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CAR Consultation
Securities and Markets Supervision Division
Central Bank of Ireland
Block D
Iveagh Court
Harcourt Road
Dublin 2

31st October 2013

Re: Client Asset Regulation and Guidance Consultation

Dear Sir/Madam,

We welcome the opportunity to consult on the proposed new Client Asset Regulations and Guidance.

The feedback below on the proposed new Regulations and Guidance represents both

1. Shared comments and views of Goodbody, Davy, Investec Wealth Management and Pershing ("the Group"), detailed in Section 1 and
2. Goodbody individual comments are detailed in Section 2.

We note that the Central Bank of Ireland ("CBI") is seeking to enhance the Client Asset regime by,

- Minimising the risk of loss or misuse of client assets,
- Maintaining public confidence in the client asset regime,
- Providing a clearer framework for investment firms that hold client assets to operate within,
- Provision of a system to enable expeditious return of client's assets as efficiently and cost effectively as possible,
- Making greater use of higher level principles reinforced with guidance so as to introduce greater flexibility into the regime and a more accessible explanation of the rationale of the rules,
- Avoiding unnecessary and potentially contradictory statements within the requirements.

We welcome enhancements to the current Client Asset regime we fundamentally believe that there are significant inconsistencies between what is being proposed and the stated objectives of streamlining the regime, eliminating inconsistencies, helping to mitigate risk and introducing greater flexibility. Instead we firmly believe what has been proposed in its current format will lead to a more stringent, complex and onerous regime. In many cases the additional administrative requirements will not afford clients any additional protection.

We are disappointed that nearly all of the considerations from the attendees participating in the joint industry consultation workshops held in 2012 have not been taken on board. Since these earlier viewpoints remain sound, we have incorporated them herein and ask for a second consideration of same.

Goodbody

In relation to the format of the Regulations and Guidance Notes we feel that having to review three different papers in order to consult at this juncture made the process cumbersome and confusing. There are also some inconsistencies between the documents, details of which are again noted in the response below.

The protection of Client Assets is a primary Regulatory priority for the firm and we firmly believe if our viable alternatives detailed below are taken on board that the proposed Regulations will be significantly enhanced in providing a clearer framework for Investment firms to operate within and will help meet the stated objectives referred to above.

We would welcome a meeting to discuss the above, at your convenience.

Yours sincerely

Vernon Rushe

Client Asset Regulations and Guidance – Comments of the Group

1. Client asset funds and Financial Instrument Facilities Letters

Proposed Rule
(3.5/3.6/3.7/3.9)
The one-step process for setting up a new client asset account with a third party has now been replaced by a three tier process,

1. Initial Facilities Letter (3.6)/(3.7), prior to investment,
2. Subsequent third party confirmation relating back to agreed terms in the Facilities Letter and provision of account number (3.9),
3. Final third party confirmation that assets are held in an account which is designated as a client asset account (3.5).

This proposed new process is increasing administration without adding any additional value to the protection of client assets and can be prone to error. In many cases third parties are unable to proceed with account opening until they are actually in receipt of client funds from the investment firm. This is due to the mechanics of their system and it is an industry-wide issue which exists in the current CAR regime (e.g. particularly in regards to client asset deposits).

The more stringent requirements will place Ireland at a disadvantage as international firms will see increased operational overhead associated in doing business with Irish firms. We already experience difficulty in this regard under the current regime.

Alternative approach

- The view of the Group is that one Facilities Letter should be put in place with each credit institution which covers all future client asset accounts opened up by the firm. Equally this Facilities Letter should be put in place with third parties holding financial instruments.
- The Client Asset letter with the bank/custodian will have a specific identifier (e.g. "client asset") for all client asset accounts opened with that counterparty. These accounts will be separately ring-fenced and identified as "client asset" in the records of the counterparty. The Client Asset Facilities Letter will clearly specify that all accounts opened under this specific identifier will meet the regulatory requirements under 3.6 and 3.7.
- In all cases the initial Facilities Letter will be worded in such a way that it is clear that all future accounts and deposits opened up under this client asset designation are protected by the terms of the initial Facilities Letter.

The Group believes that this alternative approach will reduce the risk of additional letters or confirmations being missed leaving the clients exposed under the Regulations. It will be a more efficient process for the firm, counterparty and the client.

We assume that the existing CAR Letters will be grandfathered in under the new regime.

Withdrawal of assets within one business day

Proposed Rule
Under 3.5 firms will be required to withdraw assets "without delay" and in any event within one business day where a satisfactory CAR confirmation has not been received from a counterparty holding client funds or client financial instruments.

The removal of client assets within one business day in our view is totally impractical especially for financial instruments. In the majority of cases the instrument can only be held with the party it was transacted with/transferred to in the first instance.

Alternative approach
The Group believes that the timeframe of receiving CAR confirmations from counterparties should be changed to "within a reasonable timeframe" which will be determined by the firm in its CAMP. This will cater for situations where accounts are opened up automatically by banks, custodians or Fund Service Providers and there are subsequent delays in obtaining signed agreements.

3.6(g)/3.7(h) Third party liability confirmation

Proposed Rule
Under 3.6(g) and 3.7(h) of the Facilities Letters we are required to outline the extent of the third party's liability in the event of loss of client funds whether caused by fraud, wilful default or negligence.

The Group believes that in practice this will be very difficult to implement. The third parties will have differing approaches to this and may refer to the specific Terms and Conditions which have been signed up to by the firm on the set up of the relationship. We believe therefore that it will not be possible to provide a statement on a sound legal basis in respect of the third party's liability.

Alternative approach
We believe that firms should be able to rely on the fact that each of the institutions and custodians are either regulated by the competent authority or be reputable and financially strong institutions.

2. Client Receipts

Proposed Rule
2.7 requires firms to return cheques and electronic funds no later than two business days following receipt if not applied to a client account.

The Group's view is that protection issues do not arise in so far as electronic receipts are received directly into a client asset account and in the case of cheque receipts the funds remain in a client's own bank account until the cheques are cashed. We do agree that firms should have a policy to return funds but have a strong view that a two day timeframe is far too short and is not practical. For receipt of electronic funds the industry is reliant on the client providing a client code on their transfers and on the remitting bank to capture the client code on the transfer. The majority of funds received do not contain this information and it often it takes time for firms to determine where funds were received from. In addition firms regularly experience difficulty with the remitting banks accepting the return of funds.

This requirement will negatively impact on clients due to the unnecessary return of funds. It will increase rather than reduce risk by necessitating more client fund transactions resulting in increased cost. It also increases the risk of cheques being intercepted and exposed to fraud.

Alternative approach
The Group believes that the timeframe should be changed to "within a reasonable timeframe but no more than 10 working days" which will be detailed by the firm in its CAMP. This will provide a more practical, efficient and risk based approach to unallocated client funds which will address the concerns above while improving the client service proposition.

Proposed Rule
2.20 requires firms to produce records within one business day.

The Group believes that this may not always be possible within such a short timeframe since in some cases items may be archived off site and/or there may also be a reliance on a third party to reproduce the record.

Alternative approach
The Group believes that the timeframe should be changed to "as soon as possible".

3. Reconciliation

4.1/4.2 The Group's view is that these two Regulations should be merged as a separate interpretation will be taken if one is read in isolation.

4.9 requires that the firm shall start to investigate and identify the cause of any differences in the reconciliation required pursuant to Regulations 4(1), to 4 (4) within one business day.

It is not always possible to identify the cause of a difference within one day as firms need to interact with third parties and are dependent on responses.

Alternative Approach
The Group believe the requirement should be changed to state that the investigation is commenced within one business day.

Guidance Notes Questions for consideration - Q 13

Q13 Do you agree that an investment firm should immediately make good or provide the equivalent of any shortfall in client financial instruments? If not, please explain why.

The Group require further clarification on this point as there are many aspects to take into consideration which may create a shortfall e.g. insolvency of a third party, fraudulent activities, trade failures, timing differences. This could potentially lead to an open ended funding requirement for firms and should be clarified further in the Regulations.

Guidance Notes – G4 (13)

When could a reconciling difference be considered material?

There is an inconsistency here in relation to the assessment of materiality. In this case the materiality levels are being set by the CBI rather than being defined by the firm. In relation to reporting any Client Asset shortfall the firm can determine its own level of materiality as referred to in Q19 in the Guidance Notes.

Alternative Approach
The Group's view is that the level of materiality should be set by the individual firm and defined in its CAMP. In relation to reconciliation differences, allowances need to be made for various items such as corporate actions, dividends and assets in wrong tax depots where re-registration is required. We note from G4 (10) that the Central Bank may engage with a firm to discuss how its material reconciling differences have been determined and assess if other factors need to be considered.

4. Client asset buffer

Proposed Rule
5.1 states that firms shall ensure that its client money resource is equal to the client money requirement. At the joint industry working group session which discussed the elimination of the buffer the Group expressed concerns at the time that this would not work operationally and may leave clients exposed.

The Group views this as not feasible given the potential for any private or institutional client debts or failed trades given the volume of daily trades. Any debt may result in a client asset deficit.

Given the above it is impossible to accurately predict what clients will actually pay for stock purchases and what trades will actually settle (in particular factoring in the timing difference in the US). If this was possible no buffer would be required.

Daily cash forecasting and the maintenance of a buffer is required to ensure that when debts are not settled and when trades fail that other client credit balances are not impacted. We would view this process as being prudent, proactive and ultimately adhering to the overall client asset objective of safeguarding client assets, particularly in the event of an insolvency situation. Removing the requirement of the buffer may leave clients exposed.

The current rules, 5.3 and 5.6 deal with funding a shortfall within one business day. This is after the event.

- The buffer is in place to safeguard against a deficit arising before the event.
- In the event of an insolvency of a firm a retrospective transfer the following day to fund a deficit is after the event and the clients may be exposed as a result. Operating a buffer is a risk mitigant against this happening.

Alternative approach
The Group believes that if the firm deems it prudent to maintain a buffer that the rationale and the measurement criteria should be documented in detail in the firm's CAMP. Firms are willing to accept the risk that this may cause to their own funds.

5. Statement Changes

Proposed Rule
6.16 details the information to be provided to clients in an annual statement.

Firms are required to capture the jurisdiction of assets on the annual statement. Given many assets can be held in multiple jurisdictions and may have different custodians and sub custodians this is not a feasible proposition.

The Group does not believe that the proposed requirement for firms to capture the jurisdiction of assets will provide any benefit to clients.

Instead we believe that it will lead to confusion on the statement, especially in the case of counterparties operating in different jurisdictions and where the same instrument is held with different third parties and funds are invested with several banks. We do not see how this requirement will improve the protection of assets. It will lead to increased operational complexity for firms and potential for error.

Alternative approach
The Group believe that this proposed requirement should be removed from the regulations however should a client request this information it will be provided on a case by case basis.

6. Client disclosure and consent

6.4 Information to be provided to clients

Proposed Rule
6.4 requires firms to provide the name and address of any third party where assets are held.

Given the number of bank entities and assets held with custodians and Fund Service providers we do not believe as a Group that this is feasible. It will prove to be extremely onerous as new relationships are established with third parties on an on-going basis. We fail to see how this requirement will improve the protection of client assets.

Alternative approach
We believe that this information should be provided on an exception basis only, upon client request.

6.20 Client Asset Key Information Document (CAKID)

Proposed Rule
Prior to first receiving client assets, a firm shall provide the client with a CAKID, which shall include (a) to (g).

We are in agreement that new clients should receive this document but have concerns in relation to the clients not receiving a consistent message and in a firm's ability to provide explanation/interpretation as the requirements are not fully clear as outlined in the proposed Regulations.

We are not in agreement that the CAKID should be issued to the existing client base as we feel that this may create client confusion and firms may experience a significant increase in queries from clients.

Alternative approach
In order to ensure that new clients are receiving a consistent message from firms we request that the CBI should provide a draft framework/template and provide guidance for the content in the CAKID in particular on the requirements detailed in 6.20 (a) to (g) inclusive.

For example in 6.20(g) regarding what happens to client assets in the event of an insolvency it will be not be possible to accurately detail to clients as each insolvency case will vary depending on the case and jurisdiction among other factors. In the event that this requirement is not removed, the CBI should provide guidance as to what happens to client assets in the event that the firm or a third party holding client assets becomes insolvent, is subject to liquidation, receivership or examinership. There is no set framework for this process and to date each situation has been on a case by case basis.

In addition guidance is also sought from the CBI on:

- Which assets are subject to the client asset regime and which assets are not subject to the regime as firms are required to explain circumstances where the client asset regime may not apply. This is a very grey area and one of extreme inconsistency in the industry - 6.20 (e).
- Where assets are held outside state as to how firms can set out what investor compensation scheme applies as defined in point 6.(5).
- Where assets are held by a third party as to how the firm can set out the regulations the third party entity is subject to - 6.20 (d).

We also suggest that the CAKID should be published on the firm's website.

Guidance Notes – G6 12 (c)

This clause states that we must inform clients when the client asset regime applies. It gives an example of when a client makes a direct payment to the firm in respect of a specific regulated investment then the client asset regime applies. This is inconsistent with the CP71 "Scope of Client Funds" which states that all client funds received by a firm irrespective of whether for a regulated or unregulated investment are protected under the regime.

7. Client Asset Management Plan ("CAMP")

Proposed Rule
7.6 (a) to (f) details at a minimum what needs to be recorded in the CAMP.

Whilst we believe that board oversight of the CAMP is appropriate we believe that the prescriptive nature of its content is unnecessary and too detailed. We agree with the principle but believe such detail should not be prescribed in a statutory instrument.

Alternative approach
We would suggest that the format and content of the CAMP should be agreed with and approved by the Board in line with the existing process for the ICAAP preparation and approval. We propose that while the procedures, controls, risk mitigants and other items referred to in Section 7.6 will be referred to in the CAMP that the detail around it will be contained in other documents e.g. ICAAP and procedure documents.

The time frame of 3 months for having the CAMP prepared is unrealistic given the additional requirements which the new Regulations are proposing to introduce. Given the prescriptive nature, detailed requirements and the confusion around some aspects outlined herein a 12 month timeframe would be more realistic for preparation.

8. Client Asset Examination

Proposed Rule
G8 (5) a) requires auditors to seek external bank confirmations at year end and one other randomly selected date.

The Group does not see the value of an additional confirmation to the year-end date.

Alternative approach
The audit firm can leverage off the financial year end audit date rather than adding additional layers to the testing. Also given the number of bank accounts and banks a sample basis of testing would be preferable.

Proposed Rule
G8 (5) b) requires auditors to seek positive confirmations requests from a sample of clients at a randomly selected date, not the year end date.

The Group does not see this as feasible for the reasons below.

- The majority of clients will be unable to confirm balances at randomly selected dates during the year as the annual statements they receive will be based on firms own schedules at a specific date during the year, hence this will be a redundant exercise,
- Clients will be confirming balances which the firms have sent out to them. This is not an independent record,
- Positive confirmations will be very difficult to obtain. This will be a labour intensive exercise with little value added. Given the tight audit timeframe this will take up time better spent focussing on the appropriateness and effectiveness of the firm's process and systems in relation to safeguarding client assets and compliance with the Regulations.

Alternative approach
If progressed we suggest that negative confirmations would be a more preferable approach.

9. Transitional Requirements for CAMP

Proposed Rule
9.1 requires firms to obtain an assessment of the CAMP from an independent external expert, not the external auditor completing the Client Asset examination.

We do not agree that the CAMP should be reviewed by an independent external expert. The Group does not understand the rationale for preventing the existing auditor to perform this task as they are an independent firm and will be evaluating the CAMP as part of the first audit regardless. Employing an additional firm will be a duplication of effort and cost for the industry and we do not see any value added here.

Alternative approach
The CAMP should be an internal document which is approved internally by the Board. This approach is consistent with the existing process for the ICAAP approval and the board has a fiduciary responsibility in this regard.

The firms should be able to rely on the existing auditor to review the CAMP as part of their annual audit. The CAMP will also be subject to an on-going review by the CBI.