- Independent economic advice and high quality financial statistics;
- Efficient and effective payment system and currency services;
- Operational efficiency and cost effectiveness;
- Ireland's financial sector commitments under the External EU-IMF Programme of Financial Support;
- Energy, safety and environmental developments;
- Statements and published papers by the Bank in 2013; and
- Governance.

The Annual Performance Statement Financial Regulation documents financial regulatory activities undertaken during 2013 and planned for 2014.

Both the reports are available via the links below:

http://www.centralbank.ie/publications/Documents/Central%20Bank%20of%20Ireland%20Annual%20Report%202013.pdf

http://www.centralbank.ie/publications/Documents/Central%20Bank%20of%20Ireland%20Annual%20Performance%20Statemement%202013-2014.pdf

(ii) Central Bank Publishes Information Notice relating to an Interim Solution for Unavailable PCF Returns

In April 2014, the Central Bank removed three PCF returns from its On-Line Reporting System ("**ONR**") due to technical issues arising with those returns. The Central Bank has confirmed that they are working to rectify the problem with the PCF returns as soon as possible.

The Information Notice sets out the following:

- Effective Start Date and Resignation Notifications – an interim solution is being put in place pending restoration of the relevant PCF returns on ONR;
- Change of Address – for situations where a PCF holder changes his/her address:
  - Where the PCF holder remains in the State, there is no need to report until such time as the ONR system is back live;
  - If the PCF holder has moved outside of the State, an update must be provided in writing to the Central Bank (as set out in the Information Notice).
- Annual PCF Confirmation Return – the Central Bank extended the submission date for the Annual PCF Return due from Credit Institutions and Insurance Undertakings from 30 April 2014 to 30 June 2014.

The Information Notice is available via the following link:

http://www.centralbank.ie/regulation/processes/fandp/serviceproviders/Documents/Information%20Note%20April%202014%20(2).pdf

Data Protection

(i) EU and US Remain Dedicated to the Continued Operation of the Safe Harbour Framework

On 26 March 2014, the EU and the US issued a joint statement committing to comprehensively strengthening the Safe Harbour Framework "to ensure data protection and enable trade through increased transparency, effective enforcement and legal certainty when data is transferred for commercial purposes" The European Parliament had previously threatened to veto any future trade agreement between the EU and US, unless safeguards for EU citizens' privacy rights are improved by the US.

The Safe Harbour Framework provides for a set of principles which means that any transfer of personal data to companies in non-EEA countries that have signed up to the Safe Harbour principles may take place without any additional condition over and above those for the transfer to a third party or to a data processor located within the EU/EEA.

(ii) The Data Protection Commissioner 2013 Annual Report

On 12 May 2014, the Data Protection Commissioner ("**DPC**") launched his annual report for 2013 (the "**Annual Report**"). The Annual Report summarises activities of the Office of the DPC during 2013 by reference to specific investigations and audits undertaken as well a summary of policy matters and EU/international activities.

During 2013, the Office of the DPC opened 910 complaints for investigation. Complaints from individuals in relation to difficulties gaining access to their personal data held by organisations accounted for almost 57% of the overall complaints investigated during 2013. With 517 complaints in this category, this represents a record high number of complaints concerning access requests.

The Annual Report highlights that individual complaints relating to data access requests are primarily being driven by poor customer service standards by commercial entities. The findings of the Office of the DPC indicate that individuals who consider that they are not receiving adequate customer service from commercial entities resort to exercising their data protection right to request a copy of all personal data held by that entity, which may not have become necessary had the customer's initial queries been dealt with by the entity in a timely and comprehensive fashion.

The Annual Report also provides that the vast majority of complaints in 2013 were resolved without the need for a formal decision under Section 10 of the Data Protection Acts or without enforcement action being required.

The Annual Report provides useful reading for data controllers and data processers. It may be accessed via the following link:

http://www.dataprotection.ie/docimages/documents/Annual%20Report%202013.pdf

Anti-Money Laundering/Counter-Terrorism Financing

(i) Council of EU Publishes Compromise Proposal on the Fourth AML Directive and Revised Wire Transfer Regulation

On 15 June 2014, the latest compromise text for both the Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the "**4th Anti-Money Laundering Directive**") and the Regulation on Information on the payer accompanying transfers of funds ("**Wire Transfer Regulation**") was published by the European Presidency.

The Permanent Representative Committee has now called on the Italian European Presidency to commence trialogue negotiations with the European Parliament once it has resumed work following the recent elections, with a view to adopting the latest proposed text

For a copy of the compromise text of the 4th Anti-Money Laundering Directive please see the link below:

http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010970%202014%20INIT

(ii) Financial Action Task Force Published Documents on its Activities

On 27 June 2014, the Financial Action Task Firce ("**FATF**") published:

- A summary of its plenary meeting held in Paris from 25 to 27 June 2014; and
- A report on virtual currencies, which focuses on key definitions and potential anti-money laundering ("**AML**") and combating the financing terrorism ("**CFT**") risk.

The summary and the report can be accessed via the following links, respectively:

http://www.fatf-gafi.org/documents/news/plenary-outcomes-jun-2014.html

http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf

Companies Bill 2012 Update

On 17 June 2014, the Seanad Committee Stage of the Companies Bill was completed and all of the 170 amendments tabled by the Department of Jobs, Enterprise and Innovation were agreed. The Bill will now be considered by the Seanad at the Report Stage, however a date has not yet been fixed for this stage.

It is anticipated that the Companies Bill will be enacted towards the end of 2014 and private companies limited by shares will be given an 18 month transitional period to take certain action as a result of the introduction of the Act. The Minister for Jobs, Enterprise and Innovation may choose to extend this by a further 12 months. The transitional period will give directors and shareholders the time to decide between registering as a new-form company ("**CLS**") and registering as a designated activity company ("**DAC**"). Where a company takes no action, it will be deemed to have become a CLS on the expiry of the transition period. It is to be noted that many of the changes will, however, come into effect immediately.

Further information relating the technical amendments of the Companies Bill are available accessing the following link:

http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2014061000040?opendocument

Irish Taxation Update

(i) Revenue Commissioners Finalises Relevant Regulations on FATCA

On 27 June 2014, the Irish Revenue Commissioners (in conjunction with the Department of Finance) finalised the relevant Regulations (S.I. No. 292 of 2014) with respect to FATCA (the "**FATCA Regulations**"), which came into operation on 1 July 2014.

The Irish and US Governments signed an intergovernmental agreement ("**Irish IGA**") on 21 December 2012 with respect to FATCA and legislation was subsequently included in Finance Act 2013 for the implementation of the Irish IGA. The legislation (Section 891E of the Taxes

Consolidation Act, 1997 ("**TCA 1997**")) specifically permitted Regulations to be made by the Irish Revenue Commissioners with regard to the various requirements arising under the Irish IGA (such as, the potential registration, due diligence and reporting obligations that may arise).

A consultation period followed to ensure that relevant stakeholders would have an opportunity to review / comment on the draft Regulations and Guidance Notes as issued by the Irish Revenue Commissioners. In this regard, draft Regulations and Guidance Notes were initially issued on 3 May 2013 with revised drafts of same being issued on 16 January 2014.

The consultation period has now ended with the publication of the FATCA Regulations.

The FATCA Regulations along with the Irish IGA, Section 891E TCA 1997 and draft Guidance Notes set out the framework for Irish Financial Institutions to implement and comply with the provisions of FATCA.

While the Guidance Notes are still currently in draft, it is envisaged that these will also to be finalised in the near future.

(ii) The IFIA's FATCA Working Group Drafts Self-certification Forms

On 30 June 2014, the Irish Funds Industry Association ("**IFIA**") published on their website an information update mentioning that the FATCA Working Group of the IFIA has been working with the Revenue Commissioner in relation to the obligations that FATCA imposes, with a view to obtaining clarity on fund specific issues. It is expected that these issues will be dealt with in the revised Guidance Notes.

One of the new requirements from 1 July 2014 is the need to confirm the status of investors from a US tax perspective. In this regard the Working Group has drafted appropriate self-certification forms for both individuals and entities which formed part of our discussions with Revenue.

Copies of the forms (for entities and for individuals) are available below, respectively:

http://www.irishfunds.ie/fs/doc/publications/ifia-fatca-self-certification-for-entities-27-6-14-final.PDF

http://www.irishfunds.ie/fs/doc/publications/ifia-fatca-self-certification-for-individuals-27-6-14-final.PDF

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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 June 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.

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