# Chartered Accountants Regulatory Board

## Review of Consumer Protection Code: Consultation Paper CP 47 issued by the Central Bank of Ireland

carb
Chartered Accountants

# DRAFT

## 1 Introduction

The Chartered Accountants Regulatory Board (CARB) was established in 2007 by the Institute of Chartered Accountants in Ireland, being an approved professional body under the Investment Intermediaries Act, 1995, to regulate its members. CARB regulates individual chartered accountants and firms of chartered accountants which it has authorised to conduct investment business. In this role, CARB is committed to delivering a high quality risk based regulatory regime, independently, openly and in the public interest.

## 2 Initial Comments

CARB is fully supportive of the Central Bank's objective of enhancing consumer protection and supportive of a code which requires regulated entities to act in the best interests of consumers both individually and as a class as a whole. We share this objective and have devised our Investment Business Regulations with this in mind. It is hoped that Consumer Protection Code can ultimately be adopted by CARB as part of the Investment Business Regulations, subject to any modifications that might be necessary to ensure compatibility with our regulations.

## 3 Response to detailed questions

Responses have been provided where the subject matter is of relevance to an area in which CARB has regulatory responsibilities.

### 3.1 Vulnerable Consumers

*Questions 1 and 2 (answered together)*

CARB takes a different approach to the protection of the clients who engage the firms and individuals within its regulatory remit. Whereas the Consumer Protection Code has identified circumstances which would render a consumer vulnerable and in need of additional protection CARB's Investment Business Regulations and Code of Ethics require regulated entities to obtain sufficient knowledge of every client in order to ensure that the products and services provided are suitable for that individual client. All clients are thereby afforded an appropriate level of care and protection. It is only when a client is categorised as a professional investor that certain of the requirements applicable to all other clients are not considered necessary.

We certainly support the concept in principle, and the motivation behind the vulnerable consumer requirements. Our concern lies principally in the fact that it may be considerably easier to identify those not in need of particular care than those who are. It would be our contention that the needs and circumstances of all consumers should be given careful consideration by regulated entities. The definition of "vulnerable consumer" and the list of indicative circumstances that

could render a consumer vulnerable are so broad that their usefulness ultimately is questionable.

We strongly recommend that consideration be given to the creation of a category of consumers at the other end of the spectrum, consumers with greater knowledge, experience, or acumen, as an alternative to the categorisation of vulnerable consumers.

### *3.2* Information about products

*Question 5*

CARB supports these requirements and believes that the proposed requirements are sufficient.

*Question 6*

A similar requirement exists under CARB's Investment Business Regulations and we would welcome the introduction of such a requirement in the Consumer Protection Code. It is suggested that guidelines be developed also to assist in distinguishing between 'key' and other facts.

*Question 7*

We have set out in detail the information which should be included in a Key Facts document in our Investment Business Regulations; a copy of the relevant chapter, Chapter 3 is attached. We refer in particular to sections 3.30 (Reason Why) and 3.32 (Clients understanding of risk).

*Question 8*

We believe an agreed structure or policy on risk disclosure should assist. Risks should always be expressed clearly in documentation and their effect should not be diluted or obscured by placing them in small print or in any other way. The requirement to produce a 'reason why' letter under the CARB Regulations is also, we believe, an effective means of communicating directly clients in a focused way the benefits and risks of a particular product.

*Question 9*

A system setting out the categories of risk could be helpful to the consumer however as the allocation of a colour to a particular risk is a subjective exercise we believe this would require careful monitoring and that clear criteria would need to be established for the allocation of colours.

*Question 10*

We agree that the requirements continue to be appropriate.

### 3.3 Recommendations from the Intermediary Market

*Question 15*

We agree with the proposals and have addressed this in the Investment Business Regulations.

### 3.4 Errors Handling

*Question 16*

We agree with the approach to errors handling and believe it will lead to an improvement in the way any errors are addressed.

*Question 17*

No measure can ever claim to completely eradicate errors but we believe it is a useful step in the right direction.

*Question 18*

We believe the timeframe is appropriate.

*Question 19*

This provision is, we believe, somewhat unclear and should be clarified. If it is intended that, after the six months allowed (per Chapter 11, 3), there exists an unresolved error which is not likely to be resolved within one further month an obligation to inform the Central Bank arises, then we agree that the additional one month timeframe is appropriate.

We believe that guidance should also be provided in relation to what might constitute an error that has been “resolved”.

### 3.5 Unsolicited Calls

*Question 20*

In general we believe these are appropriate though perhaps not helpful for the consumer as many will not be at home during those hours. There are extensive rules applicable to chartered accountants in relation to this issue; these are set out in the Investment Business Regulations and in the Code of Ethics.

*Question 21*

We believe the proposals in relation to protection policies will enhance consumer protection.

### 3.6 Small Print

*Question 24*

We agree with the definition of 'key information'.

*Question 25*

We do not think that the Code should go further. We think small print has a use; however it should not be used to bring essential information to the attention of the consumer.

## 3.7 Sectoral Commitments

*Question 27*

We believe that availability of a particular product should not be contingent upon the purchase of another product. However we believe that it is reasonable that a client be made aware that buying a product on its own may be more expensive than within a bundle which may be discounted.

If a client exits a bundle he should be permitted to retain any of the products he chooses but should be made aware of any cost implications that arise when purchasing the products.

## 4 Further Comments/Observations

### *4.1 Advertising*

CARB's Investment Business Regulations contain a requirement that advertisements must be approved by, for example, the principal of a firm. We would suggest that the Central Bank consider the inclusion of a similar provision in the Consumer Protection Code as we believe it may encourage a greater adherence to the provisions of the Code.

# Institute of Chartered Accountants in Ireland

# Investment Business Regulations - Investment Intermediaries Act 1995

# Volume II - Interpretation, authorisation and discipline

# Updated 7 March 2007

**Institute of Chartered Accountants in Ireland**
**Investment Business Regulations - Investment Intermediaries Act 1995**
**Volume II - Interpretation, authorisation and discipline**

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**Preface**

Authorised firms should be aware that the following Regulations have been adopted by the Institutes for the purpose of discharging their responsibilities under the Investment Intermediaries Act, 1995. To the extent that if there is any conflict between these Regulations and the Act, the Act will prevail.

The format of the regulations is such that Guidance has been placed immediately underneath the regulation to which it relates. However, if the guidance is particularly lengthy it has been placed in a Schedule at the end of the relevant Chapter. Guidance, including that contained in Schedules, has been boxed and shaded to distinguish it clearly from regulation.

The regulations have been printed in two volumes. The first contains regulations and guidance on authorisation and discipline which though essential, you may only need to refer to from time to time. The second volume contains the conduct of business rules which may be of use on a day to day basis.

Copies of the regulations will be provided free of charge on the basis of one per firm and one per office. Additional copies will be available at a cost of £10 per copy (set of two booklets).

If you have any questions about these regulations, please contact your authorising Institute on the following numbers:

| | |
|---|---|
| The Institute of Chartered Accountants in England and Wales | 01908-546337 |
| The Institute of Chartered Accountants of Scotland | 0131-3470100 |
| The Institute of Chartered Accountants in Ireland | 028-90231541 |

**Purpose of these regulations**

These regulations are issued by the *Institutes* under the Investment Intermediaries Act 1995. They come into force on 7 March 2007.

These regulations contain a lot of detail, some of which can appear complicated. However, it may help if you bear in mind what these regulations are trying to achieve. In summary, the regulations aim to make sure that *firms* provide their *clients* with a service which:

- puts the *client's* best interests first;
- is within the professional competence of the *firm*;
- provides for the *client's* assets to be held apart from those of the *firms*; and
- is properly recorded and documented.

**The Principles of the Act and The Guide to Professional Ethics**

These regulations should be read along with the *principles* (contained in section 37 of the *Act*) and the *Guide*. However, neither the *principles* nor the *Guide* form part of these regulations and contravening the *principles* or the *Guide* is not itself a breach of these regulations.

For disciplinary procedures under Section 3 of Chapter 2, and in deciding whether a complaint is proved, the *Disciplinary* or *Discipline Committee* may consider the *principles* and the *Guide*.

The *principles* form a universal statement of the standards expected from practitioners carrying on *investment business*. So they perform a parallel role to the *Guide*.

The *principles* apply to *investment business* carried out by the *firms*. They are not exhaustive and complying with them does not mean that you will automatically comply with these regulations and vice versa.

For ease of reference, the *principles* are set out below:

**1. Integrity**

A firm should observe high standards of integrity and fair dealing.

**2. Skill, Care and Diligence**

A firm should act with due skill, care and diligence.

**3. Market Practice**

A firm should observe high standards of market conduct. It should also, to the extent endorsed for the purpose of this principle, comply with any code or standards as in force from time to time and as it applies to the firm either according to its terms or by rulings made under it.

**4. Information about Customers**

A firm should seek from customers it advises or for whom it exercises discretion any information about their circumstances and investment objectives which might reasonably be expected to be relevant in enabling it to fulfil its responsibilities to them.

**5. Information for Customers**

A firm should take reasonable steps to give a customer it advises, in a comprehensible and timely way, any information needed to enable him to make a balanced and informed decision. A firm should similarly be ready to provide a customer with a full account of the fulfilment of its responsibilities to him.

**6. Conflicts of Interest**

A firm should either avoid any conflict of interest arising or, where conflicts arise, should ensure fair treatment to all its customers by disclosure, internal rules of confidentiality, declining to act, or otherwise. A

firm should not unfairly place its interest above those of its customers and, where a properly informed customer would reasonably expect that the firm would place his interest above its own, the firm should live up to that expectation.

**7. Customer Assets**

Where a firm has control of or is otherwise responsible for assets belonging to a customer which it is required to safeguard, it should arrange proper protection for them, by way of segregation and identification of those assets or otherwise, in accordance with the responsibility it has accepted.

**8. Financial Resources**

A firm should ensure that it maintains adequate financial resources to meet its investment business commitments and to withstand the risks to which its business is subject.

**9. Internal Organisation**

A firm should organise and control its internal affairs in a responsible manner, keeping proper records, and where the firm employs staff or is responsible for the conduct of investment business by others, should have adequate arrangements to ensure that they are suitable, adequately trained and properly supervised and that it has well-defined compliance procedures.

**10. Relations with Regulators**

A firm should deal with its regulators in an open and co-operative manner and keep the regulator promptly informed of anything concerning the firm which might reasonably be expected to be disclosed to it.

## Chapter 3 - Conduct of investment business

### Introduction

#### *Objectives*

This chapter contains the regulations for the conduct of all *investment business* undertaken by a *firm* for its *clients*, except for the regulations for the conduct of *investment business* relating to *corporate finance activities* undertaken for a *corporate finance client*, which are in Chapter 5.

Further, Chapter 4 is relevant if a *firm* holds *investment business clients' money* or *custodial investments* or funds under *discretionary management* on behalf of its *client*.

#### *Specific objectives*

1 **General requirements** (regulations 3.01 to 3.03)

There should be a clear understanding between the *firm* and its *client* about:

- the status and identity of the *client*; and
- the *firm's authorisation* to conduct *investment business*.

2 **Advertising and marketing** (regulations 3.04 to 3.12)

Any *investment advertisement* issued by the *firm* should be fair and not misleading, and business promotion should not put too much pressure upon *clients*.

3 **Using *authorised third parties*** (regulation 3.13)

If the services of an *authorised third party* are used, the duties of each party should be clearly defined. The use of those services should clearly be for the benefit of the *client*. The different and

separate responsibilities of the *firm* and the *authorised third party* should be clearly understood by the *client*, the *firm* and the *authorised third party*, and the *client* should be informed when an *authorised third party* has been used.

4 **Engagement letters and fees** (regulations 3.14 to 3.17)

The *client* and the *firm* should be in full agreement about the nature, scope and terms of the services to be provided by the *firm*.

5 **Independence and conflicts of interest** (regulations 3.18 to 3.28)

The *firm* must give the *client* the best service it can. Independence must be maintained and conflicts of interest avoided. Therefore the *firm* must inform the *client* of any commission it may receive and the *client* must approve any retention of commission by the *firm*.

6 **Suitability and advising *clients*** (regulations 3.29 to 3.37)

All *investment business* carried on for a *client* should be specifically tailored to that *client's* circumstances, take into account investment opportunities currently available in the market and be understandable to the *client*.

7 **Dealing for *clients*** (regulations 3.38 to 3.41)

The *firm* should carry out transactions or arrangements, including buying and selling *investments*, in the *client's* best interests.

8 ***Clients'* assets** (regulations 3.42 to 3.47)

The *firm* should keep *clients'* assets (including documents of title) which are under its control safe and secure and separately identifiable.

9 **Information to *clients*** (regulations 3.48 to 3.54)

The *firm* should keep the *client* informed of the *investment business* carried on for him or her by the *firm*, and of any assets held by the *firm*, and the *firm* should keep appropriate records.

10 **Insider dealing** (regulations 3.55 to 3.57)

Information given to the *firm* should not be used for insider dealing.

11 **Cessation of investment business** (regulation 3.58)

Any withdrawal by the *firm* from *investment business* should be done in an orderly way.

***Sequence of events***

On this basis, a typical sequence of events when doing business with a *client* would be to:

- get and record information on the *client's* personal and financial situation (regulation 3.29);
- establish the *client's* investment objectives (regulation 3.29);
- draw up an engagement letter (regulations 3.14 and 3.15);
- get the *client's* agreement to the letter including agreement to the retention of commission where appropriate (regulation 3.14);

- give and record advice and risk warnings (regulations 3.30 to 3.34);
- disclose any commission which will be received (regulations 3.23 to 3.25);
- record the *client's* instructions and that they have been passed on to brokers etc (regulation 3.51);
- inform the *client* of any transactions carried out (regulation 3.48);
- record any handling of *title documents* (regulations 3.42 to 3.47).

**Section 1 - General requirements**
***Objective***

There should be a clear understanding between the *firm* and its *client* about:

- the status and identity of the *client*; and
- the *firm's authorisation* to conduct *investment business*.

***Business letters***

**3.01** (a) (For *firms authorised* by the Institute of Chartered Accountants in England and Wales.)

(1) Subject to sub-paragraphs (2) and (3), all stationery relating to *investment business* sent by a *firm* must bear the following text: "Authorised by the Institute of Chartered Accountants in England and Wales to carry on investment business".

(2) If the *firm* has also been registered by the *Institute* to carry on audit work, the stationery may bear the following text: "Registered to carry on audit work and authorised to carry on investment business by the Institute of Chartered Accountants in England and Wales".

(3) If the *firm* uses a trading name the text must start: "(Trading name) is a trading name of (name of *firm*), which is . . . . " followed by the applicable wording in (1) or (2) above.

(b) (For *firms authorised* by the Institute of Chartered Accountants of Scotland.)

(1) Subject to sub-paragraphs (2) and (3), all stationery relating to *investment business* sent by a *firm* must bear the following text: "Authorised by the Institute of Chartered Accountants of Scotland to carry on investment business".

(2) If the *firm* has also been registered by the *Institute* to carry on audit work, the stationery may bear the following text: "Registered to carry on audit work and authorised to carry on investment business by the Institute of Chartered Accountants of Scotland".

(3) If the *firm* uses a trading name the text must start: "(Trading name) is a trading name of (name of *firm*), which is . . . . " followed by the applicable wording in (1) or (2) above.

(c) (For *firms authorised* by the Institute of Chartered Accountants in Ireland.)

(1) Subject to sub-paragraphs (2) and (3), all stationery relating to *investment business* sent by a *firm* must bear the following text: "Authorised by the Institute of Chartered Accountants in Ireland to carry on investment business".

(2) If the *firm* has also been registered by the *Institute* to carry on audit work, the stationery may bear the following text: "Registered to carry on audit work and authorised to carry on investment business by the Institute of Chartered Accountants in Ireland".

(3) If the *firm* uses a trading name the text must start: "(Trading name) is a trading name of

(name of *firm*), which is . . . . " followed by the applicable wording in (1) or (2) above.

Guidance:

A *firm* may continue to use trading names and separate *authorisation* will not be necessary. However, if there are second or further partnerships, even comprising the same partners as in the *firm*, separate *authorisations* will be needed for those partnerships. These would be parallel partnerships and not trading names. The details of any trading names being used must be passed to the *secretariat* of the *Institute* as the Central Bank's Central Register holds details of the trading names of *firms*.

***Overseas business***

**3.02** Not applicable for IIA purposes.

Guidance:

The meaning given by the *Act* to the term investment business is explained in Schedule 1 to Chapter 1. See also the guidance to regulation 1.05.

**Handling cheques made payable to third party product providers**

**3.03** Where a *firm* acts as a postbox and passes a cheque from a client made payable to a product provider it must apply regulations 4.40 – 4.42 in relation to the issue and retention of receipts.

*Guidance: A firm must ensure that a receipt is issued in all cases including where a firm acts as a postbox passing on a cheque made payable to a third party product provider to ensure that an indictable offence has not been committed.*

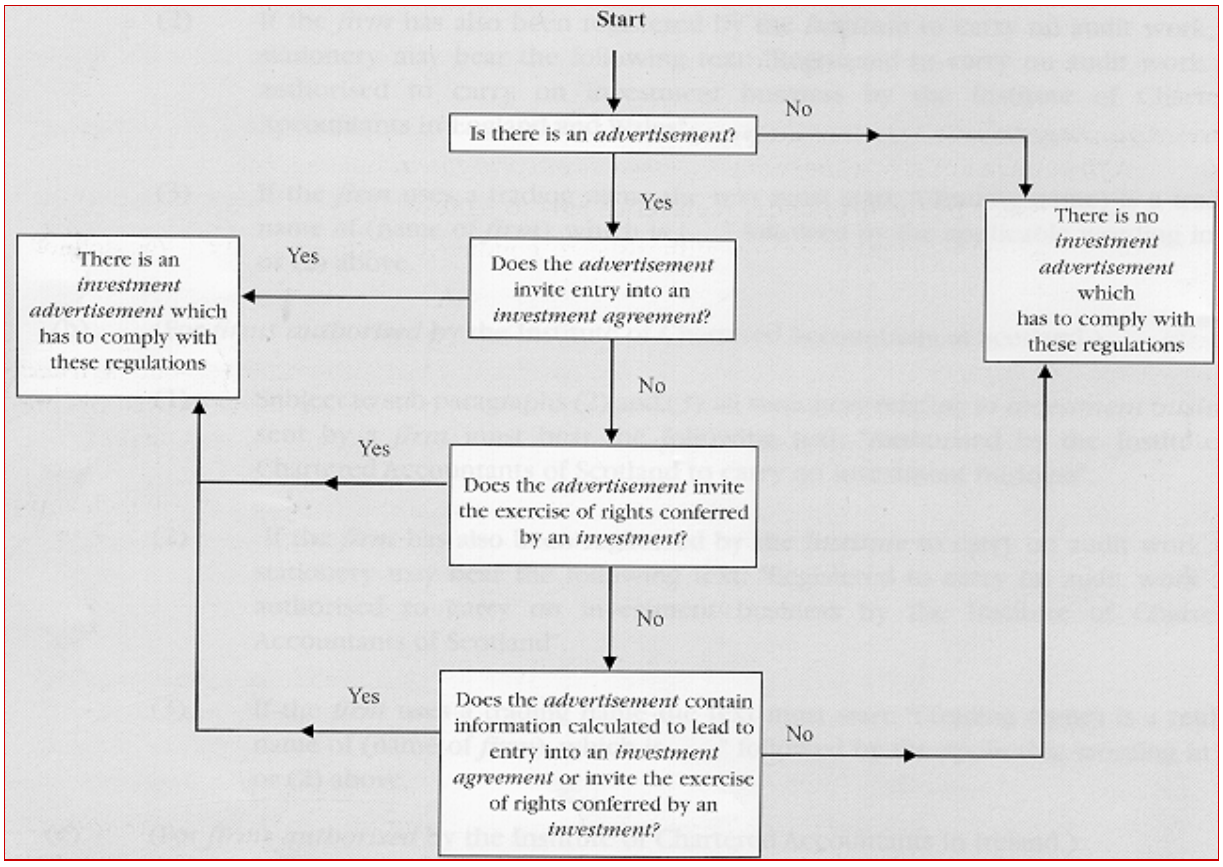
**Section 2 - Advertising and marketing**

***Objective***

Any *investment advertisement* issued by the *firm* should clearly show that investment business is carried on as an incidental activity, it should be fair and not misleading, and business promotion should not put too much pressure upon *clients*.

Guidance:

The following diagram is intended to help *firms* decide whether a document or other material is an *investment advertisement* and is therefore subject to regulations 3.04 to 3.11.




Schedule 1 to Chapter 3 contains guidance on *investment advertisements*.

***Issue of investment advertisements by the firm***

**3.04** A *principal* of a *firm* must approve an *investment advertisement* before it is issued or caused to be issued by the *firm*. The *firm* must keep a copy of the *advertisement*, endorsed with the approval, for three years.

**3.05** (a) A *firm* must take reasonable steps to ensure that any *investment advertisement* it issues or

causes to be issued is fair and not misleading. The *firm* must also comply with Schedule 2 to Chapter 3.

(b) A *firm* will be taken to act in conformity with this regulation as regards information to the extent that it can show that it reasonably relied on information provided to it in writing by an independent third party whom it reasonably believed to be competent to provide that information.

**3.06** A *firm* must not issue an *investment advertisement* which promotes a *collective investment scheme* unless it is a scheme within the meaning of Section 2 (c) of the definition of an *investment instrument* of the *Act*.

***Issue of investment advertisements***

**3.07** Not applicable for IIA purposes.

**3.08** If a *firm* issues an *investment advertisement* relating to an *investment* where any transaction in or performance of the *investment* has been guaranteed, it must ensure that the information set out in regulation 3.36(b) is included.

Guidance: See the guidance to regulation 3.36.

***Overseas persons' advertisements***

**3.09** Not applicable for IIA purposes.

***Providing advertisements issued by others***

**3.10** A *firm* must not give a *client* any *investment advertisement* unless it is:

- issued by the *firm* under regulations 3.04 to 3.09; or
- issued by another person authorised to conduct investment business (as defined in the *Act*).

***Direct offer advertisement***

**3.11** (a) A *firm* must take reasonable steps to ensure that it does not issue a *direct offer advertisement* (as defined in paragraph (b)) for selling *investments* or providing *investment business* services to a *private investor* unless the *advertisement*:

- gives adequate and fair (considering the regulatory protections which apply and the relevant market) information about:
- the *investments* or *investment business* services;
- the terms of the offer; and
- the risks involved;

and

- offers *derivatives* or *warrants* only where the *firm* itself issues the *advertisement* and does so only to a *client* for whom it reasonably believes that the *investment* is, or services are, suitable.

(b) In this regulation, a *direct offer advertisement* means an *investment advertisement* (including a pre-printed or off-the-screen *advertisement*) which:

- identifies and promotes a particular *investment* or particular *investment business* services;
- contains:

  – an offer (by the *firm* or another person) to enter into an *investment agreement* with anyone who responds to the *advertisement*; or

– an invitation to anyone to respond to the *advertisement* by making an offer (to the *firm* or another person) to enter into an *investment agreement*;

and

- specifies the way or indicates a form in which any response is to be made (for example, by providing a tear-off slip).

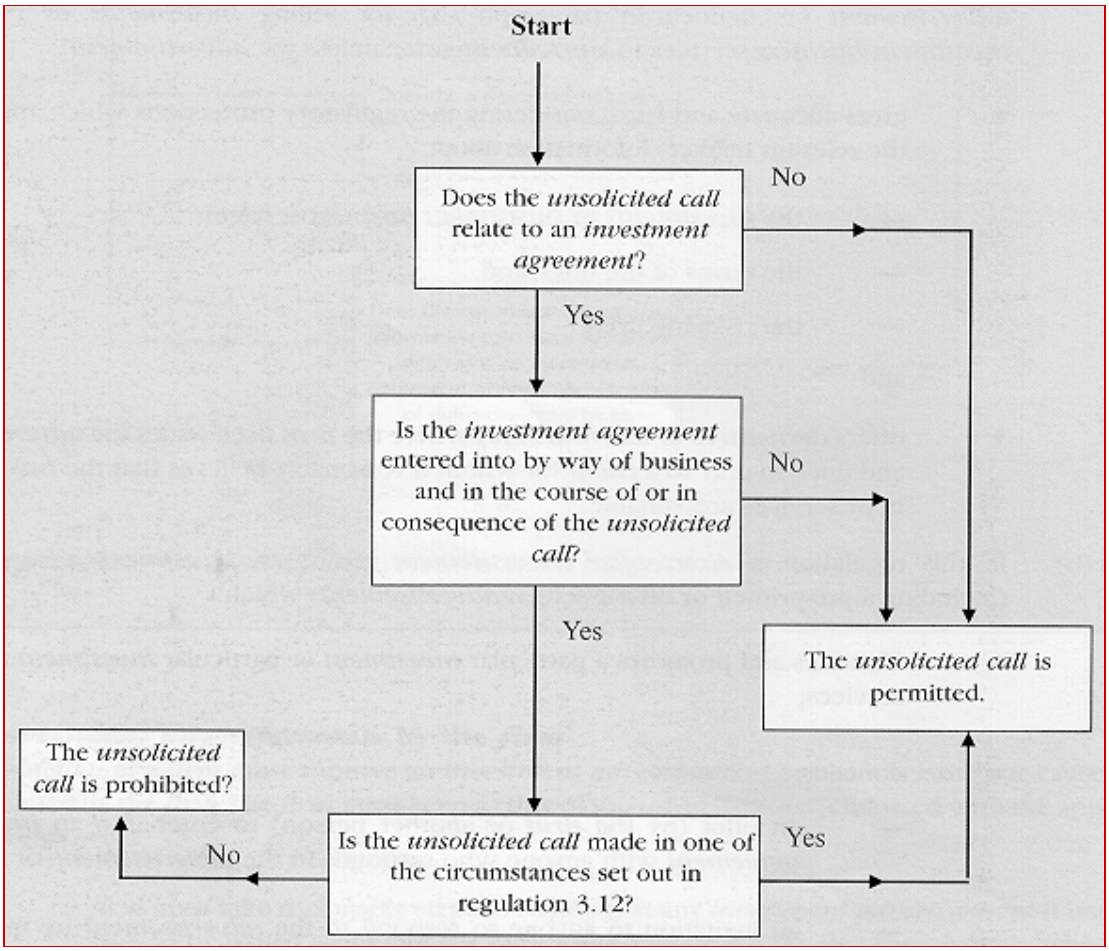
***Unsolicited calls***

**3.12** A *firm* may make an *unsolicited call*:

- to *non-private investors*;
- in relation to a *regulated collective investment scheme* or an *investment trust savings scheme* which is not a *higher volatility fund*;
- to any *client* of the *firm* in relation to an investment activity which falls within dealing, arranging deals, managing *investments*, investment advice, managing *collective investment schemes* by third parties if allowed under the terms of an engagement letter with the *client* (regardless of the nature of the services previously provided to that *client*);
- advice given by persons in the course of the carrying on of any profession or business not otherwise constituting the business of the firm, where the giving of such advice is a necessary part of other advice or services given in the course of carrying on that profession or business, and where the giving of investment advice is not remunerated or rewarded separately from such other advice or services.
- if the *firm* can show that it reasonably believed that at the time of the *unsolicited call*, any of the circumstances listed above existed.

Guidance

(1) Firms must first decide whether the call they are making is an *unsolicited call*. If so, the following diagram is intended to help *firms* decide whether that call is allowed under regulation 3.12.




These regulations generally apply to the conduct of *investment business* and, as explained in Schedule 1 to Chapter 1.

If the *firm* is making the *unsolicited call* for a *client*, the *unsolicited call* must be allowed by regulation 3.12 (which applies to the *firm*).

**Section 3 - Using authorised third parties**

***Objective***

If the services of an *authorised third party* are used, the duties of each party should be clearly defined. The use of those services should clearly be for the benefit of the *client*. The different and separate responsibilities of the *firm* and the *authorised third party* should be clearly understood by the *client*, the *firm* and the *authorised third party*, and the *client* should be informed when an *authorised third party* has been used. The *authorised third party* can be an *Independent Intermediary* which researches whole of market or in certain circumstances a *Multi Agency Intermediary* (MAI) which limits the research it carries out to the product providers from which it holds a Letter of Appointment.

Using an *Independent Intermediary* as an *authorised third party*

**3.13** (a) A *firm* does not have to comply with regulation 3.38 (best execution) if an *Independent Intermediary* carries out or arranges a transaction for the *client* and has confirmed in writing that it will be responsible for complying with the rules on best execution binding on it (under the

*Act*) as an authorised person.

(b) A *firm* does not have to comply with regulations 3.29 (know your client and suitability of *investment*), 3.31 (best advice), 3.32 (*client's* understanding of risk) and 3.33 and 3.34 (*packaged products*) if:

- an *Independent Intermediary*, either gives the relevant advice or provides the relevant service directly to the *client*, treating the *client* as its own client or customer; or
- the *firm* gives to the *client*, or acts upon, an *Independent Intermediary's* advice which the *firm* obtained by acting as a disclosed agent for a named *client* and:
  - the engagement letter with the *client* states that the *firm* may take the advice of an *Independent Intermediary* in this way and the *firm* tells the *client* that it has done so;
  - the *Independent Intermediary* has confirmed in writing to the *firm* that it will treat the *client* as its own client and that it will obtain all information from the *client* in order to enable it to comply with those regulations.

Guidance:

(1) See Schedule 3 to Chapter 3 for guidance on using *Independent Intermediaries.*

(2) See the guidance to regulation 3.18 for an explanation of *Independent Intermediaries.*

**Section 4 - Engagement letters and fees**

The *client* and the *firm* should be in full agreement about the nature, scope and terms of the services to be provided by the *firm*.

***Agreeing the engagement letter***

**3.14** A *firm* may carry on *investment business* for a *client* only as set out in an engagement letter which has been agreed with the *client*.

Guidance:

(1) Regulation 3.14 does not apply where generic advice is given. Generic advice is also excluded from regulations 3.29 to 3.34.

(2) The engagement letter is agreed if:

- the *client* signs it. This is by far the clearest way of making sure that the *client* confirms the terms on which the *firm* will act. Engagement letters for *discretionary management* and *contingent liability transactions* **must** be signed by the *client* (see regulation 3.16(a));
- the *client* receives it before the *firm* starts to act, and the *client* does not object to the terms.

(3) Engagement letters sent by a *sole practitioner* should draw the *client's* attention to the arrangements for continuing the practice if the *sole practitioner* cannot run it. *Alternates* are covered in regulation 2.30.

(4) The *client* should not be put under pressure by the *firm* to accept terms which may not be in accordance with his or her wishes. It may not be enough to hand the letter to the *client* for signature and return there and then.

(5) It is good practice for *firms* to ensure from time to time as appropriate that the *client* is aware of and understands the terms of the letter, particularly if the *client* only carries out occasional transactions with the *firm*.

(6) If the engagement letter becomes out-of-date, amendments should be agreed or a new letter issued and agreed. Engagement letters should be regularly reviewed.

***Contents of the engagement letter***

**3.15** The engagement letter must set out:

- in adequate detail, the basis of the services to be provided by, and payment (including commission) to be received by the *firm*;
- the name and address of the *firm*; and
- a statement that the *firm* gives independent advice.

Guidance:

(1) Model engagement letters for *investment business* services, which should be adapted as appropriate, are set out in annexes A to E of Schedule 4 to Chapter 3.

(2) If the *firm* is to *provide portfolio review* services to the *client*, see regulation 3.54 and Schedule 12 to Chapter 3.

(3) If, by agreeing to the engagement letter, the *client* will lose his or her legal rights of cancellation for units in *regulated collective investment schemes* acquired under the letter, he or she should be warned before the letter is agreed.

(4) One of the ways of informing and protecting investors is for *firms* to make clear to *clients* that the *firm* acts as an Independent Intermediary, rather than as a tied agent (whose services are confined to the products of one organisation or connected group of organisations). An Independent Intermediary is expected to advise its *client* having considered products generally available in the market.

***Discretionary management and contingent liability transactions***

**3.16** (a) Before a *firm*:

- manages a portfolio on a discretionary basis; or
- carries on, with or for a *client*, *investment business* which relates or is intended to relate to *contingent liability transactions*,

the *firm* must ensure that a copy of the engagement letter has been sent to the *client* and the *client* has returned a signed copy.

(b) A *client* for whom a portfolio is *managed on a discretionary basis* may give a *firm* specific authority to include within the portfolio any particular *investment* or kind of *investments* (subject to regulation 1.11), but otherwise the portfolio must be restricted to *readily disposable investments* and to any other asset which can be sold easily and to freehold and leasehold property. The *firm* must, before concluding the agreement for *discretionary management*, warn the *client* of the risks involved in the assets which may be subject to *discretionary management*.

Guidance:

(1) *Discretionary management* agreements are necessary if a *firm* has control of all or part of a *client's investments* and has the *client's* authority to change the form of the *investments* or cash without specifically consulting the *client*. This includes broker funds (or broker bonds), although see guidance note (5) to regulation 3.18. Only *firms* with category ID *authorisation* may enter into *discretionary management* agreements: see regulation 1.08.

(2) A *firm* may hold a *client's investments*, without a *discretionary management* agreement, if they are held only for safekeeping. In such cases the activity will not be investment management, but the regulations relating to the holding of *clients' money* (see Chapter 4) and *custodial investments* (see regulations 3.42 to 3.47) must be complied with.

(3) See paragraph 4 of Schedule 7 to Chapter 3 for information on risk warnings for *discretionary management*.

(4) If there is no specific authority, *investments* within a portfolio must be restricted to *readily disposable investments* and to assets which can be sold easily or freehold and leasehold property. There must be no power to invest in *contingent liability transactions* - such as certain transactions in futures, options or contracts for differences - nor to commit the *client* to underwriting, unless this is allowed by the agreement.

***Charging for services***

**3.17** A *firm* must not make unfair or unreasonable charges for its services.

Guidance: See Statement 1.210 or Statement 10 of the *Guide*.

**Section 5 - Independence and conflicts of interest**

***Objective***

The *firm* must give the *client* the best service it can. Independence must be maintained and conflicts of interest avoided. Therefore the *firm* must inform the *client* of any commission it may receive and the *client* must approve any retention of commission by the *firm*.

***Independence***

**3.18** A *firm* must always be, and be seen to be, free of any threat to its independence. It must not enter, and must require its *principals*, *employees* and its *associates* (and the *principals* and *employees* of the *associates*) not to enter, into any association or arrangement with any person which may result in the loss of the *firm's* objectivity. In particular, a *firm* must not be constrained or induced to:

- recommend transactions in some *investments* but not others, with some persons but not others, through some agents but not others, unless obliged to do so by law or because of the *client's* particular circumstances; or
- refer or introduce any *client* or *non-investment business client* to any person who is not an *Independent Intermediary* or in certain circumstances and in accordance with Regulation 3.19, a *Multi Agency Intermediary* so that person can either:

  – give any investment advice to that *client* or *non-investment business client*; or
  – perform any other *investment business* services for that *client* or *non-investment business client* other than the particular transaction which the *firm* has recommended.

Guidance:

(1) See *Principle* 6 set out at the beginning of these regulations and Section 1 Part A 110 Integrity, 120 Objectivity and Part B 220 Conflicts of Interest of the Code of Ethics. A *firm* carries on

*investment business* as an *Independent Intermediary*. Independence is central to the professional ethics expected of *Institute* members and their conduct of *investment business*. In providing best advice or ensuring best execution a firm must be wary of any situation which casts doubt on its independence. See also Section 1, Part B 241 Agencies and Referrals of the Code of Ethics.

(2) These Sections in the Code of Ethics prevent a firm entering into a "soft commission agreement". This is an agreement under which a *firm* receives goods or services in return for an assurance that at least a certain amount of business would be put in the way of another person.

(3) Unless the *client* is an *execution-only client* (see regulation 3.37), the *firm* may not introduce a *client* or a *non-investment business client* to another investment product organisation unless it has first taken account of the *client's* circumstances and advised him or her on the suitability of the relevant *investments* (see the guidance to regulation 3.29). In other words, compliance responsibility lies with the *firm*. However, when a *client* has given instructions, after receiving advice from the *firm*, to buy, say, a particular *policy*, the *firm* may carry out that transaction with the provider and receive commission on it (see also regulations 3.23 to 3.27). In particular a firm must be aware that it must advise a client where it believes that the product chosen by the client is unsuitable.

(4) *Firms* may not be tied agents of a unit trust company. However, they may have agreements with those organisations which simply allow *firms* to receive commission on transactions through the organisations concerned - as long as those transactions are arranged after the *firm* has given advice to the *client*.

(5) *Firms* should note that regulation 3.18 applies to their activities as regards broker funds. The number of *firms* marketing these products is small. Those *firms* intending to operate broker funds should contact the *secretariat* with an explanation of the products they intend to offer. They should be able to demonstrate that the services offered by using these funds are compatible with their role as independent financial advisers.

(6) See also regulation 3.26 on benefits in kind.

Using a *Multi Agency Intermediary* as an *authorised third party*

**3.19** A firm can refer a *client* to a *Multi Agency Intermediary (MAI)* provided the following requirements are fully complied with:-

(a) Before the *firm* refers a client to an *MAI* for advice the *firm* must:-

i. ensure that it has complied with the requirements of regulations 3.29 (know your client and suitability of *investment*), and 3.31 (best advice);

ii. have carried out adequate research to ensure that the *MAI* chosen holds letters of appointment which are appropriate to the *client's* requirements

(b) Before the *firm* enters into an arrangement with a *MAI* or refers a *client* the *firm* must satisfy itself that:-

i. that the *MAI* selected holds letters of appointment which cover a high proportion of the market providers, including the leading providers, of the product which meets the *client's* needs; and

ii. ensure, on an ongoing basis and not less frequently than once every 3 months, that the letters of appointment held by the *MAI* meet the requirements in i. above.

Guidance: It is suggested that a *firm* should carry out adequate checks with the *MAI* and of the market to satisfy itself that the *MAI* holds appropriate letters of appointment. These checks

should establish that the *MAI* can advise on products that cover a large percentage of the market and include the major providers of the product selected in meeting the *client*'s needs. It is not possible to quantify this, however, to meet this requirement it would be expected that the *MAI* holds letters of appointment which cover 70% of the relevant market. If the *firm* determines that a referral should be made to a *MAI* which holds letters of appointment for less than this percentage of the market he should ensure the reason for the referral is recorded fully.

(c) The firm should enter into a formal written arrangement with each *MAI* to which it refers clients. As part of that formal arrangement the *firm* must ensure that the *MAI* provides undertakings that the *MAI*:-

i. will provide information to the *firm* in relation to the letters of appointment held at the time of the agreement; and

ii. will inform the *firm* of any substantive changes to the letters of appointment held.

(d) The *firm* must provide appropriate information to the *client*;

i. The engagement letter to the *client* must adequately explain the referral is to a *MAI* by:

a. making it clear that the advice which will be received will be restricted advice,

b. outlining the product or products which have been identified as meeting the *client's* needs,

c. providing a list of the relevant product providers for which letters of appointment are held and,

d. informing the *client* that the *firm* has identified that those product providers cover the appropriate share of the market.

ii. The *client* should also be informed in the letter of engagement which outlines the referral that the compliance responsibility for advice given in relation to the products selected thereafter remains the responsibility of the *MAI.*

(e) The *firm* must retain appropriate information on each *client* file where a referral is made and which would include details of the referral and the reason for it.

(f) A firm should be aware that it cannot refer a *client* to an *MAI* for "blanket" or all encompassing advice, for example the *firm* has already determined the need for pension advice following the completion of the know your *client* form.

***Material interests and conflicts of interest***

**3.20** (a) If a *firm* knows, after making proper enquiries, that it has a material interest or any conflict of interest in a transaction, it must, when making a recommendation or before carrying out that transaction, disclose the nature of the interest or conflict to its *client*. No declaration is required if disclosure would be illegal or would be a breach of any duty owed to another person. In those circumstances a *firm* must ensure it treats the *client* fairly or it must decline to act.

(b) If none of the relevant individuals involved in the transaction for the *firm* acts with knowledge, then the *firm* will not be considered to act with knowledge.

(c) If a declaration about an interest in a transaction must be given, the *client* must receive the declaration and agree in writing to the transaction before it is carried out.

(d) If the *firm* complies with regulations 3.23 to 3.27, as appropriate, then regulation 3.20 will not apply to the relevant commission or other benefit received or to be received by a *firm* or its *associate*.

Guidance:

(1) See *Principle* 6 and Statement 1.204 or Statement 4 (Conflicts of Interest) of the *Guide*. As regards chinese walls, see paragraph 4.0 of Statement 1.203 or Statement 3 (Corporate Finance Advice) and paragraph 5.3 of Statement 1.204 or Statement 4 (Conflicts of Interest) of the *Guide*.

(2) If declaring an interest would be illegal or a breach of duty to another person, the *firm* may act as long as it has ensured the *client* will be treated fairly. In some circumstances this may involve ignoring information known to the people dealing with the *client*, although in many cases the *firm* will have to refuse to act.

(3) *Firms* should know that they still have to comply with the general law when they act as a fiduciary and so they have duties to *clients* to avoid conflicts. Compliance with these regulations does not necessarily mean a *firm* complies with the general law, and vice versa. In particular, the following should be noted.

- By law, if the *firm* is in a fiduciary relationship with its *client* and there is a conflict of interest (or the *firm* owes a conflicting duty to another *client*), the only courses of action which avoid liability with any certainty are:
  - to decline to act, if that does not itself result in liability; or
  - to disclose the conflict and obtain the *client's* agreement for the *firm* to continue to act. This is only possible if disclosing the interest is not a breach of confidence to some other person. In certain circumstances, a general disclosure of the conflict in the engagement letter may be sufficient, but if the position is of concern, take legal advice.

(4) See also guidance to regulation 3.21.

**3.21** Under regulations 3.18 and 3.20, where the persons concerned have agreed:

(a) the *firm* will not be considered to be in breach of these regulations if it maintains an established arrangement under which information the *firm* receives in the course of carrying on one part of its business is kept (in certain circumstances) from persons it deals with in the course of carrying on any other part of its business (known as a chinese wall). In those circumstances the information may be kept from the *client* and from the persons in that other part of the business; and

(b) information may be kept from the *client* where this is necessary under an established arrangement between different parts of the business (of any kind) of a *firm* and its *associates*. This does not affect any requirement to transmit information which may arise apart from these regulations.

Guidance:

(1) Regulation 3.21 can only be taken advantage of if a chinese wall has been implemented. However, it should be noted that chinese walls may not be effective to avoid conflicts of interest where they arise as a matter of general law. Further, *firms* should not operate a chinese wall which limits the availability of information to those carrying out financial reporting.

(2) The following courses of action (which are a "defence" under regulation 3.21) should not be relied upon as adequate treatment of conflicts of interest at general law:

- to act regardless of the conflict, but ensure the *client* is treated fairly;
- to shelter the conflict behind a chinese wall;

- to rely on the fact that the relevant individuals did not have knowledge.

Paragraph 2.4 of the model engagement letter in annex A of Schedule 4 to Chapter 3 contains a provision under which the *client* agrees to the *firm* using chinese walls. *Firms* should note that this provision may not be effective in all circumstances and, if in doubt, should take legal advice.

(3) Regardless of whether disclosure can be made under paragraph (a) of regulation 3.20, the *firm* must continue to ensure the *client* is treated fairly by complying with the rules on best execution, suitability and inducements.

***Own account dealing***

**3.22** A *firm* must not act collectively for a *client* or *clients* and on its own account. In no circumstances may the *firm* allocate to a *client* a bargain originally made for the *firm's* own account or vice versa.

***Commission***

**3.23** If a *firm* receives commission (or other benefit) because of acting for or giving advice to a *client*, or introduces a person to an *associate* who acts for or gives advice to that person and receives commission (or other benefit) must be accounted for by the *firm* to the *client* or person unless:

- the engagement letter allows the *firm* to keep the commission; or
- the person's contract with the *associate* allows the *associate* to keep it; or
- the *client* agrees, after being fully informed of the amount and nature of the commission, that the *firm* can keep it.

**3.24** (a) If

- advice given to a *client* by a *firm* or its *associate* is such that, if acted upon, it may result in any commission or other benefit being received by the *firm* or its *associate*; or
- a firm introduces a person to its *associate* for advice which, if acted upon, may result in any commission or other benefit being received by the *associate*,

the *client* must be informed at the time the advice is given of that fact and as much as is known of the amount or value and terms of the commission.

(b) Subject to paragraph (c), the amount or value and the terms of the commission must be disclosed in writing in a way which:

- is fair, clear and not misleading; and
- shows the different forms of commission (initial or renewal) separately, wherever appropriate, and indicates the timing for payments.

(c) The *firm* must inform the *client* or relevant person of the commission as soon as reasonably possible once the amount or value and terms are known. The *firm* does not need to disclose the actual commission received if the difference is not more than €126 from the amount previously disclosed.

(d) Renewal commission received by the *firm* in relation to a particular *investment* does not need to be disclosed or accounted for if the *firm* cannot find the *client's* name and address after making reasonable enquiries.

**3.25** (a) The *firm* must disclose commissions or other benefits received by an *associate* (under regulation 3.23 or 3.24 only if:

- the particular transaction which generated the commission resulted from advice given by, or an introduction made by, the firm, and

- the *firm* knows that the *associate* has not disclosed to the *client* the receipt of that commission.

(b) Not applicable for IIA purposes.

Guidance:

(1) A *firm* may keep commission or other benefit received from persons other than the *client* if this is disclosed to and authorised by the *client*. The phrase 'other benefit' includes any fee, reward or inducement. To avoid doubt, where these regulations and guidance refer only to 'commission', this includes any 'other benefit'.

(2) Not applicable for IIA purposes.

(3) If the *firm* receives commission in the course of non-*investment business*, it should refer to paragraph 3.1 of Statement 1.204 or Statement 4 of the *Guide* and to the clients' money regulations. *Firms authorised* by the Institute of Chartered Accountants in England and Wales should also refer to the guidance for Members in Practice on Accounting for Commission (Statement 1.314 of Volume I of the Members' Handbook).

(4) Regulation 3.23 takes account of legal advice the *Institute* has received on the position of *firms* under general law if they receive any commission. The *firm* must either:

- account to the *client* for any commission, for example by paying it to the *client* or by deducting it from the fees chargeable to the *client* and showing the deduction on the bill; or
- get the *client's* agreement to keep the commission. Agreement can be given in one of the following ways.

  – The engagement letter could contain clear wording allowing the *firm* to keep any commission. Suitable wording is as follows.

    "In some circumstances, commissions or other benefits may become payable to us [or to one of our associates] in respect of transactions we [or such associates] arrange for you, in which case you will be notified in writing of the amount and terms of payment. [The fees that would otherwise be payable by you as described above will [not] be abated by such amounts.] [You consent to such commission or other benefit being retained by us [or, as the case may be, by our associates] without our [or their] being liable to account to you for any such amounts.]"

  Before the *client* agrees to this arrangement, he or she must be given examples of the types and amounts of commission that may be received. The *firm* should emphasise to the *client* that these are only examples and may not cover all commissions received in the future. If a *firm* receives unusually large commissions which were not anticipated when the engagement letter was signed, the *firm* should get specific permission to keep that commission in case it is alleged that this was not authorised by the engagement letter.

  An existing *client* of the *firm* may be asked to sign a new engagement letter containing the above wording. The *firm* should explain that, if there is no signed engagement letter, it can only keep commission if the *client* gives full and informed consent each time commission is received, but if the *client* signs the letter the *firm* can keep any commission it receives as long as full disclosure is made (see paragraph (9)).

  – The *client* can give consent for particular amounts before they are received. In this case the *firm* must disclose, in advance, the actual amount of the commission to

be paid (or how it will be worked out) and the terms and timing of the payment.

(5) If the *firm* does not get the *client's* agreement as suggested above, the *firm* may still be able to keep that commission if the *client* subsequently agrees after learning about the amount and the terms and timing of the payment. Alternatively, the *firm* can keep the commission if the *client* gives implied permission by acquiescing in the retention.

(6) Under paragraphs (4) and (5) the *client's* permission must be based on full information provided by the *firm*. The *client* must not have been pressured by the *firm*. The steps that need to be taken to ensure a *client's* permission is in order will depend on all the circumstances but it is very important that an existing *client* has full information when asked to sign a new engagement letter or agree to authorise the *firm* to keep commission or other benefit already received.

(7) If the *client* has not agreed to the *firm* keeping commission, that commission is *investment business clients' money* and it must be paid into an *investment business client account*. The *firm* can withdraw the money from the account once the amount of the commission has been deducted from the *client's* bill and in accordance with Chapter 4, or to pay it directly to the *client* or on the *client's* instructions. This situation could be avoided if the product provider paid the commission directly to the *client*, or reduced the premiums by the amount of the commission due.

(8) If any commission the *firm* keeps is taken into account when billing the *client*, the VAT position depends on whether the *client* has agreed to the *firm* keeping the commission.

If the *client* has not given the *firm* permission to keep commission, but the commission is still offset against the *client's* fees, then offsetting the commission amounts to the *firm* using money belonging to the *client* to pay part of the *firm's* fees. In these circumstances VAT is charged on the gross fee before any offset.

The position is different if the *client* has agreed to the *firm* keeping commission with full knowledge that it would otherwise belong to the *client*.

Note: if the first method is used it is important that the commission is called a rebate.

(9) (a) *Firms* must disclose the amounts and terms of any commission, whether or not they get the *client's* permission to keep it. If a *firm* tries to get the *client's* permission to keep a particular commission payment (see paragraph (4)), then disclosure will already have been made. However, if the *firm* relies on a general provision in the engagement letter (see paragraph (4)) or accounts to the *client* by paying the commission to the *client* or deducting it from fees due, it still needs to disclose each commission under regulations 3.23 to 3.25.

(b) *Firms* must ensure the amount and terms of any commission received by an *associate* as a result of an introduction by the *firm* are disclosed to the *client*.

(10) (a) In most cases, the transaction will be buying or selling a particular *investment* for a *client*. If a number of transactions are carried out at approximately the same time and for the same *client*, and it is clear that this is really a single event, the individual transactions should be combined to form one transaction for disclosing commission.

(b) *Firms* cannot avoid making the necessary disclosures of commission even if they get the *client's* permission not to.

(11) *Firms* should ensure that all product details, as issued by a product provider, are sent to the *client*. If the amount or terms of commission a *firm* would receive is given in the key features document or other product details issued by the product provider, a *firm* does not have to disclose this separately. However, the *firm* must still ensure details of the commission are given to the *client*, either in the product details or separately by the *firm*.

(12) If the *firm* has been dealing with a stockbroker, commission due to that *firm* will normally be shown on the supporting contract notes under the regulations brokers must follow. If those notes provide the information the *firm* needs to disclose and the *client* receives these directly or is given copies of them, the *firm* does not have to provide separate information about the amount and terms of any commission. Under general law, if the broker does not know the identity of the *firm's client*, or if the broker's contractual terms so provide (usually when commission is shared), the *firm* may be liable to the broker for the full amount of the bargain if the *client* does not pay.

(13) If a *client* ends any contract under which commission is paid at an early stage, any commission paid to the *firm*, even if accounted for to the *client*, may have to be repaid by the *firm* to the product provider. *Firms* should know about this possible liability when accounting for commission to *clients* and may want to agree with the *client* that, if this happens, the *client* will refund any commission the *firm* has paid to them or deducted from their fees.

***Benefits in kind***

**3.26** (a) A *firm* (and its *principals*, *employees and associates*) must not, in return for introducing a *client*, give or offer any commission or other benefit to someone who is not:

- its own *employee*;
- another public accountant governed by ethical standards similar to those observed by members of the *Institute*; or
- another *firm*.

(b) Any commission or other benefit paid by a *firm* to any person referred to in sub-paragraph (a) must not be such as to be reasonably likely to impair the *firm's* independent judgement on behalf of its *client*.

Guidance:

The principle behind this regulation is to avoid the making of improper inducements. Note that any commission **received** by the *firm* (as opposed to commission **paid** by the *firm*, which is the subject of this regulation) is subject to regulations 3.23 to 3.25.

**3.27** A *firm* (and its *principals*, *employees and associates*) must not accept any benefit, reward or inducement which might affect their integrity and objectivity in relation to a *client*.

Guidance:

Guidance on the types of situation that may contravene regulations 3.26 and 3.27 is set out in Schedule 5 to Chapter 3. See also *Principle* 6 (set out at the beginning of these regulations) and Statement 1.201 or Statement 1 (Integrity, Objectivity and Independence) and Statement 1.204 or Statement 4 (Conflicts of Interest) of the *Guide*.

***Unnecessary transactions***

**3.28** A *firm* must not recommend or carry out any transactions for a *client* if those transactions would reasonably be regarded as unnecessary in the circumstances.

**Section 6 - Suitability and advising clients**

***Objective***

All *investment business* carried on for a *client* should be specifically tailored to that *client's* circumstances, take into account investment opportunities currently available in the market and be understandable to the *client*.

***Know your client and suitability of investments***

**3.29** (a) A *firm* can only carry out *investment business* for a *client* after completing a written fact find which details any relevant information about the *client's* financial objectives investment experience and knowledge and any other facts about the client's personal and financial situation. The *firm* must take this information into account when providing Investment Business services.

Guidance:

A *firm* may have already obtained some of the required information in the provision of other services to the *client* (such as tax services). In order to comply with the above regulation, the information must be gathered in one place (such as a permanent file) rather than be spread over the *client's* files.

(b) If a *client* only requires services in relation to general insurance products, the *firm* does not need to complete a full fact find. Instead, the *firm* is required to gather only that information that would be relevant to the type of product required by the *client*. See the guidance below.

Guidance:

For car insurance, for example, the information about the *client* that would be required to be documented would include:

- The driver's details (eg name, address, driver licence details, age of the driver, details of previous accidents or claims);
- Details of the vehicle (eg make, model, capacity, registration, value);
- The use of the vehicle (business or personal).

(c) A *firm* must ensure that any advice it gives is suitable to that client having regard to the fact find and any other relevant facts about the *client* of which the *firm* becomes aware.

Guidance:

The Guidance at the top of page 18 of Volume II of the Investment Business Regulations and Guidance, 1999 still applies.

(1) These regulations do not apply to generic advice and so the requirements of regulation 3.29 do not apply if generic advice is given (see Schedule 1 to Chapter 1). However, the *Principles* do apply. So any advice given to *clients* should be appropriate. Generic advice is broadly based advice, for example, advising a *client* to move a certain proportion of his or her equity portfolio into fixed interest securities. Advice of a more specific nature, for example, on choosing a particular fixed interest security, is not generic and so these regulations apply.

(2) Guidance on the approach to be taken, and enquiries to be made, is contained in Schedule 6 to Chapter 3.

(3) As regards *derivatives*, see guidance note (2) to regulation 1.13.

(4) In giving generic advice, a *firm* must take account of the obligations flowing from Principle 4 of the *Guide*, and, in particular, the duty of care. See also *Principles* 2, 4 and 5 set out at the beginning of these regulations.

**Reason Why**

**3.30** A *firm* must, when making a recommendation to a *client*, issue a Reason Why letter to the *client* explaining why the product chosen is suitable for and in the best interests of the *client* on the basis of

all known facts.

Guidance:

A Reason Why letter must be issued each time a *firm* makes a recommendation, the detail contained within it will vary depending on the product being recommended. It is reasonable that a less detailed letter will be required for certain types of general insurance products, however *firms* are advised to consider including details regarding the following:

Background to the *client's* enquiry, re-state the *client's* objectives, their financial position, justification of product suitability compared to other products including pricing structure, charges and terms, justification of the provider suitability compared to other providers, the selection of options available (eg waiver of premium options), appropriate risk warnings, disclosure of amount and terms of commissions, references to the key features document, etc.

If possible the *client* should sign a copy of this letter and return it to the *firm*.

**Best advice and execution**

**3.31** Before recommending or carrying out a transaction for a *client,* a *firm* must comply with Regulation 3.29 (Know your Client and Suitability) and take reasonable steps to make sure that other more suitable products are not available regardless of whether or not the *firm* holds an appointment in writing from the relevant product provider.

Guidance:

Matters to be considered include:

- Affordability;
- The amount of funds available;
- The taxation implications;
- The accessibility of the funds;
- The risks involved;
- The price;
- The interest rates;
- The availability of the product;
- The terms offered;
- The options available (eg waiver of premium, own life or joint life etc);
- The condition of the market at that time;
- The charges, costs, management fees etc;
- Previous and projected performance (from market research);
- The quality of administration;
- The terms of the instructions from the client.

If the firm determines that the product which is suitable for the *client* is one for which the *firm* does not hold a letter of appointment or is outside of its current category of authorization, the *firm* must obtain a letter of appointment or increase its category of authorization before arranging that product or refer the *client* to an independent *authorised third party* who can arrange that product. The firm must not arrange a product which is not as suitable because it is easier to arrange within its current category.

***Clients understanding of risk***

**3.32** Before recommending or carrying out a transaction in an *investment* for a *client*, a *firm* must take reasonable steps to enable the *client* to understand the nature of the risks, including risks resulting from limited marketability or further liability, by entering into the transaction. The *firm* must do this unless it reasonably believes this is not necessary considering the *client's* knowledge or experience of that *investment*, or if the *firm* is providing *discretionary management* services and has warned the *client* under regulation 3.16(b).

Guidance:

If a *firm* does not provide a key features document, the *firm* must tell the *private investor* about the main features of the product, including a summary of the effect of the product's charges on the value of the *investment* unless the *firm* is acting in the course of *discretionary management*.

**Guidance on the contents of key features document**

A key features document produced under regulation 3.32 must contain the following details:

- the name of the product provider;
- whether it is incorporated or unincorporated;
- the name of the *EU* or other state its head office is in and, the name of the state that branch is in;
- the address of the head office and the branch;
- a statement of each benefit and each option under the policy;
- the length of the contract;
- how the contract may be ended;
- how premiums are payable and for how long;
- an indication of surrender and paid-up values, and how far they are guaranteed;
- information on the premiums for each benefit;
- if the policy is unit-linked, a description of the units the benefits are linked to;
- the arrangements for any cooling-off period;
- general information on the tax applicable to the type of policy;
- the arrangements for handling complaints about policies by policy-holders;
- the law that is, or will be, applicable to the contract.

Guidance:

(1) Schedule 7 to Chapter 3 contains guidance on the circumstances in which some (but not all) risk warnings need to be given and the content of those risk warnings. However, it is not enough just to give the risk warnings to the *client*. He or she must be given time to consider them and be helped to understand the nature of the risks.

(2) If the *firm* believes that the *client* already has enough knowledge and experience that a risk warning is not needed, the *firm* should make a note of the reasons why it formed that belief.

***Packaged products (Investment Trust Saving Scheme)***

**3.33** (a) When recommending that a *private investor* buys a *packaged product*, a *firm* must give him or her sufficient information about the product to enable the *private investor* to make an informed investment decision.

(b) A *firm* must give the *client* a further key features document if the terms of a proposed *policy* are changed and that change materially affects the information originally given.

(c) Subject to paragraph (d), a *firm* must not, for a *packaged product*, give a *private investor*

any:

- forecast of realisable value;
- illustration of benefits; or
- illustration of what those realisable value or benefits may be,

unless the *firm* complies with Schedule 9 to Chapter 3.

(d) A *firm* must not give any forecast or illustration about a *higher volatility fund*.

Guidance:

(1) When reporting the effect of charges under regulation 3.33(b), a *firm* should, for example, inform the *client* that the charges will be based on the performance of the funds, that the charges will be deducted from the value of the underlying *investment* and that the *client's* initial investment will be affected by the charges made by the *operator*.

**3.34** Before or as soon as possible after a *client* buys a product referred to in regulation 3.33 in a transaction recommended, carried out or arranged by a *firm*, the *firm* must give him or her any document or documents, issued by the seller of that *packaged product*, which relate to that specific purchase unless:

- the *firm* is providing *discretionary management* services;
- the *firm* has previously provided the document and it is not out-of-date; or
- the *firm* reasonably believes that the seller of the *packaged product* will give the document direct to the *client*.

***Pension transfers and opt outs***

**3.35** Not applicable for IIA purposes.

***Guarantees***

**3.36** (a) A *firm* must not give a *client* a guarantee of the performance of any *investment* or of any transaction in an *investment*.

(b) Before recommending or carrying out a transaction in an *investment* for which a guarantee (in any way) of performance is given by a third party, a *firm* must inform the *client* in writing:

- of the precise nature and extent of the guarantee, including any limits on it;
- that no guarantee (in any way) of performance can be given by the *firm* for any *investment* or any transaction in it; and
- that the *client* will not be able to claim compensation from the *Chartered Accountants' Compensation Scheme* if the *investment's* performance fails to match a guarantee given.

The information in paragraph (b) must also be included in any *investment advertisement* about an *investment* if the performance of or any transaction in the *investment* has been guaranteed (in any way).

Guidance:

A guarantee, in this context, refers to a binding agreement given by a third party to make good any loss or costs incurred if an *investment* fails to meet stated performance targets. For example, the managers of a *unit trust scheme* may guarantee the performance of the trust so that investors who fail to recover the full amount invested may recover any shortfall from the managers. It is not intended to cover any representations or statements made about an *investment* by the issuer (for example, by

a company in relation to its own fixed interest securities, or the Government in relation to investment returns on money placed with it).

***Execution-only clients> and non-private investors***

**3.37** (a) Regulations 3.18, 3.29, 3.30, 3.33 and 3.34 do not apply if the *firm* arranges or carries out a transaction for an *execution-only client*, if:

- appropriate risk warnings are given under regulation 3.32 (without the second sentence);
- the *firm* does not know that the transaction is unsuitable for the *client*; and
- the *firm* clearly indicates to the *client* in writing that it will not be responsible for advising him or her or exercising any judgement on the relevant transaction.

(b) Regulations 3.18, 3.29 to 3.34 and 3.39 do not apply if the *firm* provides *investment business* services to a *non-private investor*.

Guidance: Guidance is contained in Schedule 10 to Chapter 3.

**Section 7 - Dealing for clients**

***Objective***

The *firm* should carry out transactions or arrangements, including buying and selling investments, in the *client's* best interests.

***Best execution***

**3.38** A *firm* must take all reasonable steps to ensure that a transaction (other than for a *packaged product*), in which it acts as agent or arranger for a *client*, is made on the best terms available generally on the market for transactions at that time of the same size and nature with reliable *counterparties*. Best execution will be established by reference to:

- the price paid or received;
- charges incurred for the *client*; and
- all other terms, including the likelihood of the *counterparty* satisfactorily performing its obligations and any other advantages to the *client*.

In deciding whether best execution has been fulfilled, the fees payable by (and disclosed to) the *client* for the *firm's* services, however the transaction is carried out, will not be taken into account.

Guidance:

(1) *Firms* normally need to consider the following three things.

(a) Price: A *firm* should ensure that *investments* are bought at the cheapest price available for similar *investments* at the time of the purchase. Similarly *firms* must ensure that sales are at the highest price available. However, the benefit to the *client* from the best available price must not be outweighed by any disadvantages with regard to charges, terms or reliability of the *counterparty*.

(b) Charges: In determining the net benefit to the *client* any charges payable to the *counterparty* for the transaction must be taken into account.

(c) Terms: These aspects of the transaction are difficult to value in money terms. They include, for example, speed of execution, the reliability of other *counterparties* and of settlement. They also include other advantages which may be available to the *client*, such as access to research findings or information.

(2) The *firm* must ensure that the *client* receives best execution in all cases unless that obligation clearly rests with an *authorised third party* under regulation 3.13.

(3) The *firm* may not act directly or indirectly as a dealer between the *client* and another party (see regulation 1.11). This means that it may not buy *investments* from the *client* for one price, in order to sell them on the market or elsewhere for a higher price, or vice versa. See also regulation 3.22.

***Timely execution***

**3.39** A *firm* which accepts an instruction to carry out a transaction for a *client* must do so at the time the *client* has stipulated; if the *client* does not stipulate a time, the *firm* must carry out the transaction as soon as possible, unless delay is justified by the need to comply with any of these regulations, or is in the interests of the *client*.

Guidance:

A transaction for a *client* may be postponed if, for example:

- the price is outside the limit set by the *client*; or
- the transaction cannot be made immediately and postponing it is unlikely to influence its terms.

***Limitations on a firm's trading***

**3.40** (a) A *firm* must give *counterparties* orders for transactions for *clients*, and for its own account, fairly and in turn.

(b) If a *firm* or its *associate* intends to give *clients* a recommendation or a piece of research or analysis about a particular *investment*, it must not knowingly carry out a transaction for the *firm's* own account, or for the account of an *associate*, in that *investment*, or any *derivative* substantially related to it, until those *clients* are likely to have had a reasonable opportunity to react to it.

Guidance: See also guidance to regulation 3.41.

***Allocation of bargains between clients***

**3.41** A *firm* must act only for an identifiable *client*. In any situation where the *firm* must allocate bargains between different *clients*, and they cannot all be satisfied, the bargains must promptly be allocated between the *clients*:

- in a way which the *firm* believes, in good faith, does not unfairly benefit one *client* over another;
- reasonably in the interests of each *client*;
- not to conflict with any instructions a *client* may have given the *firm*; and
- not to conflict with any limitations which may have been placed on the *firm's* discretion.

Guidance:

If a *firm* receives two or more orders for transactions in one particular *investment* at the same time, they should be treated equally. This may arise, for example, if instructions from two or more *clients* arrive in the same post or if a *firm* is conducting *discretionary management* and a decision is made that a particular *investment* held by a number of *clients* should be sold.

In general, this situation is unlikely to cause difficulties. However, if a combination of transactions is refused by the *counterparty*, for example because the total value of the transactions may distort the market, consideration should be given to referring back to the *clients*, or to pro-rating bargains if that power is available.

**Section 8 - Clients' assets**

***Objective***

The *firm* should keep *clients'* assets (including documents of title) which are under its control safe and secure and separately identifiable.

***Title documents***

**3.42** (a) If a *firm* holds *title documents* (other than those in electronic form) for *clients*, it must ensure they are separately identifiable from the *firm's* own *title documents* and held in safe custody by itself, by its own nominees or by a third party custodian. The *firm* must insure the *title documents* against loss or damage; they must be kept in a secure fire-proof place and access to them must be restricted and controlled.

(b) If *clients'* titles to *investments* are recorded electronically, a *firm* must ensure that:

- those titles are treated as *title documents* (or *custodial investments*) if they are held by the *firm*;
- it complies with all the requirements of the electronic system binding on it; and
- it acts in a way which is intended to protect the *clients' investments*.

Guidance:

(1) See *Principle* 7 set out at the beginning of these regulations.

(2) Regulation 3.42(a) applies if, as part of carrying on *investment business*, the *firm* holds *title documents*. See regulation 1.05 and Schedule 1 to Chapter 1 for the general scope of these regulations.

(3) *Title documents* include those to *custodial investments*. The following is guidance on the definition of *custodial investments*:

- The phrase in the definition ". . . and which the *firm* is able to sell (or procure the sale of) . . . " means that if the sale has already taken place, the document held by the *firm* is not a *custodial investment*. The document then merely records the title to an *investment* which has already been sold.
- *Custodial investments* are identified by their characteristic of being turned into cash

easily (for example bearer shares) without the involvement of forgery. Many *investments* can be turned into cash with the aid of forged instruments. These are not *custodial investments*. For the documents or certificates to be *custodial investments* (and usually there are two documents), they must be capable of being sold and exchanged for cash without getting the *client's* signature. It is also likely that good title to those *investments* will be passed.

- For the reasons given above, the following are *custodial investments*:

  – bearer shares or securities (where ownership and title pass by delivery);
  – a stock certificate with a signed transfer form (without a transferee name) unless a sale has been made;
  – a transfer form (without a transferee name) for the sale of gilts, together with its certificate and signed redemption form; and
  – a signed or renounced unit trust certificate (unless the *investments* have already been sold).

In all these situations the key to what is a *custodial investment* is the holding of proof of title (perhaps the share certificate), together with the transfer document by which, with no further signatures or action, the *investments* can be passed on in return for cash.

If *title documents* are held by a nominee and the *firm* has authority to dispose of them (for example, by quoting the PIN for the *client's* nominee account), these will normally be *custodial investments*.

The *title documents* will not be *custodial investments* if steps have been taken to ensure that the sale proceeds cannot be paid to the *firm* or someone connected with it. This could be achieved by a standing instruction from the *client* to the nominee (for example, a broker) that sale proceeds may only be held for investment or transmitted to the *client* or to a third party at the *client's* direct order.

Signed but only partly filled-in share transfer forms held by a *firm* together with share certificates are not *custodial investments* if instructions to sell have already been given for the *client* to a broker. This also applies to signed or renounced unit trust certificates.

- Shares in a private company are not usually *custodial investments* as they do not represent *readily disposable investments*. Because of the directors' possible right to refuse to register the sale of particular shares in a private company, these may not always be readily saleable. The *firm*, in this instance, is not able to "sell (or arrange the sale of)" the *investment*.
- Securities held electronically are *custodial investments* if the *firm* can instruct the relevant register holder to sell the securities and the relevant register holder must accept that instruction without needing confirmation from the *client* unless the sale proceeds cannot be paid to the *firm* or someone connected to it.

(4) *Clients* may also want the *firm* to hold other *title documents* which the *firm* cannot sell without the *client's* signature, or share certificates and signed share transfers of *investments* which are not readily disposable. These *title documents*, which are not *custodial investments*, may be held for safekeeping.

(5) A *firm* is responsible for all *title documents* until they are delivered to the *client* or are disposed of in accordance with the *client's* instructions.

(6) See paragraph 7 of the model engagement letter in annex A to Schedule 4 to Chapter 3.

(7) If the *firm* is not *authorised* to hold *custodial investments*, but receives them from a *client*, it should keep them securely and return them securely as soon as reasonably possible.

(8) Where applicable, *firms* should ensure that data processing facilities and records relating to *title documents* and *custodial investments* are appropriately safeguarded.

***Lending a client's title documents***

**3.43** A *firm* must not lend a *client's title documents* to a third party.

***Register***

**3.44** (a) Each office of a *firm* must keep an up-to-date register identifying all *title documents* received, held for *clients* including those where the firm provides custody services. The register must show details, in the case of documents, of receipt, despatch and where they are kept and, in the case of electronic titles, when they were acquired and disposed of. In any case, the register must show:

- why they are held;
- whether there is any charge over them; and
- whether they have been or are lent or held as collateral.

(b) This register must be reconciled every six months with the *title documents* actually held at that time by the firm or third party custodian and a record of the reconciliation must be kept.

(c) If *title documents* are held in safe custody by, or registered in the name of, the *firm's* own nominee or a third party custodian, the *firm* must ensure that it or the third party custodian keeps the register identifying *title documents* for each *client* as in regulation 3.45 below and which is reconciled as in sub paragraph (b).

Guidance:

The register should be divided between *title documents* which are *custodial investments* and *title documents* which are not. Both should also be divided into those held for safekeeping and those in transit.

**3.45** A list of *title documents* for each *client* must be prepared each year from the register kept under regulation 3.44, separately identifying any lent or held as collateral. The relevant list must be given to each *client* unless the *client* has already received the information for some other reason.

Guidance:

(1) The list of *title documents* sent to each *client* should state the date the list was prepared and contain` enough information to identify each item on the list. This will normally include:

- a description of the security, policy or asset;
- a reference number, policy number, certificate number or other identifier; and
- if appropriate, the number of shares or units involved.

(2) Either on the list or in a covering letter, the *client* should be invited to contact the *firm* if he or she believes that there are any inaccuracies on the list.

***Custody***

**3.46** *Title documents* to registrable *investments* which are not registered in names identifying the *clients* they belong to, and *investments* where title passes by delivering the documents of title, must be held in a way which:

- makes it clear that the *investments* do not belong to the *firm* or its *associate*; and

- allows the owner of each *investment* to be identified at all times.

**3.47** A *firm* which holds *title documents* for a *client* must ensure that any registrable *investments* which it buys or holds for that *client* are properly registered in the *client's* name or (with the *client's* agreement) in the name of:

- an individual chosen by the *client* who is not an *associate*;
- a nominee company owned by the *firm* or a third party custodian neither of which has any other business;
- an institution authorised under the Banking Act 1987, or licensed under the Central Bank Act 1971 or any subsidiary thereof; or
- a credit institution which has notified its intention to carry on the business of safekeeping and administration in the United Kingdom under the Banking Co-ordination (Second Council Directive) Regulations 1992, or licensed under the Central Bank Act 1971 or any subsidiary thereof;

A credit institution means an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account.

Guidance:

Where the *firm* is satisfied that the way in which title to *investments* held within an electronic system allows the owner of each *investment* to be identified at all times and meets the requirement of regulation 3.47, the *firm* will be deemed to have complied with the above.

Guidance:

1. A *firm* must not lodge safe custody *investments* with an eligible custodian unless the eligible custodian has agreed in writing that:

   - the account is designated in such a manner that the *investments* credited to it do not belong to the *authorised firm* or to an affiliated company;
   - the eligible custodian is not to permit withdrawal of any safe custody *investments* from the account otherwise than to the *authorised firm* or on the *authorised firm's* instructions;
   - the eligible custodian will, on request, deliver to the *authorised firm* a statement (as at a date specified by the *authorised firm* which is not earlier than one month before the statement is delivered to the *authorised firm*) specifying the description and amounts of all the *investments* credited to the account; and
   - the eligible custodian will not claim any lien or right of retention or sale over the *investments* standing to the credit of any account designated pursuant to the above, except to the extent of any charges relating to the administration or safekeeping of safe custody *investments*.

2. A *firm* must not permit an eligible custodian to hold safe custody *investments* unless the eligible custodian has agreed in writing that:

   - safe custody *investments* will be held in such a manner that it is readily apparent that they do not belong to the *authorised firm* or to an affiliated company;
   - the eligible custodian is not to part with possession of any safe custody *investments* otherwise than to the *authorised firm* or on the *authorised firm's* instructions;
   - the eligible custodian will, on request, deliver to the *authorised firm* a statement (as at a date specified by the *authorised firm* which is not earlier than one month before the statement is delivered to the *authorised firm*) specifying the amount and description of

*investment* held by the eligible custodian for the *authorised firm*, and, where it is a registered *investment*, the amount held in each name; and

- the eligible custodian will not claim any lien or right of retention or sale over safe custody *investments* except to the extent of any charges relating to the administration or safekeeping of safe custody *investments*.

3. "Safeguarding" requires physical possession of the title documents and/or having them under the *firm's* control.

A *firm* will be "safeguarding" assets consisting of or including *investments* if:

- it has physical possession of tangible assets (e.g. in the circumstances described in (8) below); or
- it has physical possession of documents evidencing title to intangible assets. Such as share certificates; or
- it protects the integrity of intangible assets which are not evidenced by a physical document, such as shares in CREST.

Thus if a *firm* holds *title documents* as a means of keeping them safe, that is "safeguarding". The *firm*, however, will require *authorisation* only if it is also administering those *title documents*. A *firm* which provides safe deposit services to the public will also be safeguarding any *investments* received, although the nature of the business means that it is unlikely to constitute custody business, since the *firm* will not be carrying on administration.

"Bare nominees" are excluded from the need to be *authorised* for their custody business, provided that the owner of the assets is not prejudiced by this arrangement (i.e. he receives the same level of protection as if the primary custodian were providing the service himself).

However, the exemption is available only where the arrangements made by the primary custodian for taking of responsibility constitute custody business and the primary custodian is an *authorised* or *exempted person* in respect of that activity.

4. "Administration" in this context includes (but the list is not exhaustive):

- maintaining accounts with clearing houses;
- settling transactions in *investments*;
- operating through depositaries, or sub-custodians in Ireland or overseas;
- operating nominee accounts (including pooled accounts) which identify each *client's title documents* in a ledger;
- cash processing associated with *clients' title documents*;
- collecting and dealing with dividends and other income associated with the assets:
- carrying out corporate actions such as proxy voting, including exercising rights conferred by an *investment* on behalf of a beneficial owner;

*Firms* do not have to be providing all of the above services in order to be carrying on custody business.

5. Excluded from the definition are the following:

- providing information as to the number of units/value of a *client's* portfolio;
- currency conversion, e.g. converting income received in another currency into sterling;
- receiving documents relating to an *investment* solely for the purpose of onward

transmission to, f rom or at the direction of the owner of the *investment*.

**Section 9 - Information to clients**

***Objective***

The *firm* should keep the *client* informed of the *investment business* carried on for him or her by the *firm*, and of any assets held by the *firm*, and the *firm* should keep appropriate records.

***Information on transactions***

**3.48** (a) If a transaction is carried out for a *client*, the *firm* must instruct the *counterparty to* send information (a confirmation note, difference account or contract note) on the transaction to that *client* or to the person the *client* has nominated to receive the information. Where it is the practice for the *counterparty* to issue the *client's* copy of such a document to the instructing intermediary, the *firm* must forward that copy to the *client* upon receipt without delay.

(b) If the *firm* finds out that the information has not been sent, the *firm* must use reasonable endeavours to send the *client*, within three *business days*, the details listed in Schedule 11 to Chapter 3.

(c) If another person has to provide some of those details to the *firm*, the rest of the information may still be sent by the *firm* with a note stating what is missing and that it will be sent as soon as possible (or that it cannot be provided at all). If the *firm* receives the missing information, it must send it on as soon as possible.

Guidance:

(1) The term *counterparty* includes the manager of a *unit trust scheme* issuing a confirmation about units bought.

***Investment business records***

**3.49** Records of *investment business* must be in English but may be in another language if the *firm* can translate the records into English within a reasonable time of a proper request being made for it. The records may be in any form, as long as they can be reproduced in printed form. If all the records relating to a *client* are not kept together, the records held in each place must indicate that and the place where most of the records are held.

Guidance:

(1) *Investment business* records may be kept in any form as long as they can be readily reproduced in hard copy. The following, for example, are acceptable:

- original documents;
- copy documents;
- micro-fiche copies of printed documents; and
- computerised records.

(2) Using pre-printed standard forms helps to ensure that all the necessary information has been recorded. A consistent approach throughout the *firm* will help to make *principals* and *employees* aware of their compliance responsibilities and will aid the compliance review.

**3.50** Unless these regulations provide otherwise, a *firm* must keep all relevant *investment business* records, including accounting records, for at least six years from the date they were made. The records must be open to inspection.

Guidance: Under regulation 3.50, *investment business* records do not include paid cheques.

**3.51** A *firm* must ensure that it has, for each *client*, at least the following records:

- a copy of the engagement letter;
- relevant details of the *client's* personal and financial situation and knowledge and experience of financial matters;
- material showing that the *firm* properly considered whether any recommendation made to the *client* was suitable;
- a record of transactions carried out for *clients*, including *execution-only clients* and *non-private investors*;
- details of all instructions received from the *client* and passed on, together with the date and time and the names of the persons instructed;
- details of the receipt and dispatch of *title documents* the *client* owns; and
- a copy of the list of *title documents*, required under regulation 3.45.

Guidance: See regulations 3.13, 3.14, 3.29, 3.30, 3.44 and 3.45.

**3.52** A *firm* must keep, for at least three years, records showing:

- for each *investment advertisement* issued under regulation 3.04, the *principal* who approved it and the location of:
  - the retained copy of the *investment advertisement*; and
  - the evidence verifying any facts stated in the *investment advertisement*;
- details of any disciplinary action taken against *principals* or *employees*, including the *principal's* or *employee's* name, details of the offence and the steps taken by the *firm*;
- details of complaints received, including the name of the complainant, the nature of the complaint, who investigated it and the action taken by the *firm*.

Guidance:

Records of complaints should be kept in the office to which the complaint relates. The complaints could be kept in a separate complaints file as long as a note is made on the relevant *client's* file.

**3.53** A *firm* must, within seven days of being asked by a *client* and subject to any duty of confidentiality, allow that *client*, or his or her agent, to inspect, during normal business hours, the *firm's* records relating exclusively to the *client's investment business* (other than the record of complaints referred to in regulation 3.52).

***Portfolio review***

**3.54** (a) If the *firm* carries out a *portfolio review*, the engagement letter should state:

- that the *firm* will provide a statement of the *client's* portfolio either at specified times or when the *client* asks for one; and
- the information that must be in that statement.

(b) The *firm* must send the statement of the *client's* portfolio to the *client* within 50 *business days* of the date to which it is made up.

Guidance:

Schedule 12 to Chapter 3 explains the nature of *portfolio review* and the requirements to which it gives rise. Information which it may be appropriate to include in the engagement letter is in annex C to Schedule 4 to Chapter 3.

**Section 10 - Insider dealing**

***Objective***

Information given to the *firm* should not be used for insider dealing.

**3.55** A *firm* must make appropriate arrangements to ensure that its *principals* and *employees* are aware of the laws against insider dealing.

**3.56** A *firm* may not carry out an own account transaction if the person proposing the transaction knows that one of the *principals* or *employees* of the *firm* or its *associates* would be insider dealing under Part 5 of the Companies Act 1990 if he or she carried out the transaction for his or her own account.

**3.57** A *firm* must use reasonable endeavours to ensure that it does not carry out any transaction for a *client* if it knows that the *client* may not himself or herself carry out the transaction because it would be insider dealing against Part 5 of the Companies Act 1990.

**Section 11 - Cessation of investment business**

Any withdrawal by the *firm* from *investment business* should be done in an orderly way.

**3.58** If a *firm* decides to withdraw from providing any *investment business* services or related custodial services to *clients* generally, the *firm* must ensure that any outstanding business is properly completed or is transferred to another independent authorised person, with the *client's* consent.

Guidance:

The precise steps to be taken will depend on whether the *firm* is withdrawing from *investment business* altogether or ceasing to provide a particular service. This may arise as a result of, for example, a commercial decision, or because of the death or ill-health of an individual in the *firm* who has particular knowledge or experience. (For the death or ill-health of a *sole practitioner*, see regulation 2.30.) Outstanding business needs to be properly completed or transferred to another independent authorised person with the *client's* consent unless instructed by the *client* otherwise. Consideration should be given to all compliance requirements including:

- giving reasonable notice of the end of the engagement for *investment business* or altering the engagement letter for the service withdrawn;
- ensuring that transactions or services in progress are completed and accounted for in the best interests of the *client*;
- preparing closing statements for *portfolio review* on the same basis as for regular reviews;
- obtaining instructions for the orderly return of *investment business clients' money* and *title documents* or their transfer to a third party; and
- identifying all documents which must be kept for the relevant period for individual *clients* (regulation 3.51), together with other necessary records.

**Section 12 - Tax Efficient Investment Schemes (TEIS)**

This section should be used in conjunction with all other sections of these regulations and is in relation to additional requirements which come into force when advising on or arranging transactions in this type of investment for a *client*.

Guidance: A tax efficient investment is any investment were a tax relief and/or an exemption associated with the investment is such that an investor would not make the investment if the relief or exemption was not available.

*A Tax Efficient Investment Scheme* would be any scheme which would enable the client to utilise relief under the Taxes Consolidation Act 1997 and would include, but is not limited to Business Expansion Schemes (BES), Section 35 Film Schemes, Forestry Schemes or Seaside Resort Schemes.

***Recommending and Arranging Transactions in Tax Efficient Investment Schemes (TEIS)***

**3.59** A *firm* must not recommend or arrange a transaction for a *client* to invest in a *tax efficient investment scheme* unless it has handed or despatched a copy of the relevant particulars to the *client*.

**3.60** (a) A *firm* must not arrange for a *client* to invest in a *TEIS* which it is promoting or in a *TEIS Fund* of which the *firm* or an *associate* is a Manager unless the *firm* has advised the *client* that he should seek independent advice from an independent financial adviser who has no interest in either the scheme or the fund.

(b) The *client* must confirm in writing either:

- that he has obtained independent advice, or
- that he does not wish to obtain such advice.

***Acting as the Manager of a Tax Efficient Investment Scheme managed Portfolio***

**3.61** Where a *firm* is acting as the Manager of a *TEIS* managed Portfolio or a *TEIS Fund* it must;

(a) ensure that the terms of the engagement letter with the *client* allow the investments to be made wholly or mainly into *TEIS*.

(b) hand or dispatch to the *client* a copy of the relevant *TEIS* particulars either before or as soon as reasonably practicable after any *TEIS* investment has been acquired for the portfolio.

Guidance: It is important to obtain the clients agreement allowing the portfolio or fund to invest wholly or mainly in *TEIS* as regulation 3.16(b) restricts a portfolio or fund managed on a discretionary basis for a *client* to invest in *readily disposable investments* and freehold or leasehold property only.

***General Prohibitions***

**3.62** A *firm* must not:

(a) lend money or extend credit with a view to facilitating that *client* investing in a *TEIS* investment; or

(b) make known to the *client* any arrangement which it has, or may make on behalf of the *client*, with a third party whereby the third party will lend money or extend credit with a view to facilitating the *client* investing in a *TEIS* investment unless:

- the *client* without solicitation, sought to borrow money or obtain credit expressly for that purpose; or
- following full consideration of regulation 3.29 the *firm* believes it to be suitable for the *client* to borrow money or take credit for the purpose of investing in a *TEIS investment*.

***Advertisements in Connection with TEIS Investments***

**3.63** A *firm* shall not issue or provide any *advertisement* to a *client* which relates to a particular *TEIS* investment unless:

(a) the *firm* believes that investments which are not *Readily Disposable Investments* are suitable, and

(b) it consists of, or is accompanied by the relevant *TEIS* particulars, or

(c) in the case of a *TEIS Fund* or *TEIS Managed Portfolio* of which the *firm* is the Manager, unless it consists of or is accompanied by a copy of the particulars relating to **each** *TEIS* company or investment in which the *firm* intends to acquire interests on behalf of the fund or

portfolio.

This obligation is in addition to the requirement that the *advertisement* consists of or is accompanied by the *TEIS Particulars* prepared by the *firm* in relation to the fund or managed portfolio.

Guidance: Provided that clients have previously received *TEIS* particulars it will not be necessary in (b) and (c) of regulation 3.63 to give the particulars to a *client* for a second time.

**3.64** A *firm* must not issue or approve an *advertisement* relating to a private offer of a *TEIS* shares unless it contains all information that a *client* or a client's independent financial adviser might reasonably require or expect to find for the purpose of making an informed assessment of the assets and liabilities, financial position, profits and losses, and any prospects of the relevant *TEIS* company, as well as the rights attaching to these *TEIS* shares.

Guidance: For this purpose, a "private offer" means an offer or invitation in relation to those *TEIS* shares which would not be made available to the public for the purpose of the Companies Acts 1963 - 1990

***Contents of Advertisements in Connection with TEIS Investments***

**3.65** In addition to Regulations 3.04 to 3.11, if a *firm* is advertising a *TEIS investment* or *TEIS Fund* it must include the following items in the advertisement.

(a) a statement which will indicate to *clients* or potential *clients* that the *firm* is carrying on an accountancy practice, offering all the usual practising services for example accounting, auditing, taxation services.

(b) a statement which indicates that the *firm* is *authorised* to provide *investment business* services and advice, and

(c) the details of the *investment business* service or product it wishes to promote, in accordance with these regulations.

Guidance: This is to ensure that members of the public are aware that *firms* of Chartered Accountants are authorised only to provide investment business services and advice in an '*incidental manner*' in accordance with the *Act*.

For additional Guidance see Schedule 14 to chapter 3.

**Section 13 – Personal Retirement Savings Accounts (PRSA's)**

This section should be used in conjunction with all other sections of these regulations and is in relation to additional requirements which come into force when advising on or arranging this type of investment product for a *client*.

**3.66** A *firm* must provide a *client* with a leaflet outlining the nature of the product concerned. The wording for such a leaflet can be found at Schedule 15.

**3.67** Where a *firm* recommends a non-standard PRSA it must;

(a) Provide a comprehensive explanation in the fact find as to why it believes a non-standard PRSA would be more suitable than a suitable PRSA, bearing in mind that charges for such a product are not capped;

(b) Demonstrate in the reason why letter to the *client* why the *firm* believes that the product is more suitable than a standard PRSA, and

(c) Complete a declaration which must be signed by the *client* and the *firm*. The original declaration must then be retained by the *firm* on the relevant client file. Wording for the declaration can be found on Schedule 16.

**Schedule 1 to Chapter 3 - Guidance on investment advertisements (Regulations 3.04 to 3.11)**

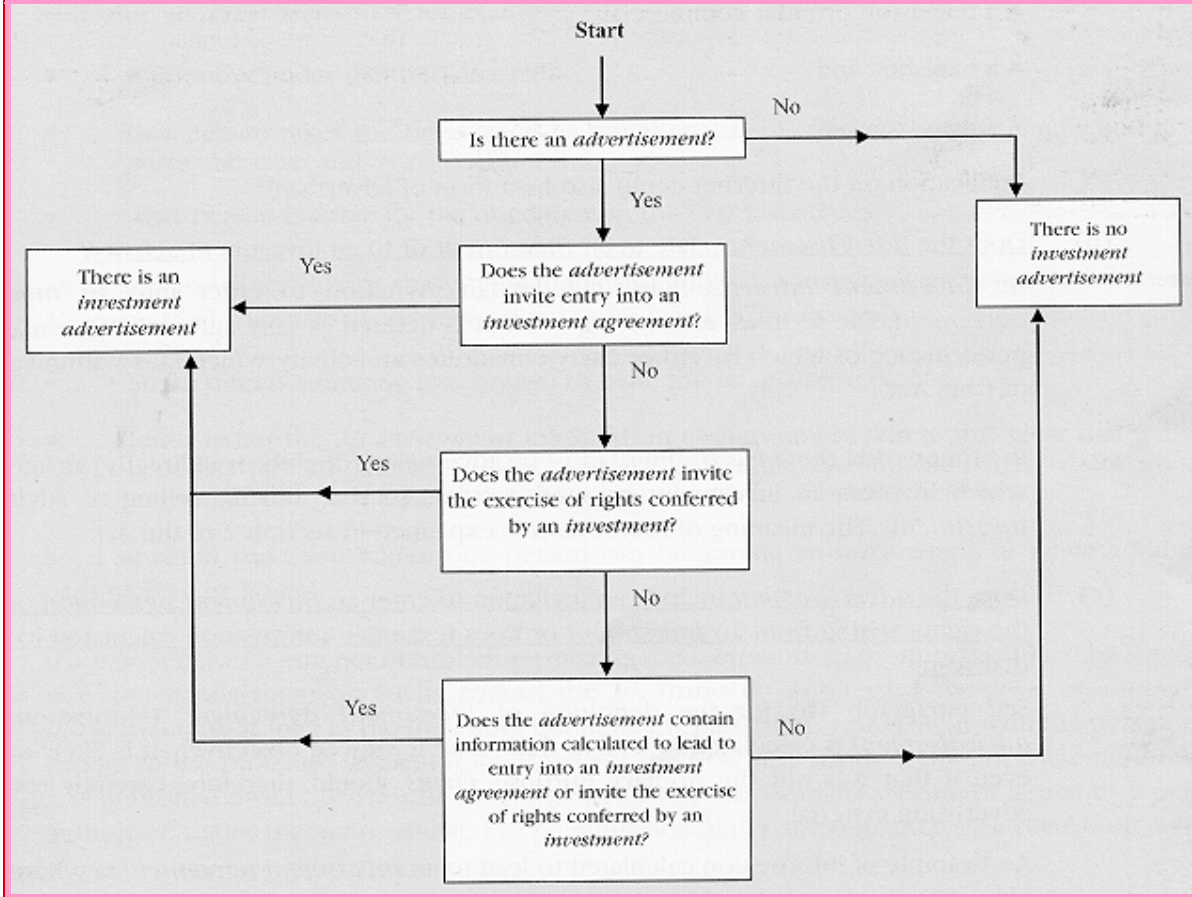
***Introduction***

**1** This schedule explains *investment advertisements* and contains guidance on the meaning of that term in these regulations.

**2** The term *investment advertisement* is used in the context of:

- in regulations 3.04 to 3.11 which provide that any *investment advertisement* issued by the *firm* must comply with those regulations.

**3** The following diagram should help *firms* decide whether a document or other material is an *investment advertisement*. The diagram at the beginning of Section 2 to Chapter 3 is similar, but addresses whether a document is an *investment advertisement* under regulations 3.04 to 3.11.




See paragraph 9 below.

**4** Not applicable for IIA purposes.

**5** Not applicable for IIA purposes.

**6** As authorised persons, *firms* can issue *investment advertisements*. However, they are subject to the provisions of the regulations which regulate the issuing and content of *investment advertisements* (see paragraphs 18 and 19).

**7** Not applicable for IIA purposes.

***The meaning of investment advertisement***

**8** An *investment advertisement* is defined as "any advertisement inviting persons to enter, or offer to enter, into an investment agreement or to exercise any rights conferred by an investment to acquire, dispose of, underwrite or convert an investment or containing information calculated to lead directly or indirectly to persons doing so".

**9** If, taken in order, the answer to any of the following questions is "no", then there is not an *investment*

*advertisement*.

(a) Is there an *advertisement*?

the term *advertisement* is very wide to include every form of advertising. Examples of *advertisements* are:

- a brochure, booklet or leaflet;
- a promotional piece in a newspaper, journal or magazine, which could include a letter in the correspondence columns or an article written by the *firm*;
- a television or radio commercial;
- a mailshot; and
- a press release.

Publication on the Internet could also be a form of advertising.

(b) Does the *advertisement* relate to an *investment* or to an investment activity?

An *investment advertisement* includes an invitation to enter into an *investment agreement*. The term *investment agreement* is defined as "any agreement the making or performance of which by either party constitutes an activity which falls within section 2 of [the] Act".

In other words, the *advertisement* must be advertising (directly or indirectly) an agreement which involves an investment business service, such as buying, selling or advising on *investments*. The meaning of *investment* is explained in section 2 of the *Act*.

(c) Does the *advertisement* include an invitation to enter an *investment agreement* or to use the rights arising from an *investment* or does it contain information calculated to lead to that result?

See paragraph (b) for the definition of *investment agreement*. Information in an *advertisement* is calculated to lead to that result if, viewed objectively, it is likely to do so, even if that was not the primary purpose. *Firms* should, therefore, carefully review all advertising material.

An example of information calculated to lead to an *investment agreement* is where a *firm* gives its *clients* general information on a company which is for sale (for example, the name of the company, price and profit record), even if the document does not contain a formal offer.

***Examples of investment advertisements***

**10** The following are examples of *investment advertisements*:

- a brochure or newspaper *advertisement* issued by the *firm* describing its *investment business* services;
- a "box ad" in a newspaper describing the share dealing service offered by the *firm*;
- an *advertisement* referring (expressly or by implication) to the *firm's* investment management, broking or corporate finance expertise; and
- any of the documents referred to in paragraph 9(a), if they relate to *investments* or *investment business* services.

**11** Not applicable for IIA purposes.

**12** In the context of *corporate finance activities*, the following are examples of *investment advertisements*:

- a private placing or information memorandum in relation to the sale of a private company;

- listing particulars;
- announcements, by a listed company, which could affect the price of its shares;
- an offer document in a takeover. However, a defence document is not an *investment advertisement* because it does not recommend the selling of shares, but rather keeping them (see paragraph 9(c));
- a placing letter; and
- in a vendor consideration placing, the placing agreement and letter, any sub-placing letter and (if a listed security) the listing particulars or (if unlisted) the prospectus.

***Issuing and causing to be issued***

**13** This applies to any person who issues an *investment advertisement* or causes it to be issued. (Similarly, regulation 3.04 applies to any *investment advertisement* issued or caused to be issued by the *firm*.) These terms are not particularly clear but it is possible to give examples. A person will issue an *advertisement* if, for example:

- it goes out under that person's name;
- that person takes the decision as to whether it is distributed, both generally and in any particular case; and
- that person is liable for the document in the first instance.

**14** As an anti-avoidance device, these regulations also apply to causing *advertisements* to be issued. A person (Smith) causes an *advertisement* to be issued if, for example:

- Smith directs someone else (Jones) to issue the *advertisement*; or
- Jones issues the *advertisement* for Smith in circumstances where it is clear that Smith is generally directing matters (for example, a general advertising campaign, where Smith is in overall charge, but Jones decides who to hand the *advertisement* to).

So, a situation can arise where one person can be issuing an *advertisement* while another is causing it to be issued.

**15** If a *firm* receives a number of brochures relating to an *investment* product produced by someone else and hands them on to its *clients*, the *Institutes* do not regard the *firm* as issuing the *advertisement*, as long as the *firm* does not have any particular arrangement with the person who produced the brochure to hand it on. However, the *firm* may hand on the *advertisement* only if it is published by an *operator* of a *regulated collective investment scheme* or issued by a person authorised under the *Act* or allowed to be published under any other Act. (See regulation 3.10).

**16** On *investment advertisements* generally, *firms* are reminded of Statement 1.211 or Statement 11 (Obtaining Professional Work), Statement 1.202 or Statement 2 (Insolvency Practice) and Statement 1.203 or Statement 3 (Corporate Finance Advice) of the *Guide*.

**17** There are special rules about issuing *advertisements* relating to unregulated *collective investment schemes*. The Institute prohibits the promotion of schemes which are not *regulated collective investment schemes*, except to a very limited class of persons.

***Firms issuing advertisements***

**18** If a *firm* issues (or causes to be issued) an *investment advertisement*, then:

- a *principal* must approve the *advertisement* before it is issued (regulation 3.04);
- the *firm* must take all reasonable steps to ensure that the *advertisement* is fair and not misleading (regulation 3.05). Schedule 2 to Chapter 3 contains relevant regulations.

The *firm* must keep a copy of the *advertisement* for three years (regulation 3.04).

Note that regulations 3.04 to 3.06 and 3.10 to 3.11 apply if the *firm* causes an *advertisement* to be issued, as described in paragraph 14.

**19** Not applicable for IIA purposes.

**20** Not applicable for IIA purposes.

***Annual report and accounts***

**21** Difficult questions arise as to whether some annual reports and accounts are in fact *investment advertisements*.

These publications will not normally be *investment advertisements* because there is no invitation to enter into an *investment agreement* and they do not contain any offer of securities or information intended to lead to buying and selling the company's shares. This is so even if the chairman's statement refers to the prospects of the company, as long as there is no direct reference to the attractiveness of the shares or an investment in them. The same applies to extracts from annual reports contained in newspaper *advertisements*. However, in exceptional circumstances, these documents can amount to *investment advertisements* and if in doubt legal advice should be taken.

**22** Even if the report and accounts, or the published extract from them, is an *investment advertisement*, it can be issued under strict conditions. If they are, then there is no need for the *advertisement* to be approved by the *firm*. In summary, the conditions are that:

- the company is not an open-ended investment company;
- the shares of the company or its parent company are listed on an *EEA* exchange or the *advertisement* is or is accompanied by all or part of the company's annual accounts or the directors' report;
- the *advertisement* does not contain any invitation, offer or advice to underwrite, subscribe for, acquire or dispose of any *investments*;
- the *advertisement* does not contain any invitation or offer to carry out any transaction with, or use any service provided by, the company or any named person in the course of an investment activity (as explained in paragraph 9);
- the *advertisement* does not contain any information intended to lead directly or indirectly to persons doing any of the things referred to in paragraph 8 in relation to any *investment* other than shares in the company or another company in the same group; and
- if the *advertisement* contains information about price or yield on the shares (other than earnings per share, dividend or nominal rate of interest payable), it has a prominent warning that past performance cannot be relied upon as a guide to future performance.

***The Exemption Orders***

**23 - 24** Not applicable for IIA purposes.

***Approving the investment advertisements of clients***

**25-26** Not applicable for IIA purposes.

***Content of investment advertisements issued or approved by a firm***

**27** Under these regulations *investment advertisements* issued by a *firm* must not be misleading (see paragraph 18).

**28** Not applicable for IIA purposes.

**Schedule 2 to Chapter 3 - Further regulations on the contents of investment advertisements (Regulations 3.04 to 3.11)**

***Application***

**1** This schedule does not apply to the following types of *investment advertisements*:

- *advertisements* required or permitted to be published by an investment exchange (for example, listing particulars);

Guidance:

(1) See paragraphs 20 to 24 of Schedule 1 to Chapter 3 for an explanation of these *advertisements*.

***General requirements***

**2** The *advertisement* should:

- set out the name and address of the *firm* and that it is *authorised* by an *Institute* to carry on *investment business*; and
- make it clear that *investment business* activities are conducted in a manner which is incidental within the practice.
- make it clear that it contains promotional material, has a promotional purpose and is distinct from any other matter in the medium which carries it;
- describe clearly the nature of the *investment* or the services to which the *advertisement* relates;
- describe enough of the relevant features to give a fair view of the *investment* or *investment agreement* being advertised, including the financial commitments and risks involved, and state how full details may be obtained;
- make it clear where the *firm* knows it
  - has or may have a position or holding in the *investment* concerned or in a related *investment*; or,
  - is providing or has provided within the previous 12 months significant advice or *investment business* services in relation to the *investment* concerned or a related *investment*.

- include information about past performance only if:

  - it is relevant to the performance of the *investment* or service advertised;
  - it is complete, or is a fair and not misleading representation of the past performance of the *investment* or service;
  - it has not been chosen in order to exaggerate (or disguise) the success (or lack of it) of the *investment* or service over the period to which the information relates; and
  - the source of the information is stated and the *advertisement* contains a warning that the past is not necessarily a guide to future performance;
- make it clear whether the person offering any *investment* or service is to contract as principal or agent and (if that person is to act as agent) give the name of the principal if the principal can be identified at the time the *advertisement* is issued;
- if any references are made to taxation:
  - include a warning that the tax levels, bases, exemptions and reliefs can change;
  - if a matter is based on an assumed rate of tax, state the rate;
  - state that any tax reliefs referred to are those currently available and that their value depends on the individual circumstances of the investor;
  - make it clear whether any tax reliefs (or freedom from tax) referred to in the *advertisement* apply directly to the investor, to the provider of the *investment* or to the fund in which the investor takes part or, if such is the case, to more than one of them;

- state whether the matters referred to are only relevant to a particular class or classes of investor with particular tax liabilities and identify the class or classes and liabilities concerned;
- not describe the *investment* as being free from any liability to capital gains tax unless equal prominence is given to a statement, if appropriate, that the value of the *investment* is linked to a fund which is liable to that tax; and
- not describe the income from the *investment* as being free from any liability to income tax unless equal prominence is given to a statement, if appropriate, that the income is paid out of a fund which pays that tax;

- state whether any rights to cancel apply to the *investment* advertised and, if they do, the period within which any *investment agreement* made may be cancelled and whether the right is given by law.
- where cancellation rights apply;
  - the *advertisement* must state that upon cancellation the investor may not obtain a full refund of the amount invested, if this is the case; and
  - if the *advertisement* relates to a high volatility investment, the *advertisement* must state, if it is the case, that the shortfall in the amount recovered by the investor on cancellation may be large.

- an *advertisement* for a fund which invests in property, or which refers to the fact that a fund may be invested in land or interests in land;
  - it must state that the value of the property or land is a matter of a valuers opinion,
  - is in respect of a fund which is not open-ended, the *advertisement* must state that the land and buildings may be difficult to sell and there may be times when the units cannot be sold.
- where an *advertisement* contains any forecast or projection, whether of specific growth rate or of a specific return or rate of return, it should make clear the basis upon which that forecast or projection is made, explaining for example
  - whether reinvestment of income is assumed
  - whether account has been taken of the incidence of any taxes or duties and if so, how, and
  - whether the forecast or projected rate of return will be subject to any deduction either upon premature realisation or otherwise.

**3** The *firm* should:

- reasonably believe (on the basis of evidence of which a record is kept or is accessible) that any statement relevant to any *investment* or service being advertised is and will remain true while the *advertisement* is current;
- take all reasonable steps to verify that the person giving any statement of opinion still has that opinion when the *advertisement* is issued or approved.

***Prohibitions***

**4** The advertiser should *not* issue an *advertisement* to persuade anyone who responds to it to transact investment business of a kind not described in the *advertisement*.

**5** The *advertisement* should *not*:

- state or imply that any *investment* or service being advertised or any other matter in the *advertisement* has been approved by an *Institute*, the Central Bank of Ireland or any other regulatory body unless:
  - approval has been given in writing;
  - the *advertisement* is issued by or for the Government; or

- the *advertisement* is for an *investment* recognised by the Inland Revenue as qualifying investors for tax relief, in which case it may state that fact;

- disguise the significance of any statement, warning or other matter which ought to be included in an *advertisement* either through relative lack of prominence or by including matter likely to detract from it;
- include any statement implying that the scale of the activities or the extent of the resources of the advertiser are greater than they are;
- claim or imply limited availability of *investments* or services (for example, limited period of offer, or special terms for a limited period) unless justified;
- quote from a testimonial or commendation unless the quotation is:

  - complete, or a fair representation of the whole;
  - accurate and not misleading when the *advertisement* is issued; and
  - relevant to the *investment* or service advertised,

  and the author has agreed to the words being used in the *advertisement* and, if a *principal*, *employee* or *associate* of the *firm*, the *advertisement* says so;

- include any comparison or contrast:

  - with other *investments*, expenditure, assets, services or indices, unless it is fair and the *advertisement* does not leave out factors which are likely to be relevant to an accurate appreciation of such comparison or contrast;
  - in relation to units in a *collective investment scheme* or in a unit-linked *policy*, between the value of an investment in those units at different times unless it is on an offer to bid basis; that is to say, on the basis of what it would have cost to buy an amount of the units at the earlier time and what a disposal of that amount of those units would have realised at the later time. That this is the basis of the comparison must also be stated.

***Risk warnings***

**6** An *advertisement* should give the following risk warnings:

- (for an *investment* which can fluctuate in value) a statement that values may go down as well as up and that the investor may not get back the amount invested;
- (for high yield or income *investments*) a statement that income from the *investment* may go up or down;
- (for *investments* involving a foreign currency) a statement that changes in rates of exchange may cause the value of the *investment* to go up or down;
- (for *non-readily disposable investments*) a statement that there is no recognised market for the *investment* and that it may, therefore, be difficult for the investor to deal in the *investment* or to get reliable information about its value or the extent of the risks it faces;
- (for *investments* where the market is restricted to less than three independent market makers) a statement of this fact;
- (for *investments* which are front-end loaded) a statement of this fact;
- (for *investments* which risk significant loss on realisation) a statement of this fact and the reason for it;
- (for *investments* carrying a contingent liability to pay more money later) a statement that the investor may lose his or her original investment and (as appropriate) have to make a further investment or contribution;
- (for *warrants* or options) a statement that a *warrant* or option often involves a high degree of gearing so that a relatively small movement in the price of the asset the *warrant* or option relates to can result in a disproportionately large movement, unfavourable as well as favourable, in the price of the *warrant* or option; and that the investor should carefully consider whether these *investments* are suitable in the light of his or her circumstances and finances;

- (for futures or contracts for differences) a statement that the risk of loss in investing in commodity, financial or other futures or contracts for differences can be substantial, and that the investor should carefully consider whether these *investments* are suitable in the light of his or her circumstances and finances; and
- a statement that past performance is no guide to future performance.

Guidance:

Where relevant, wording complying with Schedule 7 to Chapter 3 should also be in *advertisements*.

**Schedule 3 to Chapter 3 - Guidance on using authorised third parties (Regulation 3.13)**

***General***

**1** Chartered accountants must never undertake, or continue, professional work which they are not competent to perform. A *firm* may consider that its own knowledge and experience of some types of *investment* is too limited to provide the appropriate level of service. In this case the *firm* should introduce the *client* to another Independent Intermediary. *Firms* cannot introduce *clients* to an intermediary which is not independent. By definition, an intermediary which is not independent cannot give best advice across the whole market place.

**2** The choice of intermediary will depend on a number of factors, including the particular service required by the *client*, the location of the *firm* and any existing relationship. In many cases, the most appropriate intermediary might well be another *firm*. Often, formal or informal contacts between practitioners already exist. If they do not, contacts can be established. Virtually all *firms* able to give advice of this kind will be happy to help colleagues. The secretaries of District Societies can often make appropriate introductions.

**3** Of course, a *firm* may not want to refer a *client* to another *firm*. They may well be competing in the same market. The *client* may be referred to any authorised person competent to provide the advice, for example, banks, insurance brokers or other financial advisers if they are authorised as independent intermediaries. (If there is any doubt about status, it can be checked with the regulator concerned or the Central Bank of Ireland.)

***Using Independent Intermediaries as authorised third parties***

**4** A *firm* can use an *Independent Intermediary* as an *authorised third party* in a number of ways.

- Introduction

  The *firm* may simply make an introduction so that the *client* becomes a customer of the, *Independent Intermediary,* leaving the *firm* with no responsibilities for the particular transaction or service.

  If the *firm* acts as a 'post-box' (that is, receives the *Independent Intermediary* 's written advice or contract notes), it will not have best execution, and risk warning obligations under these regulations because it will not be carrying on *investment business*. However, these obligations will arise if the *firm* is performing a more active role and as a result is carrying on *investment business* (for example, if the *firm* is arranging or acting as agent in transactions, or reviewing the advice of the *Independent Intermediary* so that it can be said to be giving investment advice).

  The nature of the *firm's* services should be made clear to the *client* in the engagement letter. If the *firm* is carrying on *investment business* for the *client*, then it has the best execution, and risk warning obligations unless regulation 3.13 applies. This is explained in paragraphs 5 to 9.

- Where the *Independent Intermediary* provides a service to the *firm*

  The *firm* may get information or advice from an *Independent Intermediary* and then use that information or advice to advise the *client*. In that event, the *firm* still has all

of its obligations under these regulations.

- Where the *Independent Intermediary* provides some services to the *client*

  Where the *firm* keeps some responsibilities to the *client*, but the *Independent Intermediary* becomes responsible for the particular advice or for carrying out the transaction, the *firm* is released from its obligations of best execution, and to administer risk warnings if certain conditions are met. This is explained in paragraphs 5 to 9.

**Best execution**

**5** The *firm* has no best execution obligation under regulation 3.38 if the *authorised third party* is an *Independent Intermediary* and confirms in writing that it will be responsible for best execution. *Firms* should agree this with *Independent Intermediaries*; a model letter is in paragraph 9. Note that, in this situation, the *firm* may still have the risk warning obligations.

**Risk warnings**

**6** The *firm* has no obligation to consider "know your client" and suitability or to give risk warnings and product information under regulations 3.29 to 3.34 if either:

- the *Independent Intermediary* gives the advice or provides the service direct to the *client* and he or she becomes the *Independent Intermediary 's* own client or customer under the relevant rules of its *Regulatory Body*. The *firm* will not have the best execution obligation unless it is involved in carrying out a transaction; or
- the *Independent Intermediary* gives the advice to the *firm* acting as disclosed agent and the engagement letter between the *firm* and the *client* allows this (see paragraph 4.3 of annex A to Schedule 4 to Chapter 3 for model wording for the engagement letter). However, the *Independent Intermediary* must agree to treat the *client* as its own client or customer under the relevant rules of its *Regulatory Body* and agree that it will obtain all information from the *client* in order to enable it to comply with its own obligations to give risk warnings. *Firms* should agree this with *Independent Intermediaries.* A model letter is in paragraph 9. In particular, it should be noted that if the *Independent Intermediary* produces the draft agreement, *firms* will get the exemption in regulation 3.13(b) only if the *Independent Intermediary* confirms in the agreement that it will treat the *client* as its own client or customer.

**7** The *firm* may be giving the *client* both generic and specific advice. An example of generic advice is "you should be investing in an income-yielding authorised unit trust". Generic advice does not fall within regulations 3.29 to 3.34. However, as explained in the guidance to regulation 3.29, the *firm* has similar obligations under the *Code of Ethics*. If the *firm* gives generic advice, it may tell the *client* to take specialist advice on the particular *investment*. Here, the *firm* keeps the best advice and risk warning obligations unless an *Independent Intermediary* acts as in paragraph 6.

**8** The *firm* may consider that it should review the *Independent Intermediary* 's advice due to its general duty to the *client* or if the *client* asks the *firm to* do so. If this happens:

- if the *firm* agrees with the advice of the *Independent Intermediary* and has already complied with regulation 3.13(b), then no further requirements arise under these

regulations unless the *firm* gives further advice which cannot be said to come from the *Independent Intermediary;*

- if the *firm* disagrees with the advice and instead provides its own, it keeps the best advice and risk warnings obligations. Alternatively, the *firm* may refer the matter back to the *Independent Intermediary* for a further view, or recommend that the *client* takes advice from a different *Independent Intermediary.*

**Agreement with an *authorised third party***

**9** The model letter referred to in paragraphs 5 and 6 is below.

"To [independent intermediary]

*[1 We are acting as agent for [ ] ("the client") and propose to give you instructions on behalf of the client to [effect certain transactions in investments for] [and] [give investment advice to or for] the client.]

OR

*[1 We are acting as agent for such clients (each "the client") as are [referred to in the Appendix to this letter] [and] [notified to you by us in writing from time to time] and propose to give you instructions on behalf of the client to [effect certain transactions in investments for] [and] [give investment advice to or for] the client.]

2 In carrying out such instructions you will treat the client as your client or, as relevant, customer for all the purposes of the rules of the Regulatory Body by which you are authorised, including best execution.

This letter will prevail in relation to any inconsistent provision in any other agreement entered into between us or terms of dealing sent to us.

Yours faithfully

[**the *firm***]

On copy:

To [***firm***]

We agree to the terms of the above letter.

[Independent Intermediary]"

Note:

There are two versions of the first paragraph of the letter. Use the first if separate letters are written for each *client.* Use the second if the letter relates to several *clients.* If using the second version, firms should ensure the *Independent Intermediary* is advised of any changes to the names of the *clients* in order that all compliance responsibilities for such *clients* are transferred to the *Independent Intermediary.*

***Firms*** **acting as** *Independent Intermediaries*

**10** Authorised persons, such as solicitors, may ask *firms* to provide *investment business* services to their clients. The regulatory rules binding upon the authorised person may make him or her exempt from the duties to the client, if the service is provided by the *firm*. So it is important that the *firm* provides the necessary investor protection to the client.

In each of the following three situations the *firm* must know the identity of the client.

- Where the authorised person simply introduces the client to the *firm*, so the client becomes the *client* of the *firm*.
- The authorised person may get information or advice from the *firm* and then use that information or advice to advise the client. Here the authorised person should be treated as the *client* unless he or she is acting for a named client.
- The authorised person may retain some responsibilities to the client but rely on the *firm to* assume others. Here the *firm* will know the name of the client and should treat him or her as a *client*.

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**Schedule 4 to Chapter 3 - Guidance on the contents of engagement letters - (Regulation 3.15)**

***Introduction***

**1** When providing to *clients* or *non-investment business clients* services which are not *corporate finance* activities, four possibilities arise:

- no *investment business* is being carried on (for example, pure audit or tax work);
- the services include necessary investment advice or arranging of transactions;
- *investment business* is carried out which is integral but not necessary to other services; or
- separate identifiable *investment business* is carried out.

**2** On the face of it, no engagement letter is required in the case of the first two points in paragraph 1. However, *firms* should be cautious before assuming that no *investment business* will be carried out or that *investment business* is necessary (see Schedule 1 to Chapter I). As a precaution, *firms* may want to issue an engagement letter in relation to integral *investment business*.

***Integral investment business***

**3** In the course of providing general professional services such as tax or auditing, *firms* are likely to carry out integral *investment business*. This likelihood arises out of the broad definitions of *investments* and *investment business*. To avoid being in breach of these regulations, an engagement letter for general professional services needs to be agreed (see annex D). This enables a *firm* to give a *client* investment advice as a part of ordinary business without needing to agree a full letter of engagement, see paragraphs 7 and 8 below.

**4** The test is whether the purpose of the *investment business* service is integral to the main purpose of the general professional services (that is, whether it can be readily distinguished from general professional services because of its nature or its size). *Portfolio review* (see regulation 3.54) and *discretionary management* are not considered to be part of a *firm's* general professional services. They are mainstream *investment business*.

**5** Apart from providing a briefer letter of engagement, when carrying out integral *investment business* the *firm* is not relieved of any of its other obligations, for example to give risk warnings or to get instructions for particular transactions. If, following investment advice given during other professional work, a *client* wants the *firm* to provide a further, separate, *investment business* service, the *firm* must have written instructions from the *client* before the transaction is carried out. These instructions should include the matters covered in the sample execution only engagement letter in annex E to this Schedule.

**6** The written instructions must be posted to the *client*. The instructions may be acted on, once the *client* has acknowledged receipt of the letter and agreed its terms. If the *client's* agreement is not written, the *firm* should make a note of the time and date and the form of approval.

***Separate identifiable investment business***

**7** If the *investment business* can be separately identified, then the *firm* should agree with the *client* a letter of engagement in the form of annex A to this Schedule (as adapted). It is a matter of judgement whether an activity includes or consists of separate, identifiable *investment business*. If the purpose of the *investment business* service is not integral to the main purpose of other professional services, and the fee involved is material by

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| | comparison with that for other services, it is likely to be separate, identifiable *investment business*. |
| **8** | Annex B contains additional provisions if *discretionary management* services are provided. Annex C contains provisions for *portfolio review*. |
| ***Using the model letters*** | |
| **9** | *Firms* will need to consider carefully the model letters in the annexes when adapting them to fit the *firm's* circumstances. In particular, certain paragraphs contain alternatives in square brackets. The letters do not contain every provision which, commercially, *firms* may want to agree with *clients*. However, they do refer to the areas in which *firms* should reach agreement with their *clients* under these regulations. Where they provide custody services, *firms* will also need to ensure they meet the requirements of regulations 3.46 and 3.47. NB: *Firms* should note that as contractual documents between the *firm* and the *client*, legal advice should be taken as necessary in adapting the models to their circumstances. |
| **10** | The engagement letter may be a convenient place to insert the statements required by these regulations, for example, risk warnings (regulation 3.32) and conflicts of interest (regulation 3.20). However, if an engagement letter including a risk warning was agreed a number of years before the transaction is carried out, then the fact that the risk warning is in the engagement letter will not be enough. |
| **11** | In drafting an engagement letter, *firms* should consider the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159) European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 in relation to unfair terms. The Unfair Contract Terms Act requires that terms restricting or excluding liability in standard form contracts or contracts made with consumers must satisfy the requirement of reasonableness. The Unfair Terms in Consumer Contract Regulations prevent enforcement of unfair terms in contracts made with consumers where the terms were not individually negotiated. |
| **12** | The model letters are no more than suggestions. *Firms* may prefer to use standard terms of business and supplement them with an assignment letter each time the *client* asks for *investment business* services. |

***Annex A - Model engagement letter for investment business services***

[On *firm's* letterhead which should include:

- the *firm's* name and address; and
- the statement about the *firm's authorisation* in regulation 3.01]

Dear

This engagement letter sets out the services we shall provide and your and our rights and obligations. Please read this letter carefully. If you have any questions about anything in it, please contact us immediately.

**1 Our status**

We are an independent professional chartered accountancy firm. We must consider more than one brand or range of products and advise you on what you need most. We will act as your agent in any dealings with product suppliers and are responsible for the advice which we give to you.

**2 Our services**

**2.1** We shall [give advice] [and/or] [act as agent or arrange on your behalf] for the purchase or sale of investments of the following types:

- shares, government securities and other investments for which there is a ready market;
- [ **state other investments or assets, if any**].

**2.2** If you want to restrict the type of investment or service covered by this engagement letter, please let us know in writing as soon as possible, or we shall assume that no restrictions apply.

**2.3** [Of course, we are able to provide other services for you. If you want any other services, please let us know.]

**2.4** [In accordance with common procedures used by accountancy firms, we operate a "chinese wall" procedure under which our corporate finance department conducts its activities entirely separately from the department of the firm which provides services to you under this engagement letter. You agree that we will not be obliged to disclose to you or to take into consideration in providing services to you information the disclosure of which would or might be a breach of duty or confidence to any other person.]

**3 Your investment objectives**

**3.1** We understand that your investment objectives are:

[***Firm*** **to discuss with** ***client*** **and complete as appropriate**.]

**3.2** If you would like to discuss those investment objectives, please let us know as soon as possible. [***Firms*** **should remember that the** ***client's*** **objectives can change and** ***firms*** **should conduct a regular review**.]

**4 Communicating with you [and using third parties]**

**4.1** We shall act on instructions given by you or any person you have nominated as long as you

have written to us about that person. We can accept instructions over the telephone or in writing, which will not take effect until actually received by us. If we accept instructions over the telephone, we may act on them before we receive confirmation, unless you specifically tell us not to.

**4.2** We shall keep you (or, if you want, the person you nominate) informed about transactions arranged for you. We will also send contract notes to you or that person. Any change in these instructions should be in writing.

**4.3** If you have asked for our advice on any investments, we may give that advice to you over the telephone or in writing. [Please note that if we think it is appropriate, we may take advice for you from another person authorised under the Investment Intermediaries Act 1995. (Please ask us to explain these terms if you are unsure of their meaning). If this happens we shall tell you that we have done so.]

**[Note: For the use of *authorised third parties* see regulation 3.13(b) and Schedule 3 to Chapter 3.]**

**4.4** To enable us to provide a proper service to you, there may be occasions when we will need to contact you without your express invitation. For example, it may be in your interest to buy a particular investment and we would wish to be able to inform you of that fact. We therefore may contact you in such circumstances. We would, however, do so only between 8 a.m. and 7 p.m. on weekdays and 8 a.m. and 1 p.m. on Saturdays. We shall, of course, comply with any other restrictions you may wish to impose which you notify to us in writing.

**[Note: See regulation 3.12. The times inserted must be reasonable.]**

**5 Our fees**

**5.1** Our fees for the services covered by this engagement letter are [**state basis of calculation**]. These are due every [**state frequency**]. You must pay our invoices promptly.

**5.2** In some circumstances, commissions or other benefits may become payable to us [or to one of our associates] in respect of transactions we [or such associates] arrange for you, in which case you will be notified in writing of the amount and terms of payment. [The fees that would otherwise be payable by you as described above will [not] be abated by such amounts.] [You consent to such commission or other benefit being retained by us [or, as the case may be, by our associates,] without our [, or their,] being liable to account to you for any such amounts.] In the event that you terminate any contract giving rise to commission at an early stage in its operation, we may have to repay all or part of the commission to the product provider. We reserve the right to ask you to contribute to any such repayment.

**[Note: For an explanation of the requirements of these regulations and of the general law as regards receipt of commission, see regulations 3.23 to 3.27 and the guidance to those regulations.]**

**5.3** [Please note that in the event of your failing to make any payment due to us when requested, we reserve the right to retain any money held for you to satisfy your liability to us.]

**6 Your money**

**6.1** [We do not hold money received in the course of providing investment services to our clients. Accordingly, any money which we receive on your behalf will be forwarded to you or to a named third party on your instructions forthwith. Any cheques or banker's orders drawn by you in respect of amounts owed to third parties should be drawn in favour of the third party concerned as we are not authorised to handle cheques, etc, representing clients' money drawn in favour of the firm.]

OR

**6.1** [Money which we hold or receive on your behalf in the course of providing the services

covered by this engagement letter will be paid into an investment business client bank account (which may include other investment business clients' money) pending being sent to you. You consent that, where appropriate, money may be held outside Ireland. Where such a bank does not operate trust accounts under or in a way similar to that required by Irish law, your money may not be protected as effectively as if it were held in a client account in Ireland. We shall inform you accordingly.]

**6.2** [Any money we receive from clients in connection with our investment business services (including your money) will be held on a statutory trust for all our [investment business] clients. This money will not be available to our creditors in the unlikely event that we become insolvent.]

**6.3** [In general, we will pay you interest on any money we hold for you, except that waived by you in accordance with the attached agreement.]

**[Note: The second version of paragraph 6.1, together with paragraphs 6.2 and 6.3 apply if the *firm* holds *investment business clients' money*. See Schedule 1 to Chapter 4.]**

**7 Your investments**

If we handle any title documents on your behalf, the following arrangements will apply.

**7.1** [Registered investments purchased by us on your behalf will be registered in your name unless you instruct us otherwise in writing and certificates or other title documents will be sent by us to you or the person nominated by you [in writing]. Any bearer investments will be sent by us to you or to the person nominated by you. Any certificates, title documents or investments so sent will be at your risk and at your expense.]

OR

**7.1** [All investments purchased by us on your behalf will be retained in safe custody by us. Registered investments will be held in the name of [**state name of nominee company**] which is associated with us. Certificates or other title documents in respect of registered investments and bearer certificates will be held in safe custody by [us] [**state name of nominee company**] [**state name of third party custodian**].]

**7.2** Where appropriate, for example in the case of overseas securities, investments or certificates or other documents of title representing them may be held outside Ireland.

**7.3** We will account to you promptly for all dividends, interest and other payments due on investments held on your behalf.

**7.4** If any voting or similar rights become exercisable on investments held for you, we shall contact you to obtain your instructions as to how those rights should be exercised. If you do not give instructions within the time period stated, we shall take no action. In no circumstances will we or the custodian be liable for any loss you may suffer if you fail to give us instructions when requested or if we are unable to contact you to seek your instructions.

**7.5** We may hold securities and/or, when you sell securities, deliver them, in electronic form or through an electronic medium.

**7.6** Where we provide custody of title documents belonging to you, we

- will charge for such services [separately from] [together with] our other fees, on the basis stated above;
- will provide you with periodic **[state when - at least annually]** statements or records of title documents
- may appoint sub-custodians to undertake the arrangements for the custody of your title documents; and
- will re-imburse you for any losses of investments due to fraud, wilful default or

negligence arising from our activities [and/or those of our nominees] [and /or sub-custodians] [and/or third party custodians];

All instructions for custody services will be given or received in line with the procedures detailed in section 4 of this letter.

**8 Variation**

This engagement letter may be varied or superseded at any time by agreement in writing between us, but any such variation shall not affect any rights or obligations of either of us already accrued. You or we may initiate such variations.

**9 Termination**

Either of us may terminate this engagement letter by written notice at any time.

**9.1** Termination will not in any event affect accrued rights, existing commitments or any contractual provision intended to survive termination and will be without penalty or other additional payment save that you will pay (i) our fees pro rata to the date of termination; (ii) any additional expenses necessarily incurred by us in terminating this engagement letter; (iii) any losses necessarily realised in settling or concluding outstanding obligations.

**9.2** On termination of our appointment we will promptly account to you for all investments and cash held by us or any nominee company of ours for your account, save that we shall be entitled to retain such investments and cash as may be required to settle transactions already initiated and to pay any outstanding liabilities.

**9.3** If, on termination, any money is or may become due as a result of a commitment entered into on your account ("an outstanding amount") we may at our sole discretion sell such of the investments as we may select in order to realise cash sufficient to cover any outstanding amount (but only to the extent that insufficient cash is otherwise held on your account and available for the purpose) and/or cancel, close out, terminate or reverse any transaction or enter into any other transaction or do anything which has the effect of reducing or eliminating any outstanding amount or of reducing or eliminating liability under any contracts, positions or commitments undertaken on your account.

**10 The Investment Business Regulations**

We are subject to the Investment Business Regulations of the Institute of Chartered Accountants [in England and Wales] [of Scotland] [in Ireland] when we provide services to you under this engagement letter.

**11 Complaints procedure and compensation**

**11.1** If you would like to talk to us about how we could improve our service to you, or if you are unhappy with the service you are receiving, please let us know by telephoning [**state name**] or [**state telephone number**].

**11.2** We will carefully consider any complaint as soon as we receive it and do all we can to explain the position to you. If we do not answer your complaint to your satisfaction, you may of course take up the matter with the Institute.

**11.3** In the unlikely event that we cannot meet our liabilities to you, you may be able to claim compensation under the Chartered Accountants' Compensation Scheme.

**12 Governing law**

[Irish [[English] [Scots] law will govern the provision of the services covered by this letter, and the [Irish] [English] [Scots] courts will have exclusive jurisdiction over any dispute.

**13 Other provisions**

**13.1** [**If the *firm*** is a sole practice, explain the arrangements for appointing an ***alternate*** **to be**

**responsible for *investment business*. if the *principal*. is unable to run the practice**.]

Please confirm that you agree to the terms of this letter by signing the enclosed copy and returning it to us. If you do not agree with the terms of this engagement letter, please let us know. Once it has been agreed, this letter will remain effective until replaced or amended as agreed between us.

Yours faithfully

[**name of *firm***]

[On copy:

I/We agree to the terms of the above letter.

Date:

***Annex B - Model engagement letter for discretionary management services***

The following changes should be made to the model in annex A.

**1** Paragraph 2.1 should be replaced with:

"2.1 We shall manage the assets referred to in the Appendix on a [discretionary] [referral] basis subject to the restrictions contained in this engagement letter and will arrange for the purchase or sale of investments of the following types:

(1) shares, government securities and other investments for which there is a ready market;

[(2) **state other investments or assets if any**]."

**2** Delete paragraph 4.2, and the first sentence of paragraph 4.1 should be replaced with:

"We shall manage your portfolio at our discretion as to the purchase, sale and/or retention of investments."

**3** Paragraph 7.4 should be replaced with:

"7.4 We shall exercise voting or similar rights which become exercisable on investments held for you."

**4** Further, a *discretionary management* agreement must contain:

- the initial composition and value of the portfolio;
- instructions on the kinds of investment activity permitted;
- any restrictions. Restrictions may be of any kind the *client* wants. The *client* may want to restrict - or even prohibit - particular types of *investment*, such as debentures, or shares in a particular market, such as banking. *Clients* may also want to limit the amount that may be invested at any one time in any particular *investment* or market. If there are restrictions like this in the agreement, it must also state the steps to be taken, and how speedily, to put right any problem caused by changes in *market values*;
- management and reporting arrangements;
- authority (if any) to borrow money for the portfolio; and
- the arrangements for the custody of cash and other assets.

***Annex C - Model engagement letter for portfolio review***

The following changes should be made to the model in annex A.

**Where portfolio review is the only service**

**1** Paragraphs 2.1 and 2.2 should be replaced with:

"2.1 Our services under this engagement letter will comprise portfolio review of the following investments:

[**state description**].

2.2 We will review the portfolio [**state frequency**] and send to you within [**state number not more than 50**] business days of the relevant account date a statement of your portfolio with the following information:

- the number of the units of each asset in the portfolio or fund, their initial value and their value at the closing date;
- a statement of how we calculated the value [and performance measure] of each asset at the closing date and, if we have calculated it in a different way from previously, we will say so;
- details of any assets which at the closing date were lent to a third party or charged as security for loans to the portfolio;

[**Note: Regulation 3.43 prohibits the *firm* lending a *client's title* which it holds to a third party.**]

- the income each asset produced during the period;
- the amount of any interest payments made on money borrowed for the portfolio;
- a summary of all transactions carried out (and expenses incurred) during the period; and
- a statement of our [and our associates'] fee and commission income for the portfolio review during the period unless we have given that information to you in another way.

2.3 The appendix to this letter has a statement of your portfolio and the value of each item in it on [**state date**]."

**2** Delete paragraphs 4.2, 5.2, 6 and 7.

**Where *portfolio review* is an additional service**

**1** These paragraphs should be added to paragraph 2.

"2.5 Our services under this engagement letter will include portfolio review of the following investments:

[**state description**]

2.6 We will review the portfolio [**state frequency**] and send to you within [**state number not more than 50**] business days of the relevant account date a statement of your portfolio with the following information:

- the number of the units of each asset in the portfolio or fund, their initial value and their value at the closing date;
- a statement of how we calculated the value [and performance measure] of each asset at the closing date and, if we have calculated it in a different way from previously, we will say so;
- details of any assets which at the closing date were lent to a third party or charged as security for loans to the portfolio;]

[**Note: Regulation 3.43 prohibits the *firm* lending a *client's title documents* which it holds to a third party.**]

- the income each asset produced during the period;
- the amount of any interest payments made on money borrowed for the portfolio;
- a summary of all transactions carried out (and expenses incurred) during the period; and
- a statement of our [and our associates'] fee and commission income for the portfolio review during the period unless we have given that information to you in another way.

2.7 The appendix to this letter has a statement of your portfolio and the value of each item in it on [**state date**]."

***Annex D - General professional services engagement letter - model paragraphs covering investment business***

**[Note: These paragraphs may not be appropriate in all circumstances for *firms* in category IB and should be adapted accordingly. *Firms* in category IA are restricted to *corporate finance activities* and should refer to Schedule 3 to Chapter 5.]**

[On *firm's* letterhead which should include:

- the *firm's* name and address;
- the statement about the *firm's authorisation* in regulation 3.01.]

**Investment business services**

**1 Our status**

We are an independent professional chartered accountancy firm. We must consider more than one brand or range of products and advise you on what you need most. We will act as your agent in any dealings with product suppliers and are responsible for the advice which we give to you.

**2 Our services**

We may, in the course of the other professional services set out in this engagement letter, advise you on buying and selling investments.

If, as a result of such advice, you want us to arrange or carry out a transaction, you must instruct us in writing.

Please note that we cannot do any more investment business for you unless you agree with us the terms and conditions that will apply.

**3 Communicating with you**

**3.1** We may advise you over the telephone or in writing.

**3.2** To enable us to provide a proper service to you, there may be occasions when we will need to contact you without your express invitation. For example, it may be in your interest to buy a particular investment and we would wish to be able to inform you of that fact. We therefore may contact you in such circumstances. We would, however, do so only between 8 a.m. and 7 p.m. on weekdays and 8 a.m. and 1 p.m. on Saturdays. We shall, of course, comply with any other restrictions you may wish to impose which you notify to us in writing.

[**Note: See regulation 3.12. The times inserted must be reasonable.**]

**4 The Investment Business Regulations**

We are subject to the Investment Business Regulations of the Institute of Chartered Accountants [in England and Wales] [of Scotland] [in Ireland] (the Institute) when we provide investment business services to you under this engagement letter.

**5 Complaints procedure and compensation**

**5.1** If you would like to talk to us about how we could improve our service to you, or if you are

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| | unhappy with the service you are receiving, please let us know by telephoning [**state name**] on [**state telephone number**]. |
| **5.2** | We will carefully consider any complaint as soon as we receive it and do all we can to explain the position to you. If we do not answer your complaint to your satisfaction, you may of course take up the matter with the Institute. |
| **5.3** | In the unlikely event that we cannot meet our liabilities to you, you may be able to claim compensation under the Chartered Accountants' Compensation Scheme. |
| **6** | **Other provisions** |
| **6.1** | **[If the *firm* is a sole practice, explain the arrangements for appointing an *alternate* to be responsible for *investment business* if the *principal* is unable to run the practice.]** |

***Annex E - Model engagement letter for execution-only services***

[On *firm's* letterhead which should include:

- the *firm's* name and address;
- the statement about the *firm's authorisation* in regulation 3.01.]

Dear [ ]

**1 Our services**

**1.1** Following our meeting on [**state date**] we confirm that you have asked us to [buy] [sell] for you [**state investment**] at [**state price or terms**]. We are not offering and have not offered you any advice on this transaction nor exercised any judgement on your behalf.

**1.2** We shall send you copies of our written instructions to [brokers] [insurance companies] [other counterparties].

**1.3** As instructed we shall send contract notes to [**state name**].

**2 Your money**

**2.1** Please note that we [do] [do not] receive or hold, in our own name, clients' money. Please let us have your cheque for € [**state amount**] payable to [us] [**state name**].

**2.2** Our arrangements for looking after clients' [cash] [and] investment assets are [state description].

**3 Risk warning**

**3.1** [**State specific risk warnings under regulations 3.32 and 3.37.**]

**4 Our fees**

**4.1** Our fees for the services covered by this engagement letter are [**state basis of calculation**]. You must pay our invoices promptly.

**4.2** [**If appropriate, include paragraph 5.2 from annex A**].

**5 The Investment Business Regulations**

We are subject to the Investment Business Regulations of the Institute of Chartered Accountants [in England and Wales] [of Scotland] [in Ireland] (the Institute) when we provide investment business services to you under this engagement letter.

**6 Complaints procedure and compensation**

**6.1** If you would like to talk to us about how we could improve our service to you, or if you are unhappy with the service you are receiving, please let us know by telephoning [**state name**] on [**state telephone number**].

**6.2** We will carefully consider any complaint as soon as we receive it and do all we can to explain the position to you. If we do not answer your complaint to your satisfaction, you may of course take up the matter with the Institute.

**6.3** In the unlikely event that we cannot meet our liabilities to you, you may be able to claim compensation under the Chartered Accountants' Compensation Scheme.

**7 Other provisions**

**7.1** **[If the *firm* is a sole practice, explain the arrangements for appointing an alternate to be responsible for *investment business* if the *principal* is unable to run the practice.]**

Please confirm that you agree to the terms of this letter by signing the enclosed copy and

returning it to us. If you do not agree with the terms of this engagement letter, please let us know. Once it has been agreed, this letter will remain effective until replaced or amended as agreed between us.

Yours faithfully

[**name of *firm***]

[On copy:

I/We agree to the terms of the above letter.

Date: ]

**Schedule 5 to Chapter 3 - Guidance on benefits in kind - (Regulations 3.26 and 3.27)**

**General**

**1** Accepting gifts, goods or services from a *client* or another investment business may be a threat or appear to be a threat to the *firm's* objectivity and integrity.

**Product bias**

**2** A *firm* must ensure that it always provides best advice and best execution and does not allow these requirements to be overshadowed by other considerations. In particular, a *firm* must not provide or accept any inducements, for example, commission rates or frequency of payment, likely to influence those advising on or carrying out transactions for a *client* in favour of types of *investment* which would not be in the best interest of the *client*.

**3** A *firm* must not motivate its *employees* and *associates* to promote only certain types of *investment*, regardless of their suitability to particular *clients*, because those types earn more for the *firm*, its *employees* or *associates*. However, in deciding the amount of commission it keeps, with consent (see regulations 3.24 and 3.25), a *firm* may properly take into account both the different characteristics of types of *investments* and the greater time and effort which may be needed to explain the features of the more complicated types.

**Gifts**

**4** A *firm* must not accept gifts from another investment business where the value or frequency of the gifts might be thought to influence the *firm's* judgement in advising or carrying out transactions for *clients*. Gifts include free or subsidised entertainment or travel, although reasonable business entertainment and seasonal or promotional gifts may be accepted.

**Volume overriders**

**5** A *firm* may receive commission from an investment business for a *client's* transactions but that commission must be calculated according to the size of that *client's* transaction. A *firm* must not accept a "volume overrider", that is, a commission calculated according to the total number of transactions made for a number of *clients*.

**Reciprocal arrangements**

**6** A *firm* must not arrange with another *firm* to place *investment business* with that *firm* on condition that that other *firm* reciprocates.

**Schedule 6 to Chapter 3 - Guidance on suitability and advising clients (Regulation 3.29)**
***Know your client***

**General**

**1** The first step is to find out about a *client's* situation, investment experience and competence in financial matters. Information on an individual *client's* personal and financial situation must be obtained. For corporate *clients*, full information is needed on their activities, objectives and financial situation. This information must be recorded; a check list for making the necessary enquiries can be the record. These regulations distinguish here between *private investors* and *non-private investors* (see regulation 3.37(b) and paragraphs 9 and 10 of Schedule 10 to Chapter 3). Further, these regulations recognise the difference in obligation between, for example, advising a personal *client* with modest investment objectives and limited knowledge, and advising the treasurer of a major conglomerate. The treasurer might reasonably be expected to have extensive knowledge of the investment scene.

**2** Typical enquiries are set out below. However, in each case the details needed may well be different. In many cases more information will be needed, and in others less, for example, if a *client* asks for advice on just one *investment*.

**Personal clients**

**3** Personal situation. The details of a *client's* personal situation include: age, health, marital status, dependants, business or employment prospects, current and future commitments and attitude to risk.

**4** Financial situation. The details on a *client's* financial situation include: current earned income, investment or other income, capital, mortgages, current investments and other assets, tax position, anticipated inheritances, current and future expenditure and financial plans, commitments and objectives (short, medium and longer-term goals or needs, including retirement, and priority of objectives). The *firm* should also find out the financial position of a *client's* spouse and dependants (and even potential dependants).

**5** Illegal acts. The *firm* should ensure that the *client* is not, in making an investment, doing anything illegal, such as money laundering, insider dealing or fraud. In case of doubt, legal advice should be taken.

**Corporate clients**

**6** Status. Large companies are *non-private investors* to whom the know your client and suitability obligations do not apply (see regulation 3.37(b)).

**7** Company profile. If the corporate *client* is a *private investor*, the details needed of a corporate *client's* situation include the company's historical financial results, current position (including commitments), current budget and future business plans, the company's operations and markets, management and corporate structure, personnel, operating strengths and weaknesses, and the degree of financial expertise within the management.

**8** Financial situation. If the corporate *client* is a *private investor*, the corporate *client's* financial situation covers: current income and expenditure, nature and level of assets and liabilities, liquidity, gearing, tax position, cashflow forecasts and any relevant elements of a corporate plan, for example investment in capital equipment or research and development, expansion or contraction of operations, and other investments.

**9** Illegal acts. Whether the corporate *client* is a *private investor* or *non-private investor*, the *firm* should ensure that the corporate *client* is not, in making an investment, doing anything illegal, such as money laundering, insider dealing or fraud. In case of doubt, legal advice should be taken.

**Investment objectives**

**10** The engagement letter must state a *client's* investment objectives (see regulations 3.14 and 3.15 and the model engagement letters in the annexes to Schedule 4 to Chapter 3). The *firm* should therefore establish the *client's* preferred investment strategy (for example, income or capital growth) and desire to take risks. These and any other factors (for example, refusal to invest in particular types of companies) must be recorded and taken into account in making recommendations about suitable *investments*. Here, too, a check-list of questions will be a useful aid in ensuring that the ground is fully covered. At the same time, the *firm* should tell the *client* about any recommendations it will not be able to give. For example, if it is the auditor of a company, it may have a conflict of interest preventing it recommending that company.

**11** Personal *clients* in particular may well have little or no idea of a suitable investment strategy and the *firm's* advice is important in helping them to decide what their objectives should be. For example:

- what is the time scale? Is income needed now or in the future?

- is the aim for income to keep pace with inflation or do better?

- is capital growth needed for the benefit of the *client* or those who will inherit?

- what are the related tax planning objectives?

***Client's* best interests**

**General**

**12** A *firm* must ensure that it serves its *client's* best interests in:

- giving advice about *investments*;
- recommending *investments*; and
- carrying out any transactions involving *investments*.

It must reasonably believe that the advice, recommendation or transaction is suitable for the *client* considering the information it has about the *client's* personal and financial position and understanding of *investments*. It also means that the *firm* must act to ensure that a *private investor* appreciates any risks involved (see regulation 3.32). Above all, a *client's* interests come before the *firm's*.

***Packaged products***

**13** A full review of investment possibilities in the light of the *firm's* understanding of the *client's* wishes and circumstances may suggest that the most suitable *investment* is a long term insurance contract or units in an *authorised unit trust scheme* or other *regulated collective investment scheme*.

**14** If so, the *firm* must take reasonable steps to check that the *client* will not be better served by another contract or units It must also be able to show that it did check. In comparing particular *investments*, a *firm* may need to consider non-financial matters.

**15** For *packaged products*, *firms* must also comply with regulations 3.33 and 3.34.

**Records**

**16** As well as keeping up-to-date records on every *client's* personal and financial situation and

understanding of financial matters, the *firm* must keep documentary evidence that it considered the suitability of its advice in the light of that information.

**Schedule 7 to Chapter 3 - Guidance on risk warnings - (Regulation 3.32)**

**Circumstances in which risk warnings are necessary**

**1** *Clients* who are *private investors* should understand the advice given to them by the *firm*. These regulations therefore provide that, before a *firm* allows a *client* to rely on its advice, it must be confident that the *client* appreciates the risks involved. This is particularly so when the *investments* are not straightforward and the risks may be considerable. Risks may be:

- related to changes in the value of the *investment*;
- caused by a need to put more money into a position before it can mature;
- caused by a lack of a continuing or ready market in the *investment*; or
- caused by losses on early termination or surrender due to the type of *investment*.

Broadly, any *investment* where there is a risk of loss of capital, income or property requires some form of risk warning. This includes all variable *investments*, for example, equities, *unit trust schemes*, unit-linked policies, *investment trusts* and enterprise zone property trusts. It can also include fixed interest *investments* where outside influences can affect the value, for example, an *investment* held in a foreign currency.

**2** The *firm* should give a risk warning at the time it advises on the type of *investment* or when the transaction is contemplated. Risk warnings should not be in small print in *investment advertisements*, but should be included in the main text (see Schedule 1 to Chapter 3).

**3** (a) It is recommended that the warnings in paragraphs 6 to 15 should be given in writing so that both the *client* and the *firm* know the circumstances in which the service is provided.

(b) The *firm* need not produce its own risk warnings if, for the relevant *investment*, it gives to a *client* a document issued by another person which contains appropriate and sufficient risk warnings and the *firm* points out those risk warnings in writing to the *client*.

**Circumstances in which risk warnings may not be necessary**

**4** There are four circumstances in which a *firm* need not itself ensure that *clients* understand the risks involved:

- if the transaction is carried out for an *execution-only client* (although the *firm* must still ensure that the *execution-only client* receives the appropriate risk warnings - see regulation 3.37(a));
- if the transaction is carried out for a *non-private investor* (see regulation 3.37(b));
- if a transaction is carried out through an *authorised third party* (see regulation 3.13(b)); and
- if a proposed transaction is as part of *discretionary management* for a *client*. In these circumstances, it is clearly unnecessary to give risk warnings for every transaction. However, the *client* must be given the opportunity to understand the

kinds of risks the funds face while under the management of the *firm* (see regulation 3.16(b)). If, therefore, the *firm* wishes to invest managed funds in particular types of *investments* it must first:

- obtain the *client's* permission in the engagement letter;
- include in the engagement letter any limits the *client* wants to set; and
- include in the engagement letter risk warnings appropriate to the *investments* contemplated.

**Model risk warnings**

**5** (a) In paragraphs 6 to 15 are model risk warnings which may (adapted appropriately) be sufficient warning of risks. Some *non-readily disposable investments* have extra risks which should be pointed out to *clients* in a specific form.

(b) Paragraph 6 of Schedule 2 to Chapter 3 gives further examples of risk warnings.

**6** ***Non-readily disposable investments***

The statement in the fourth point of paragraph 6 of Schedule 2 to Chapter 3.

**7** **Enterprise zone property trusts**

Not applicable for IIA purposes

**8** **Home income plans**

Not applicable for IIA purposes

**9** **Equity release schemes**

Not applicable for IIA purposes

**10** ***Warrants***

*Warrants* are an *investment*, although they are marketed in the same way as shares and bonds, the gearing risk is very different. This warning should be given:

"This warning cannot go into all the risks and important features of warrants. You should not deal in them unless you understand the nature of the transaction you are making and the possible losses you face.

You should consider carefully whether warrants suit you. In deciding whether to trade, you should know the following:

- A warrant is a right to subscribe for shares, debentures, loan stock or government securities, and can be used against the original issuer of the securities. Warrants often have a high degree of gearing, so that a small change in the price of the underlying security means a disproportionately large change in the price of the warrant. The prices of warrants can therefore change enormously.

  You should not buy a warrant unless you are prepared to lose all the money you have invested together with any commission or other charges.

  Some other instruments are also called warrants but are actually options (for

example, a right to buy securities which can be used against someone other than the original issuer of the securities, often called a "covered warrant").

- Transactions in off-exchange warrants may involve greater risk than dealing in exchange traded warrants because there is no exchange market through which to sell, check the value of the warrant or the risk faced. Bid and offer prices need not be quoted, and, even where they are, they will be established by dealers in these instruments and so it may be difficult to establish what is a fair price.
- Before you begin to trade you should be given details of all commissions and other charges you will have to pay.
- Foreign markets involve different risks to Irish markets. In some cases the risks will be greater. Profit or loss from transactions on foreign markets will be affected by changes in foreign exchange rates."

**11** ***Derivatives*** **transactions (that is, futures and options)**

"**Risk warning for futures and options**

This warning cannot go into all the risks and other important features of futures and options. In light of the risks, you should trade only if you understand the nature of the contracts (and contractual relationships) you are entering and the risks you face. Trading in futures and options is not suitable for many members of the public. You should carefully consider whether trading is appropriate for you including whether you have the resources to meet possible losses.

**Futures**

**Effect of 'leverage' or 'gearing'**

Transactions in futures carry a high degree of risk. The amount of initial margin is small compared with the value of the futures contract so that transactions are 'leveraged' or 'geared'. A relatively small market movement will have a much larger impact on the money you have paid or will have to pay; this may work against you as well as for you. You may lose all the initial margin funds and any extra funds deposited with the firm to maintain your position. If the market moves against your position, or margin levels are increased, you may have to pay a lot more on short notice. If you do not pay on time, your position may be sold at a loss and you will have to make good that loss. You should therefore note that your loss may not be limited to the money you put up in the first instance.

**Risk-reducing orders or strategies**

Placing certain orders (for example, 'stop-loss' orders, where allowed by local law, or 'stop-limit' orders), which are intended to limit losses to certain amounts, may not work because market conditions may make it impossible to carry them out. Strategies using combinations of positions, such as 'spread' and 'straddle' positions, may be as risky as taking simple 'long' or 'short' positions.

**Options**

**Variable degree of risk**

Options transactions carry a high degree of risk. Buyers and sellers of options should be

familiar with the type of options (that is, put or call) which they contemplate trading and the risks. You should work out by how much the value of the options must increase for your position to become profitable, taking into account the premium and all costs.

The options buyer may offset or exercise the options or allow them to expire. The exercise of an option results either in a cash settlement or in the buyer acquiring or delivering the underlying interest. If the option is on a future, the buyer will acquire a futures position with associated liabilities for margin (see the section on futures). If the options expire worthless, you will lose all your investment which will consist of the option premium together with transaction costs. If you are thinking of buying deep-out-of-the-money options, you should know that there is little chance of these options becoming profitable. (If you have any difficulty in understanding any of these terms, please ask us to explain them.)

Generally, selling ('writing' or 'granting') options is a much greater risk than buying options. Although the premium received by the seller is fixed, the seller may lose much more than that. The seller will have to pay for extra margin to maintain the position if the market moves against him or her. The seller will also face the risk of the buyer exercising the option and the seller will have either to settle the option in cash or to acquire or deliver the underlying interest. If the option is on a future, the seller will acquire a position in a future with associated liabilities for margin (see the section on futures). If the option is 'covered' by the seller holding a corresponding position in the underlying interest or a future or another option, the risk may be reduced. If the option is not covered, the risk of loss can be unlimited.

Certain exchanges in some countries allow late payment of the option premium, so that the buyer may have to pay margin payments not more than the premium. The buyer still faces the risk of losing the premium and costs. When the option is exercised or expires, the buyer must pay any outstanding premium.

**Additional risks common to futures and options**

**Terms of contracts**.

Please ask us about the terms of the specific futures or options which you are trading and associated obligations (for example, the circumstances when you may have to make or take delivery of the underlying interest of a futures contract and, in respect of options, expiration dates and restrictions on the time for exercise). In some circumstances the exchange or clearing house may change the terms of contracts (including the exercise price of an option).

**Suspension or restriction of trading and pricing relationships**.

Market conditions and the operation of the rules of some markets (such as the suspension of trading in any contract or contract month because of price limits or 'circuit breakers') may increase the risk of loss by making it difficult or impossible to carry out transactions or cash in or offset positions. If you have sold options, this may increase the risk of loss.

Further, normal pricing relationships between the underlying interest and the future or the option may not exist. This can occur when, for example, the futures contract underlying the option has price limits while the option does not. If there is no underlying reference price it may be difficult to judge 'fair' value.

**Deposited cash and property**

Please ask us about how money or other property you deposit for domestic and foreign transactions is protected, particularly if a firm goes bankrupt. How much money or property you can get back may depend on legislation or local rules. In some countries, property which is clearly yours, as well as cash, may be used to repay the firm's debts.

**Commission and other charges**

Before you begin to trade, you should ask us to explain all commission, fees and other charges you have to pay. These charges will decrease your profit or increase your loss.

**Transactions in other countries**

You may face extra risks with transactions on markets in other countries, including markets formally linked to a market in this country. These markets may offer different or less protection to investors. Before you trade, you should ask us about any rules affecting your transactions. Your local regulator will be unable to enforce the rules of regulators in other countries where your transactions have been carried out. You should ask us for details about the protection you have both in this country and in other countries before you start to trade.

**Currency risks**

The profit or loss in transactions in contracts in foreign currency (whether they are traded in this country or another) will be affected by changes in rates.

**Trading facilities**

Most open-outcry and electronic trading facilities have computer systems for order-routing, executing, matching, registering or clearing of trades. As with all systems, they may go wrong. If they do, and you lose money, you may not be able to get back the full amount. The system provider, the market, the clearing house or member firms may limit the amounts they pay back. These limits vary; you should ask us for details.

**Electronic trading**

Trading on any electronic trading system may differ not only from trading in an open- outcry market but also from trading on other electronic trading systems. If you carry out transactions on an electronic trading system, you will face risks associated with the system including the failure of hardware and software. A system failure may mean that your order is either not executed as you instructed or is not executed at all.

**Off-exchange transactions**

In some countries, in restricted circumstances, we may make off-exchange transactions for you. We may be acting as your counterparty to the transaction. It may be difficult or impossible to cash in an existing position, to assess the value or the risk or to determine a fair price. For these reasons, these transactions may be riskier. Off-exchange transactions may be less regulated or have a separate regulatory regime. Before you carry out any transaction, you should ask us about the relevant rules and the risks."

**12 Transactions in stabilised issues**

Some privatisations of public utilities and some rights issues are examples of stabilised

issues. This risk warning would be suitable.

"This warning points out the risks associated with Stabilised Investments. The value or market price of your securities may fall following the period of stabilisation. You should carefully consider whether these investments suit you.

Stabilisation occurs when the price of a security is fixed while a new issue of securities is sold to the public. Stabilisation may take place in the new issue or in other securities related to the new issue so that the price of the other securities may affect the price of the new issue or vice versa. Stabilisation is permitted because when a new issue is brought to market the sudden glut will sometimes force the price lower before buyers are found for the securities on offer.

As long as a strict set of rules is obeyed, the "stabilising manager" (normally the issuing house chiefly responsible for bringing a new issue to the market) may buy securities that were previously sold to investors or allotted to institutions who were included in the new issue but who have decided not to continue taking part. This may keep the price at a higher level than would otherwise be the case during stabilisation.

There are rules on

- the length of time of stabilisation;
- fixing the price of stabilisation (in the case of shares and warrants but not bonds); and
- requiring disclosure of possible stabilisation."

**13** ***Unregulated collective investment schemes***

Unregulated *collective investment schemes* have different characteristics. This risk warning (adapted to the scheme) would be suitable:

"This warning points out the risks associated with investments in unregulated collective investment schemes and in this scheme in particular. As with investments in general, values, prices and income can go down as well as up and the whole investment may be lost.

There is no established market in an interest in a scheme of this type. You may have difficulty in selling your investment or in getting reliable information about its value. You should consider carefully whether these investments suit you. You should note that:

- [Specify the risks particular to this type of scheme]
- [Specify the tax treatment: see paragraph 2 of Schedule 2 to Chapter 3]
- [Specify any restriction on transfers of interests]
- Historical facts, information gained from experience, present facts and information, and assumptions made from any of these are not a guide to the future. Aims, targets, plans and intentions and projections are just that and are not forecasts."

**14** ***Higher volatility funds***

These include *regulated collective investment schemes* linked to these funds which can invest extensively in futures, options and contracts for differences (including those known as "GFOFS" - geared futures and options funds) and can be geared (see the definition of *higher volatility funds* in the glossary). The following warning should be given:

> "This warning points out the risks associated with Higher Volatility Funds. You should carefully consider whether these investments suit you including whether you have the resources to meet possible losses.
>
> Because the investment is volatile, a fall in its value could result in your recovering nothing at all."

**15 Building society permanent interest bearing shares (PIBS)**

The following warning would be suitable:

> "This warning points out the risks associated with Permanent Interest Bearing Shares (PIBS). You should carefully consider whether these investments suit you. PIBS have the following general characteristics:
>
> - PIBS are building society shares which are listed and traded on the London Stock Exchange.
> - PIBS are a society's risk capital. They cannot be redeemed.
> - PIBS pay a fixed rate of interest net of basic rate tax.
>
> PIBS have the following risks:
>
> - PIBS offer no certainty about capital because the society need not repay the amount invested.
> - The sale price may be less than the price paid.
> - The secondary retail market in PIBS is both recent and small, so that cashing in PIBS is uncertain. Investors may have difficulty in selling PIBS at what they think is a reasonable price.
> - If the society is wound up, PIBS holders come after all lenders, depositors and other shareholders for repayment.
> - PIBS holders are not protected by the Building Society Investor Protection Scheme.
> - The society will not pay interest if:
>
>  – interest remains unpaid on any other of the society's deposits or shares; or
>  – the Board of the society decides that paying PIBS interest would lead to failure of the society or would damage its business.
>
> Unpaid interest is non-cumulative, so that if the society does not pay interest for one of these reasons, it need not pay that sum in the future."

**Schedule 8 to Chapter 3**

**Regulations on contents of key features document**

(Used elsewhere under IIA authorisation)

**Schedule 9 to Chapter 3 - Regulation on forecasts and benefits relating to packaged products (Regulation 3.33)**

**1** A *firm* must only give a *client*, for units in a *regulated collective investment scheme*, a projection of benefits which:

- is supplied by the relevant *operator* who is subject to the rules of a *regulating authority* or the Central Bank of Ireland and which the *firm* has not changed (except by including extra information about surrender and maturity values);

**Schedule 10 to Chapter 3 - Guidance on execution-only clients and non-private investors (Regulation 3.37)**

***Acting for execution-only clients***

**1** *Clients* may ask *firms* to act on an execution-only basis, that is to carry out *investment* transactions as requested, without going through the process of ensuring that they are suitable for the *client*. This is only allowed in the narrowly defined circumstances of regulation 3.37(a).

***If the transaction is unsuitable***

**2** If a *client* asks a *firm* to arrange a particular transaction, but not to advise on its merits, the *firm* should still consider whether the *investment* is suitable for the *client* in the light of what the *firm* already knows of the *client's* circumstances. The *Principles* apply and a chartered accountant's relationship with the client demands more than simply carrying out instructions. The *firm* will be acting unprofessionally if it arranges what it believes to be an unsuitable transaction for that *client* and does not warn the *client*.

**3** If the *firm* is already providing *investment business* services to the *client*, then it should take account of the "know your client" information that it has already gathered and advise the *client* if it knows the *investment* is unsuitable.

**4** On the other hand, if the *client* was previously a *non-investment business client* receiving, for example, tax advice, then the *firm* should make use of the information that it has from providing those services in deciding whether the *investment* is suitable.

**5** If the *client* still wants to carry out a transaction which the *firm* has advised is unsuitable, the *firm* should either:

- ensure the *client* knows that the transaction is against the *firm's* advice (and put that in writing), before carrying out the transaction; or
- having considered all the implications for the *client*, refuse to act.

***Competence***

**6** The *firm* should not go beyond its competence and should advise the *client* to take specific advice from an independent *authorised third party* if, for example, a *client* wants to have a transaction in equities arranged and the *firm* does not have expertise in this area (see regulation 3.13).

***Acting for persons who are not clients***

**7** If a person who is not a *client* asks the *firm* to arrange or carry out a transaction on an execution-only basis, that person will become a *client* if the *firm* acts. This brings with it the need for an engagement letter (see regulations 3.14 and 3.15). Whilst that person will be an *execution-only client* the *firm* should still take care in deciding whether or not to take on the *client*, particularly in the light of the money laundering requirements. The *firm* should ask itself why it is being asked to act.

***Model engagement letter***

**8** A model engagement letter for execution-only services is in annex E of Schedule 4 to Chapter 3.

***Acting for non-private investors***

**9** Regulation 3.37(b) disapplies all requirements under these regulations, in respect of best

| | |
|---|---|
| | advice, suitability, risk warnings and best execution, if the *firm* provides *investment business* services to a *non-private investor*. This is because *non-private investors* are professional or sophisticated and the regulatory system takes the view that these investors can be expected to look after themselves. However, the *firm* must still follow the *Principles* and the *Guide*. |
| **10** | A *non-private investor* to whom the *firm* provides *investment business* services is a *client* and the appropriate form of engagement letter must be put in place (see regulations 3.14 and 3.15). |

**Schedule 11 to Chapter 3 - Further regulations on information on transactions (Regulation 3.48)**

***Introduction***

**1** This schedule provides further regulations under regulation 3.48. They apply where the *firm* produces its own contract note, confirmation note or difference account.

***Matters to be included in contract notes***

**2** The following must be included in contract notes:

- The *firm's* name and address and a reference to its *authorisation* in the form required by regulation 3.01.
- The *client's* name, account number or other identifier.
- The date of the transaction, and either the time of execution or a note that the *firm* will inform the *client* of that time if asked.
- The security concerned, the size involved and whether the transaction was a sale or purchase.
- The unit price at which the transaction was carried out or averaged, and the total due from or to the *client*, and a statement, if applicable, that the price is an averaged price.
- The settlement date, if agreed.
- The amount of the broker's charges to the *client*.
- The amount or basis of any payment which the *firm* has received or will receive from another person.
- The amount or basis of any charges shared with another person.
- If the transaction is a purchase of a unit in a *collective investment scheme*, the amount of any front-end loading.
- A statement (if applicable) that any dividend, bonus or other right which has been declared, but not yet paid, allotted or become effective in respect of the security, will not pass to the buyer under the transaction.
- If any interest which has accrued or will accrue on the relevant security is accounted for separately from the price, the amount of the interest which the buyer will receive or the number of days for which he will receive interest.
- The amount of any costs, including taxes, which are part of the transaction and which will not be paid out of the broker's charges.
- If the transaction involved, or will involve, buying a different currency, the rate of exchange or a statement that the rate will be supplied when the currency has been bought.

***Matters to be included in confirmation notes (derivatives)***

**3** The following must be included in confirmation notes for *derivatives*:

- The *firm's* name and a reference to its *authorisation* in the form required by regulation 3.01.
- The *client's* name, account number or other identifier.
- The date of the transaction, and either the time of execution or a note that the *firm* will inform the *client* of that time if asked.
- The *derivative* concerned, the size involved and whether the transaction was a sale or purchase.

- The unit price at which the transaction was carried out, which in the case of an option must include a reference to the last exercise date and the strike price of the option.
- The maturity, delivery or expiry date of the *derivative*.
- The amount of the broker's charges to the *client*.
- The amount or basis of any payment which the *firm* has received or will receive from another person.
- The amount or basis of any charges shared with another person.
- The amount of any costs, including taxes, which are part of the transaction and which will not be paid out of the broker's charges.
- If the transaction involved, or will involve, buying a different currency, the rate of exchange or a statement that the rate will be supplied when the currency has been bought, including the maturity or expiry date of any currency hedge, unless the currency hedge is in a separate contract or confirmation note.

***Matters to be included in difference accounts (derivatives)***

**4** The confirmation note must contain, for any *derivatives* transaction which closes out an open position, all details required by paragraph 3 for each contract, and the profit or loss to the *client*.

***Matters to be included in confirmation notes of exercise of options***

**5** The following must be included in confirmation notes for the exercise of options:

- The *firm's* name and a reference to its *authorisation* in the form required by regulation 3.01.
- The *client's* name, account number or other identifier.
- The date of exercise, and either the time of exercise or a note that the *firm* will inform the *client* of that time if asked.
- The option concerned, the size involved and whether the exercise creates a sale or purchase in the underlying asset, and its terms.
- The amount of the broker's charges to the *client*.
- The strike price of the option and, where applicable, the total due from or to the *client*.
- The amount of any costs, including taxes, which are part of the exercise and which will not be paid out of the broker's charges.
- If the exercise involved, or will involve, buying a different currency, the rate of exchange involved or a statement that the rate will be supplied when the currency has been bought.

**Schedule 12 to Chapter 3 - Guidance on portfolio review (Regulation 3.54)**

***Nature of portfolio review***

**1** Keeping a *client's* securities (including shares, debentures, government securities, *warrants*, units in *collective investment schemes*) under review on a wholly advisory basis is called *portfolio review*. It differs fundamentally from *discretionary management* in that the *firm* does not have authority to commit the *client* to a transaction without the *client's* agreement. It may be carried out by *firms* in category IB, as a *firm* conducting *portfolio review* is not necessarily carrying on *investment* management within the wider scope of category ID.

**2** Under the *Act*, a *firm* providing *portfolio review* is **probably** advising and, if the *client* accepts that advice, may well be arranging deals (or acting as agent for the buying or selling of *investments*). Portfolio review is different from occasional investment advice (and arranging), because there is a standing *client* instruction to provide the advice, either at specific intervals, on occasions or at the *firm's* own initiative. (The service could also include book-keeping for the portfolio.) If there is no standing *client* instruction, the *firm* should ensure that it does not act so that the *client* expects a regular review which could be considered to be *portfolio review*. If a review is carried out regularly, for example, as part of annual tax planning services, this may be *portfolio review* and the *firm* must comply with regulation 3.54.

**3** In giving tax advice, the *firm* may stray out of generic into specific advice on *investments* (see Schedule 1 to Chapter 1 and guidance note (1) to regulation 3.29), and in practice it may be difficult to avoid doing so. Other considerations then arise.

First, is the investment advice a necessary part of the tax advice?.

Is the investment advice integral to the tax work, or can it be separately identified? If it is integral, then the engagement letter should reflect this (model wording is in annex D to Schedule 4 to Chapter 3). If it is separate, then it is likely that a form of *portfolio review* is being carried on and paragraphs 4 and 5 below apply.

***The need for an engagement letter***

**4** An arrangement with a *client* for *portfolio review* needs an engagement letter on *investment business* to be entered into with that *client* (see regulation 3.14). The engagement letter must clearly set out the nature of the service to be provided and state:

- the initial composition of the portfolio and a description of the *investments* in it;
- the total initial value of each item in the portfolio, at a time as near as possible to the date of the engagement letter or at some other time agreed with the *client*;
- the frequency of periodic statements; and
- the basis of performance measure (where it is agreed to provide this). A model letter is in annex C to Schedule 4 to Chapter 3.

***Contents of the portfolio review***

**5** The information which must appear in the periodic statement must be detailed in the engagement letter. In broad terms, it must include the following.

- **Capital**

  The capital structure and composition of the portfolio at the accounting date and a summary of the transactions for the portfolio since the last accounting date.

- **Revenue**

  The income and expenditure (including interest charges on money borrowed) of the portfolio, since the start of the arrangements with the *client* or the last accounting date.

- **Charges**

  The fees, commissions received or other charges by the *firm*, its agents or *associates*, for the services to the *client*.

A model of this information is in paragraph 2.2 or 2.7 of the model engagement letter in annex C to Schedule 4 to Chapter 3.

**Schedule 13 to Chapter 3 - Further Regulations on Custody (Regulation 3.47)**

**1** When a *firm* acts as custodian, *clients' title documents* must be held by the *firm* itself or its nominee, with appropriate arrangements to keep the *title documents* safe, having regard to any relevant settlement, legal and regulatory requirements.

**2** When a *firm* acts as custodian and uses nominees to hold *title documents*.

- the nominee must act, in relation to each *title document*, only in accordance with the *firm's* instructions;
- the nominee must be dedicated to the holding and to activities related to the holding of *investments*; and
- the *firm* must accept responsibility to its *clients* for any of its nominees used, to the same extent as the *firm* itself accepts responsibility to its *clients*.

**3** When a *firm* itself acts as custodian, it must clarify with its *clients* the services which are to be provided and the respective responsibilities of the *firm* and of the *client* in relation to:

- arrangements for recording, registering and separately identifying *title documents*;
- procedures for giving and receiving clear instructions;
- provision of periodic statements or records of *title documents*;
- any liens or other security interests held by the *firm* over *title documents*;
- the use of nominees in accordance with 2 above;
- losses of *clients' title documents*; and
- the appointment of sub-custodians, the review, as appropriate, of their performance and the extent, if any, of the *firm's* responsibility for losses caused by their fraud, wilful default or negligence.

**4** A *firm* must not disclaim responsibility for losses of *investments* due to fraud, wilful default or negligence arising from its or its nominees' activities and must make good, or provide the equivalent for, any irreconcilable shortfall.

**5** A *firm* must (where appropriate) notify its *clients* that there may be different settlement, legal and regulatory requirements in overseas jurisdictions from those applying in the Republic of Ireland, together with the different practices for the separate identification of *clients' title documents*.

**6** If a *firm* appoints a third party custodian, or recommends a custodian to its *clients*, it must use skill, care and diligence (including undertaking an appropriate risk assessment) to select suitable custodian, *authorised* to provide custody services as appropriate.

**7** If a *firm* appoints a third party custodian:

- services must be supplied under a written agreement between the *firm* and the custodian which covers, as appropriate, the matters set out in paragraphs 3 and 4 above;
- the written agreement must oblige the custodian to have appropriate arrangements to keep *title documents* safe having regard to any relevant settlement, legal or regulatory requirements; and

- the *firm* must check that the custodian is acting in accordance with the agreement.

**8** A *firm* must not:

- register its *clients' title documents* in its own or sub-custodian's name;
- use for its own account the *title documents* of any *client*, except where the *client* has given clear and express consent;
- pool (or commingle) the *investments* of different *clients* except where those *clients* have been given clear notification of the intention to pool and of the implications for them; or
- except where *investments* of different *clients* are pooled, use for the account of one *client* the *title documents* of any other *client* except where that other *client* has given clear and express consent.

**9** When a *firm* appoints a third party custodian, the *firm* must require the custodian to:

- distinguish, within its own records, the *firm's clients' title documents* from those of the *firm*; and
- hold separately the *firm's* and the *firm's clients' title documents* from the custodian's own.

**10** A *firm* must disclose to its *clients* if it appoints or recommends a custodian which is an *associate* of the *firm*.

**11** Where a *firm's clients* act as or appoint their own custodians, the *firm* must agree in writing the necessary consequential arrangements (e.g. for settlement) with the *clients* and their custodians.

**12** A *firm* is not permitted to arrange for the custody of its *clients' investments* overseas (unless it has obtained prior permission from the *Institute*).

**Schedule 14 to Chapter 3 - Guidance on Tax Efficient Investment Schemes**

**1** A number of methods may be adopted for investing in share which qualify for tax relief or exemption provided for under the Taxes Consolidation Act 1997.

(a) Investment in any individual *TEIS* qualifying company.

(b) Investment in a fund designated by the Revenue Commissions and having the characteristics of a collective investment scheme.

(c) Under an individual discretionary portfolio management agreement which provides that the Manager will invest in a spread of *TEIS Shares* or *TEIS Schemes* on the investor's behalf.

**2 Offer Material**

(a) Where the *firm* is not the promoter of a *TEIS Company* or the manager of a *TEIS Fund* or *TEIS Managed Portfolio*, the person who is the promoter or manager should have available an appropriate form of selling memorandum. In relation to a *TEIS Company*, the selling memorandum must take the form of a prospectus prepared in accordance with the Companies Acts 1963 1990 (unless it is a private offer).

If it is a *TEIS Fund* or a *TEIS Managed Portfolio*, particulars describing the arrangements will have been prepared by the manager in accordance with the investment business rules of the *Approved Professional Body* of that person.

A *firm* must have available the relevant offer document and have given a copy to the *client* before recommending to the *client* that he invest in the relevant company or fund, or that he enter into the managed portfolio arrangement and before arranging for a *client* to do any of these things. In any event, an engagement letter will be necessary before any recommendation can be made. *TEIS* particulars can only be given to the client if the relevant investments to which it relates are suitable for that client.

(b) Where the *firm* is the promoter of a *TEIS Company*, it will need to have prepared a prospectus in relation to the company prior to offering shares in the company to the public. The Companies Acts 1963 - 1990 set out the requirements with which such a prospectus must comply.

Where the offer is carried out in such a way that a Companies Act prospectus is not required, then all reasonably required information must be given in the offer memorandum unless it is a short form "*trailer advertisement*".

In any such case referred to in this paragraph it will usually be appropriate to seek specialist legal advice.

(c) Where a *firm* acts as the manager of a *TEIS Fund* (i.e. as manager of the underlying fund of investments) or as the manager of a *TEIS Managed Portfolio*, it will need to prepare *TEIS* particulars.

**3 Recommending and Arranging Transactions in *TEIS Investments* for *Clients*.**

In particular, *firms* are reminded of their obligations to have regard to the *client's* particular circumstances and the suitability of the *TEIS Investments* for that *client* and that the *client* understands the risk involved.

***TEIS Investments* will by their nature not be readily disposable investments**.

When considering the suitability of *TEIS Investments* for a *client* or the *client's* understanding of the risks involved, a firm should have particular regard to:

(a) whether that *client* has already invested directly or indirectly in *TEIS Investments*;

(b) whether the *client* sought the advice of the *firm* about a particular *TEIS Investment* or *TEIS Investments* generally or whether the *client* has previously sought the advice of the *firm* on such matters.

**4 Acting as the Manager of a *TEIS Managed Portfolio***

In addition to the Regulations of Chapter 4 which apply where a *firm* undertakes discretionary management for a *client*, where the *client's* portfolio of *investments* is to be constituted wholly or mainly by *TEIS Investments*, the arrangement will amount to a *TEIS Managed Portfolio*. Where this is the case, the engagement letter, in addition to setting out the matters referred to in Regulation 3.16 of Chapter 3 should state that the fund is to be constituted wholly or mainly by *TEIS Investments*.

On making any *investment* in a *TEIS* for the fund of which the *firm* is the discretionary manager, the *firm* must give the *client* a copy of the relevant particulars prepared in relation to that *investment*. In the case of an acquisition of *TEIS shares*, this will be the prospectus or offering memorandum prepared in relation to that company, which the *firm* will, in all but the most unusual cases, need to have considered in advance so as to comply with its obligation to make only investments which are suitable for the *client*.

**5 Where the Firm or an Associate of the Firm Acts as the Manager of a TEIS Fund**

Because of the potential for a conflict of interest, a *firm* is required to advise a *client* to seek independent advice from a suitably qualified independent financial adviser (who may be another accountancy firm authorised by the Institute or some other financial adviser authorised under the *Act*), before recommending or arranging for that client to invest in a *TEIS Fund* of which the *firm* or an *associate* of the firm is the manager. If the *client*, having been so advised, declines to seek independent advice, that fact must be confirmed to the firm in writing, which the firm should retain with that client's other investment business records.

If the *client* refuses to take independent advice or to confirm that he does not wish to obtain independent advice, the *firm* should not advise the *client* to purchase the *TEIS Investment* concerned or arrange for him to do so.

**6 Credit Facilities**

Having regard to the risks associated with investment in *TEIS companies*, the Regulations prohibit certain credit facilities being made available or offered to prospective investors in *TEIS Investments*. There are, however, exceptions when a firm may discuss with a client the availability of credit facilities. These are set out in Regulation 3.62. They apply if the *client*, without any form of solicitation on the part of the *firm*, indicates to the *firm* that he is interested in obtaining credit for the purposes of investing in *TEIS Investments or* if the *firm* considers those arrangements to be suitable for the *client* applying the same standards that it applies where the *firm* is advising a *client* in relation to the *TEIS Investment*.

**7 Advertisements in Connection with *TEIS Investments***

Regulations 3.63 and 3.64 contain restriction on the issue of *advertisements* relating to particular *TEIS Investments*. They would not apply to *advertisements* issued by the firm in relation to services offered by it generally which did not refer expressly to *TEIS Investments*. Although, of course, the provisions of Regulations 3.04 to 3.11 would continue to apply.

Such *advertisements* may be issued only to persons for whom *TEIS Investments* are suitable. In practice this means that the recipient of the *advertisement* must already be a *client* of the *firm* for investment or non-investment services.

*Advertisements* which invite a response from the recipient in the manner described in the advertisement (this is most commonly done by including an application form for the recipient to complete and return) as a result of which the recipient will enter into an investment agreement relating to *TEIS Investments* may not be issued. This is because of the need, before the *client* signs the engagement letter, for the *firm* to have ensured suitability of the proposed arrangements for the client.

Forecast of realisable value of *TEIS Investments* must not be published, whether *advertisements* or otherwise.

**Schedule 15 to Chapter 3 - Guidance to be issued to clients PRSA (Personal Retirement Savings Account)**

What is a PRSA?

A PRSA is a new way of helping people provide for their retirement by saving now. It is a long-term investment product sold by financial institutions and intermediaries or brokers. It allows you to create a pension fund for yourself when you retire; you can vary the amount you pay into it over time and, if you change employment, you can continue to use the same PRSA. You can switch from one PRSA to another at any time free of charge.

**Types of PRSA:**

There are two types of PRSA:

- Standard PRSA – where the charges you have to pay are capped and where there are certain investment restrictions on how your money is invested.

- Non-Standard PRSA – where there is no maximum level of charges and there are fewer investment restrictions.

*Do you need a PRSA?*

To see if you need a PRSA you should ask yourself some questions:

- **Can you join an existing pension scheme in your job?** You should find out if there is a good scheme available to you through your job. If not, you will need to consider making provision for your retirement and should consider a PRSA. If you already have good pension arrangements you may not need to make any additional provisions or you may be able to top-up your benefits through making Additional Voluntary Contributions (AVCs).

- **What if you are in a Defined Benefit Scheme?** If you have a defined benefit pension scheme – this promises a pension related to your salary, for example, two thirds of final salary on retirement – you may not need to make any further pension provisions or you may already have a facility to make additional voluntary contributions (AVCs). Transferring from a defined benefit scheme into a PRSA involves a risk and should only be done after very careful assessment of your financial position and the advantages/disadvantages for you – you will be foregoing a defined salary related pension in retirement for an uncertain income.

- **What if you are in a Defined Contribution Scheme?** If you are in a defined contribution scheme you are already carrying the investment risk – your pension will depend on the contributions you make together with the investment performance of your fund less the charges involved. But your employer may be making a contribution to the Scheme – would this contribution continue if you transferred into a PRSA?

- **Should you start a PRSA if you already have a Personal Pension Plan?** You will need to take professional advice based on your personal circumstances.

What Type of PRSA is Best For You?

A standard PRSA is likely to meet the requirements of most people. You cannot be charged for more than the maximum allowed (5% of contributions paid and 1% per year of the PRSA assets).

The level of charges is very important. Charges reduce the fund you can build up. The size of your fund on retirement will depend on your contributions and the Investment performance less the charges deducted. Investment performance cannot be predicted, but higher charges are just like a weight handicap in a horse race – creating a need to produce a better investment performance just to remain level with products carrying lower charges.

Charges on Non-Standard PRSAs are not capped and, in most cases, are higher than on Standard PRSAs.

A second difference between Standard and Non-Standard PRSAs is in the way in which your money is invested. A standard PRSA invests only in pooled funds, where the risk is spread across a large number and type of investments. A Non-Standard PRSA can offer you a wider investment choice. If a Non-standard PRSA is offered to you on the basis of the investment choice it gives you, you need to be sure that you understand the investment choices, and that you understand why you need them. This is your pension, your income in your retirement years. If you do not understand how your pension will be invested then perhaps you should consider again if this particular product is the one for you.

You should keep the level of your contributions and the investment performance of your PRSA under regular review, so you can see if your PRSA will provide you with the pension you need.

***Buyer Beware – What to Look Out For***

Where a Non-Standard PRSA is being offered, you should ask for a full explanation of the differences between this product and the Standard product, especially the additional costs to you.

Beware of promises of better returns on Non-Standard PRSAs. Predicting investment performance is notoriously difficult.

Beware if you are advised to abandon an existing pension plan in favour of a new PRSA – ask for details in writing why this would be the best course of action for you.

Make sure you can afford the level of monthly payment suggested and that it is the most effective payment for tax relief purposes.

The Irish Financial Services Regulatory Authority has instructed the sellers of PRSA products to obtain a declaration, signed by themselves and by their customer, where a Non-Standard PRSA is recommended.

**DO NOT PURCHASE A NON-STANDARD PRSA WITHOUT READING THE DECLARATION FULLY AND, ONLY IF SATISFIED, SHOULD YOU THEN SIGN IT.**

**Schedule 16 to Chapter 3 – Non Standard Personal Retirement Savings Account**

***DECLARATION***

SECTION A
TO BE COMPLETED BY THE CONSUMER

- I declare that I understand that the charges payable on a non-standard PRSA may be higher than those for a standard PRSA.
- I declare that I understand that the investment risks associated with non-standard PRSA may be higher than those for a standard PRSA.
- I declare that I understand that the Irish Financial Services Regulatory Authority recommends that consumers should seek independent financial advice, before buying a non-standard PRSA.
- I declare that I am satisfied that I require a pension product and that, having reviewed the differences between standard and non-standard PRSAs, a non-standard PRSA is the most appropriate pension product for me.

Signed: Date:

SECTION B
TO BE COMPLETED BY THE VENDOR (WHETHER PRODUCT PRODUCER OR INTERMEDIARY).

- I declare that in my opinion it is in the best interests of the above named to purchase a non-standard PRSA rather than a standard PRSA.
- I declare that in my opinion the non-standard PRSA I propose to sell the above named is the product most suited to this consumer from among all those I am able to advise on.
- I declare that I have fully explained to this consumer the differences between this non-standard PRSA and standard PRSAs, and, where this is the case, focused on the fact that the charges are higher and the investment risks are greater for this non-standard PRSA.

Signed: Date:

Name of Firm: Position Held: