

Irish Fund Directors Association (IFDA) response to the Central Bank's CP111 – Consultation on the Second Edition of the Central Bank Investment Firms Regulations including changes related to MiFID II.

Investment Firms Regulations Consultation,
Markets Policy Division,
Central Bank of Ireland, New Wapping Street,
North Wall Quay,
Dublin 1
Email : Invfirmspolicy@centralbank.ie

27th September 2017

Re : Consultation on the Second Edition of the Central Bank Investment Firms Regulations including changes related to MiFID II – CP111.

Dear Sir / Madam,

The Irish Funds Directors Association (“IFDA”) is the representative body for independent directors within the Irish funds industry and our purpose is to support the industry through the delivery of professional independent directors and to represent the interests of our members to stakeholders in the industry. Our Association’s objectives are to advocate industry best practice in corporate and fund governance as well as board oversight, and to encourage continuous professional development for fund directors. Our Association represents a significant number of the independent directors within the funds industry in Ireland.

We welcome the opportunity to represent the comment and feedback from our members on the Central Bank’s Consultation Paper (CP111) on the Second Edition of the Central Bank Investment Firms Regulations including changes related to MiFID II.

In summary, we acknowledge the requirement by the Central Bank of Ireland to address necessary changes to Client Asset and Investment Firm regulations in line with the single investment firm rulebook approach and the changing regulatory framework in light of Mifid II and its January 2018 implementation date. We also note and welcome the proposed integration of the Investor Money Regulations (“IMR”) and the Central Bank’s rules on capital requirements into the Central Bank’s Investment Firm Regulations (Second edition). The proposed additional and new Parts (Part 6, Part 7 and Part 8) of the Investment Firm Regulations are welcomed and should provide for clearer interpretation, consolidation, application and timely implementation of the Mifid II consequential revisions.

IFDA’s response to the Central Bank’s Questions for Consideration is as follows:

CP111 - Question 1 :

In the existing 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.

IFDA's Response to Question 1 :

From the perspective of Independent Directors fulfilling their roles and responsibilities in the Irish funds sector, IFDA members believe it is of critical importance that all regulations should be clear and unambiguous. With regard to the current Client Asset Regulations ("CAR"), we would suggest that, in the context of the proposed transposition of MiFID II, the CAR could be updated with regard to qualifying third parties for which client assets can be held or deposited, with all defined terms, where possible, defined with reference to criteria set out directly in the Directive from which the regulations are based, except where reference is required to other local associated legislation or Statutory Instrument, such as the Companies Act 2014.

In the example highlighted in the Consultation Paper ("CP111"), IFDA members agree that there are some terms that are effectively redundant references in the context of MiFID II or are defined more than once in the current CAR. For example, referring to "Appendix 1: Definitions" of CAR on Page 123, in the meaning of "eligible custodian" it includes another defined term "eligible credit institution"; the structure of this itself is unclear as, by definition, an eligible credit institution by virtue of its authorisation could include custodian activities.

As IFDA represents Independent Directors with a primary focus on fund governance, there could be increased perceived risk to effective governance with the transposition of MiFID II. Specified subsections of Arts 3 and 4 of EU Directive 2017/593 set out the criteria required for a third party to be deemed appropriate and suitable to deposit client funds or financial instruments. On this basis, we would contend that the Investment Firm Regulations should only refer to such specified criteria set out in the Directive; there should be no need for continued use of terminology that is a carry forward from previous legal regimes to co-exist that may lead to challenges of legal enforcement and regulatory confusion.

Taking the specific example from CP 111, we see no reason why the existing CAR terms "eligible credit institution", "eligible custodian", "relevant party", "related party" and all nominee references could not be consolidated into a single defined term such as "qualifying third party" with the definition of this term referring specifically to the qualifying criteria set out in the Directive.

In adopting such a style in all related areas, the Central Bank's Investment Fund Regulations can become an efficient and effective reference, with relevant and consistent MiFID II context, facilitating clear and unambiguous application while reducing the risk of unintended actions arising from any continuing ambiguity.

CP111 - Question 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 approach and 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?

IFDA's Response to Question 2 :

We welcome the integration of the CAR into the Central Bank Investment Firm Regulations as part of the Single Rulebook approach outlined in CP97. The IFDA would also encourage this single rulebook approach as a continuing goal of the Central Bank across all industry areas. The revised presentation, and in particular the grouping of related requirements into topical sections, is helpful. The extension of the CAR to IIA authorised Fund Administrators is noted. The logic of a single legislative regime to protect client assets across all sectors is clear and ultimately may be in the best interests of Fund clients.

With respect to the second part of question 2, we have not identified any provisions of the CAR that have not been adequately addressed in a MiFID II context and have no additional comments.

We acknowledge that these revisions to the regulatory framework will strengthen investor protection, reduce systemic risks and increase the efficiency of financial markets and the funds industry in Ireland.

CP 111 - Question 3 :

As part of the integration of the 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?

IFDA's Response to Question 3 :

The proposed Investment Firms Regulations (IFR) is very similar to the structure and sections already included in the Investor Money Regulations (IMR) (set out in SI no 105/2015).

The proposed revisions outlined by the CBI provide clearer prominence to protecting the investor and emphasises the priority for better governance regarding operational risk and data records. We believe that the proposed format and layout is a significant improvement and clearer for all stakeholders.

We note however that CP111 does not include definitions and references to Collection accounts, Credit institutions and Related Parties

In addition, Section 78.2 requires the Head of Investor Money Oversight to ensure that the Investor Money Facilities Agreement is "obtained and maintained" but perhaps could expand on the expected time limits.

Section 78.2 (i) extends reporting to partners in a partnership in anticipation of new partnership structures.

And finally Section 79.4 extends the items to be included in the Investor Money Management Plan which is welcomed.

CP111 - Question 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 comments in relation to the amendments proposed? Is it envisaged that such amendments would have any significant operational impact?

IFDA's Response to Question 4 :

Overall IFDA do not have any material observations on the proposed changes to the defined terms, however consideration may be given to the following sections of CP111 :

Part 2, Chapter 1, Point 4.1 (b) - The proposed amendment introduces the term "regional" instead of the term "branch". The CBI may consider offering further insight into their expectations on this matter. It could be envisaged that Investment Firms may or may not consult with the CBI on an additional premises utilisation due to the firm's definition of "regional".

Part 4, Chapter 2, Point 19.1 (a) - The proposed amendment introduces the term "senior staff member" instead of the term "member of senior management". The CBI may consider offering further clarification into their expectations on this matter. The introduction of the term "suitably skilled and experienced member of staff" may set out clearer expectations from Investment Firms on this matter.

Part 6, Chapter 1, Point 53 - The CBI has changed the term Fund Facilities Letter to Fund Facilities Agreement. The expectation may be that these terms relate to the same document and that existing signed letters are fit for purpose and do not need redrafting and re-execution .

Part 7, Chapter 1, Point 77.3-77.5 - There appears to be no reference to foreign currency third party accounts within the EEA. We anticipate that the practice for those accounts could mirror foreign currency third party accounts held outside of the EEA.

Additional comments on CP 111 :

An observation we have relates to the Reporting Requirements Schedule Ref. Regulation 8 Part 1. The proposed revisions to the reporting deadlines for Management / Annual Accounts (Upload) and (Data Entry) to ONE month after a firm's reporting year end may cause difficulty for some Investment Firms. Our suggestion is a two-month reporting timeframe rather than the proposed one month.

To conclude, we observe that there appears to be no suggestion whether there may be a transition period to implement the changes. We would anticipate that a transition period is introduced to CP111 revisions, to ensure members investment firms have the appropriate time, if necessary, to implement the consequential changes in a timely and efficient manner.

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We hope the Central Bank will consider the feedback from the membership of the Irish Fund Directors Association (IFDA) which we trust you find helpful and constructive.

We look forward to your response to IFDA's submission. Our Association through its elected Council is available to the Central Bank for further consultation on CP 111 and this significant regulatory development and initiative.

Yours faithfully,

Fergus Sheridan,
Chairman

Conor Molloy
Council Member