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Markets Policy Division,
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New Wapping Street,
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27th September 2017

Re: Consultation on Second Edition of the Central Bank Investment Firms Regulations including changes related to MiFID II – Consultation Paper 111

Dear Madam/Sir,

We welcome the opportunity to comment on this Consultation Paper regarding Investment Firms Regulations including changes related to MiFID II.

The Irish Funds Industry Association ("Irish Funds") is the representative body of the international investment funds community in Ireland, representing fund managers, custodian banks, administrators, transfer agents, professional advisory firms and other specialist firms involved in the international fund services industry in Ireland.

Given Ireland's strong reputation as a leading centre for the domiciliation, management and administration of collective investment vehicles (with industry companies providing services to collective investment vehicles with assets totalling in excess of €4.1 trillion) we acknowledge the importance of an effective and well-reputed regulatory environment. As a proven part of Ireland's international financial services offering our industry has been a consistent and growing part of the internationally traded financial services landscape for over twenty-five years.

We have considered the matters set out in Consultation Paper 111 ("CP 111") and the questions posed therein.

Our response is set out below in three sections,

1. General Comments summarise observations and questions submitted by member firms on a range of issues relating to the matters set out in CP 111;
2. Regulation Specific Comments outline the comments or questions relating to specific regulations set out in CP111; and
3. The third section outlines our response to the four questions posed in CP 111.

1. **General Comments**

A. Implementation timeframe

An implementation timeframe is required once these Regulations are introduced in order to facilitate Fund Service Providers re-draft the investor money management plan (IMMP), Investor Money Regulation (IMR) procedures and documentation, training programs etc. to reflect the new requirements.

It would be beneficial for the Central Bank of Ireland ("CBI") to indicate when the new regulations are expected to be transposed into law and what the expected implantation timeframe is.

B. Investor Money Facilities Agreement

CP 111 refers to 'Investor money facilities agreement' (IMFA) whereas the current regulation refers to "Investor money facilities letter ("IMFL"). Industry have questioned whether this change in terminology requires the letters to be re-drafted and re-signed. The legal provisions within the letters remain valid, and the letters are contractual legally binding documents, as such, Industry propose that the existing IMFL's remain valid and there is no requirement to resign them. Industry has no concern with future agreements being labelled as IMFA's where required.

C. Instances of shortfall or excess

CP 111 and the current regulations do not make sufficient provision for instances of shortfall or excess where the actual currency for such accounts is closed (i.e. currency holiday).

Where a shortfall or excess arises on a currency, as identified through the DailyCalc., but that currency market is closed for trading, the fund service provider is unable to fund such moneys or remove such excess's due to primary market restrictions. The fund service provider is bound by the market requirements of the local currency holiday schedule.

The fund service provider would like to avoid any potential technical breach of the regulations, and would ask that the regulations recognise that currency holidays prevent the fund service provider from removing an excess or funding a shortfall – this should not be considered a violation or breach of the regulations.

D. Investor money held in IMR account

Circumstances may arise where investor money is held in an IMR account because the investor does not claim the money for one of the following reasons:

1. the investor has declined to accept payment of proceeds due in part to the immaterial nature of the balances held
2. the investor is not-contactable, but the fund service provider continues to invest time and resources in attempting to effect payment
3. the investor refuses to accept payment as moneys are not accounted for or recognised by them e.g. residual cash balances for liquidating subfund which is distributed after final NAV is struck and investors do not recognise or want such 'additional' income to their book.

Industry would like to work with the CBI on considering:

1. a deminimus threshold where a charitable donation may be made by the fund service provider in instances where investors:

- a) expressly advised that they do not want such moneys, or remain dismissive on agreeing to accept payment

or

- b) are non-contactable for a period of 1 year, and at least three attempts are made to contact them.

2. an age/ timeline limit of 6 years for any instance where the fund service provider is holding moneys for investors who are non-contactable, after which, such proceeds are paid to charity.

3. any instance where investors have expressly stated they do not want payment of such moneys held, the fund service provider may agree with the investor to pay such moneys to a charity.

Industry is happy to work with the Central Bank on agreeing protocols and governance on adopting such deminimus and age-limit thresholds, allowing for charitable donation, where best practise is determined.

Each fund service provider would be required to document their specific largest amount that they would pay to charity after holding it for a period of 6 years (based on the concept of materiality). The rational for this limit would have to be documented in the IMMP and therefore agreed by the Board of Directors.

Such a precedent exists in the UK under CASS 7.11

E. Schedule reporting requirements – part 1

- Management/Annual Accounts (Upload) 1 month after firm reporting year end
- Management/Annual Accounts (Data Entry) 1 month after firm reporting year end

Industry believe that the proposed annual requirement to provide Management / Annual Accounts (Upload) and Management / Annual Accounts (Data Entry) is not practical within a one month timeframe. Industry has a number of significant deliverables at year end but believe a two month timeframe could be achievable.

2. Regulation Specific Comments

A. Review of Final NAV

19. (1) A fund administrator shall ensure that -

(a) a senior staff member ~~member of senior management~~ of the fund administrator completes, signs and dates a review of the check and release of each investment fund final NAV prior to the release of that final NAV, and

It has been suggested that the wording “suitably experienced staff member” would be more appropriate and achieve the same end as “senior staff member”.

B. CBI prior approval

72. (8) A fund service provider shall not hold investor money without the prior written approval of the Bank.

80. (6) If a fund service provider claims not to have held investor money throughout the period to which the investor money examination relates, the fund service provider shall –

(a) arrange that an external auditor performs such procedures as the external auditor deems appropriate to enable the external auditor to determine whether anything has come to its attention that causes the external auditor to believe that the fund service provider held investor money during that period,

(b) ensure that the external auditor provides the assurance report to the fund service provider in a timely manner and in any event, in good time to enable the fund service provider to comply with its reporting obligations under Regulation 83.

Where a fund service provider does not hold IMR during the period, are they still required to conduct the Investor Money Examinations (IME)? Industry have raised the question as to whether such a rule is to be interpreted as 'perpetually binding' even where Investor Moneys are not held by the fund service provider? Is the intention that this rule will only apply to fund service providers approved by the Bank (per 72 (8)), and the IME of the fund service provider should no longer be required where the fund service provider seeks to revoke its requirement / authority to act as fund service provider for the purposes of IMR.

Where a fund service provider no longer intends to hold investor money, and seeks to remove itself from the list of approved fund service providers, industry are of the opinion that these fund service providers should no longer be required to conduct an IME and section 80 (6) should not apply.

It is suggested that the process to revoke the authority to act as a fund service provider for the purposes of IMR be outlined, and in that 80 (6) would no longer apply.

C. Foreign currency accounts located inside the EEA

77 (5) Without prejudice to Regulations 77(3) and 77(4), in the event of a shortfall or an excess in a foreign currency third party collection account that is held outside the EEA, fund service provider shall issue an instruction to its credit institution, without delay and in any event within one working day, to -

(a) deposit into a third party collection account such money from the fund service provider's own firm money as is necessary to ensure that the investor money resource is equal to the investor money requirement, or

(b) withdraw such money from a third party collection account to ensure that the investor money resource is equal to the investor money requirement,

Section 77 (5) does not acknowledge situations where foreign currency accounts can be located 'inside' the EEA. It has been suggested that the regulations should be amended to recognise that foreign currency accounts can be held inside the EEA also.

Where a shortfall or excess arises on a foreign currency account that is held 'inside' the EEA, the fund service provider is required to ensure an instruction is issued to the third party bank to either remove the excess or fund the shortfall, but recognise that such instructions are bound by local currency market timelines, and will not be cleared within 'one working day'. We would ask that the regulations be amended to remove any interpretation of technical breach in such circumstances, where it is beyond the control or influence of the fund service provider.

To ensure the regulations do not contradict existing market requirements, provisions should be made for the movement of moneys being issued after the currency deadline, for example, of an Eastern currency.

To ensure such technical breaches of the regulation are avoided it is suggested that an amendment of the regulations would be appropriate to recognise that foreign currency accounts can also be held 'inside' the EEA.

D. Fund service provider semi-annual due diligence on Third Party Credit Institutions

72 (6) Investor money shall only be deposited with a third party where the fund service provider

(a) is satisfied that the legal, jurisdictional, regulatory requirements and market practices relevant to the holding of investor money with that credit institution in the manner proposed do not adversely affect investor rights, and
(b) has exercised due skill, care and diligence in the selection and appointment of that entity.

72 (7) Where investor money is deposited with a third party, the fund service provider shall, at least every 6 months, review the arrangements for the holding of investor money with that third party as against the criteria set out in Regulation 72(6).

Industry believe the requirement to have a semi-annual due diligence review instead of an annual one does not provide any greater positive benefits and it is believed an annual review should suffice. Financial statements are only published on an annual basis, and a risk assessment would only formally be performed post that publication by the third party.

Industry also believe the requirement under section 72 (6) should exclude accounts held inside the EEA and to remove the on-ongoing requirement for a legal/ market/ jurisdictional review where accounts are held in the EEA.

E. Minor amendments

72. (2) For the purposes of this Part, a fund service provider is deemed to hold investor money where the investor money has –
(a) been lodged into a third party collection account in a third party,
(b) is deposited into a third party collection account, and

Section (a) above refers to money being lodged while section (b) is referring to money being deposited. Due to the change of definitions in the amended regulations it would seem that lodged and deposited are a duplication of each other.

73. (1) In advance of opening a third party collection account, a fund service provider shall –
(b) ensure that the third party will designate in the financial records of the third party, the name of the third party collection account held with it in a manner which makes it clear that the investor money is not the money of the fund service provider.

74. (1) In advance of opening a third party collection account with a third party, a fund service provider shall enter into an agreement with the third party (in this Part to be known as an "Investor Money Facilities Agreement") and the terms of such Investor Money Facilities Agreement shall be that

(c) the third party will designate the name of the third party collection account in its records as a "collection account" to make it clear that the investor money does not belong to the fund service provider;

Section 73(1) (b) and 74(1) (c) look to be slightly different requirements for the same matter. It would be preferable if these were consistent.

3. Questions posed by CP 111

1. ***In the existing Client Asset Regulations ("CAR"), a series of defined terms are used to describe or refer to third parties with whom client assets (client funds or client financial instruments) may be held or deposited. These terms include for example "eligible credit institution", "eligible custodian", "relevant party" and "related party". There are also***

separate definitions (or terms otherwise used) in relation to nominees including "nominee", "nominee company" and "eligible nominee". While this terminology appears to have been carried over from earlier versions of the client asset requirements, the terminology seems unnecessarily confusing and perhaps warrants revision in light of MiFID II. For example, MiFID II has certain specifications concerning the third parties with whom client assets may be deposited. In this regard, MiFID II specifies that client funds may only be deposited with a third party meeting the criteria set down in Art. 4 (1) of Commission Delegated Directive (EU) 2017/593 and client financial instruments may only be deposited with a third party where the criteria set down in Article 3(1) –(4) of Commission Delegated Directive (EU) 2017/593 are met. Do you consider that there is scope to better align definitions contained in the existing CAR to MiFID II and/ or to otherwise streamline the number of defined terms (or terms otherwise referenced) in the existing CAR as outlined above? Please provide any clear suggestions you may have for improvement in this area.

The series of defined terms contained in the existing CAR should be streamlined and aligned to the definitions contained within MiFID II. The rapid influx of new regulations in recent years has borne a number of legacy definitions that can lead to confusion within the Industry.

In addition, ESMA is promoting the principle of supervisory convergence across the 28 member states which the Central Bank has stated it is fully committed to[1]. Supervisory Convergence is furthered by the use of agreed and consistent terminology across the EU.

Irish Funds proposes that the Central Bank adopts the definitions used throughout MiFID II in respect of any changes it makes to the Central Bank Investment Firm Regulations and reviews references in the Regulations to terms which are not defined centrally in Europe to determine if they are still valid.

2. ***Sections of the existing CAR have been deleted or modified in the new proposed Part 6 of the Central Bank Investment Firms Regulations in order to eliminate duplication of MiFID II requirements or to express CAR requirements in such a way that they are read as being complimentary to MiFID II requirements. For example, the requirement for an annual external auditor's assurance report in CAR is linked to the overarching equivalent requirement in MiFID II. The intention here is to ensure that any additional domestic rules under CAR are not read in isolation from the overarching EU wide MiFID II requirements. Do you agree with this approachand are there any rules in the existing CAR that you consider are not adequately addressed in the revised Part 6 proposed when read in conjunction with MiFID II requirements on the safeguarding of client assets?***

Irish Funds agrees with the approach proposed by the Central Bank. Irish Funds considers the existing CAR is adequately addressed in the revised Part 6 when read in conjunction with the MiFID II requirements on the safeguarding of client assets.

3. ***As part of the integration of the Investor Money Regulations ("IMR") into the Central Bank Investment Firms Regulations proposed in Part 7, certain changes to the IMR have been effected as described above. Do you have any comments in relation to the drafting revisions to the IMR?***

Industry comments in relation to the changes proposed to IMR have been outlined above in the "General Comments" section and some regulatory specific comments have been itemised above in the "Regulation Specific Comments" section.

[1] **MiFID II – Keynote Speech, PwC Breakfast Briefing "MiFID II – Are you Ready?" Denise Murray, Head of Asset Management: Authorisation and Inspection Division**

4. ***Certain established defined terms in the existing CAR and the IMR have been amended for clarity, consistency and to ensure that the defined term better reflects its meaning. Do you have any such comments in relation to the amendments proposed? Is it envisaged that such amendments would have any significant operational impact?***

   Industry has not provided any specific comments in relation to the amendments to defined terms contained in the existing CAR and the IMR. Irish Funds agrees with the Central Bank's approach to review the defined terms

We hope you find these comments helpful, and we remain at your disposal to discuss the issues raised in this response further.

Yours faithfully

Aoife Coppinger
Regulatory Affairs Manager