Proposed Review of Consumer Protection Code

Consultation Paper CP54

Submission by J & E Davy

CAPITAL MARKETS | CORPORATE FINANCE | PRIVATE CLIENTS | RESEARCH

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Re: Response to Second Consultation on Review of Consumer Protection Code. CP54.

Dear Sirs,

We welcome the opportunity to respond to the Consultation Paper CP54 Second Review of the Consumer Protection Code ('CPC' or the 'Code'). Whilst we are fully supportive of a regime that protects the rights of the consumer, it is important that firms can continue to seek to grow their business and operate in an efficient manner.

We are disappointed that some of the key points raised in the first review have not been taken into consideration by the Central Bank. Our response is divided into two sections. The first section concentrates on those areas which we consider to have significant impact for the firm. The second section concentrates on additional and more detailed comments on the Code and is outlined in Appendix I. We would point out that the revised version of the CPC was not marked up to indicate where amendments have been made and it was also unclear whether certain rules relate to section 1 or 2. On that basis, we have sought to comment on those areas that we consider significant.

1. Scope of the Code

As a firm authorised under the S.I. No 60 of 2007 European Communities (Markets in Financial Instruments) Regulations 2007 ('MiFID Regulations'), we would reiterate comments made in our initial response highlighting the importance of ensuring that the scope of the Code and its interaction with MiFID is clear. The Code states that it does not apply to "MiFID services", which incorporates those services provided in respect of MiFID 'financial instruments'. This means that the Code applies to MiFID services provided in respect of non MiFID 'financial instruments'. Where a client holds a portfolio of MiFID financial instruments and Investment Intermediaries Act 1995 ('IIA') investments, it adds a significant level of complexity to apply two levels of regulatory requirements dependent upon the product. In practical terms, the only way a firm can implement the Code in this instance is to either apply CPC rules in addition to MiFID (effectively goldplating the MiFID Regulations) or to develop IT systems enabling CPC investment products to be flagged on its system and to apply different rules depending on the product.

From a client perspective, it is difficult to see how this is beneficial and indeed we would argue is potentially confusing for a client. The consequences of the Code as it currently is written is that a firm will be required to request one level of information to determine suitability for MiFID financial instruments and another level of information to determine

suitability for IIA investment products. We recommend that the Code should either be amended to reflect the fact that it does not apply to a firm authorised under the MiFID Regulations where providing a MiFID service in respect of a portfolio of investments or it should be amended to align it to the MiFID Regulations in key areas such as suitability and the management of conflicts of interest.

2. Time frame
The proposed time table for implementation is challenging, taking into consideration other significant regulatory developments and the work required to implement provisions in the Code. Other regulatory developments include (but are not limited to) the Fit and Proper Regime, the new Reporting Requirements under CP52, Guidance notes on Anti Money Laundering and potential developments regarding the Client Asset Requirements. Implementing the Code will require significant IT related work, changes to procedures, client documentation and staff training. We strongly recommend that a reasonable lead in time is provided and would suggest that a period of 6 months from the date of issue of the Code at a minimum should be provided for.

3. Unsolicited contact
We are particularly disappointed that the Central Bank has not amended this section in light of comments received from industry participants. Clearly firms must operate within the rules and guidelines issued by the Data Protection Officer. However this section of the Code means that firms will not be permitted to contact non clients. This is a fundamental part of growing any business and of seeking new business opportunities. Firms are operating in increasingly difficult market conditions and the ability to seek new business, within reasonable parameters, is essential. We agree that consumers need to be protected but would contend that the existing regime provides a balance of affording consumers with the necessary level of protection, whilst permitting firms to seek to grow their consumer base. Furthermore the new provisions will put Ireland at a disadvantage to other countries, which is at variance with the goal of encouraging a level playing field for EU member firms and may have other ramifications such as discouraging international firms from operating in Ireland, thereby restricting consumers' choice.

4. Product information
The requirement to provide information in writing about a product before "offering, arranging or recommending a product" is significantly onerous. We believe that there is a fundamental distinction between offering or arranging a product and recommending a product. It is unclear how this is intended to apply where offering products through direct channels (over the phone or online). The terms "offer" and "arrange" require clarification in this context. In general, we would consider that offering or arranging products would be similar to making them available without any form of recommendation. It would be more consistent with an execution only type service, where the customer takes responsibility for their own investment decisions. Furthermore this provision should take into account the level of risk and complexity of a product. Not all products will require a detailed information document and terms and conditions. There is a real risk that mandating the provision of product information in this way will ultimately serve to limit consumer choice

5. Know your customer and Suitability
We continue to be extremely concerned that the Code has not been amended to reflect comments received on this topic. These can be summarised as follows:

Execution only services

Under the Code, a firm is required to carry out a detailed suitability assessment when "offering, arranging or recommending a product". As mentioned previously, we believe that there is a fundamental distinction between offering or arranging a product and recommending a product.

Rule 5.27(a) provides an exemption from the suitability assessment where the client has *"specified both the product and the producer by name and has not received any assistance from the regulated entity in the choice of that product"*. However **5.27(ii)** goes on to state that this exemption does not apply where *"a consumer is seeking an investment product"*. As it stands firms will no longer be in a position to offer execution only services to clients in non MiFID financial instruments. Our concerns on this section may be summarised as follows:

- Many consumers do not require the advice of a regulated entity. They have sufficient knowledge to make their own investment decisions and do not wish to provide the information necessary to enable a firm to complete a suitability analysis. Under the new rules, consumers will be forced to seek an advisory relationship, which will be more costly for the consumer and may also force consumers to seek such services from non Irish firms.
- Firms will be limited in their ability to provide an effective online execution only service.
- Ireland may be placed at a disadvantage to other jurisdictions, on the basis that in accordance with MiFID, firms in other jurisdictions can provide execution only services in non complex products.

We strongly recommend that this section is amended to align it with MiFID and incorporate the ability to offer execution only services. Additional comments on this section are included in section 2.

Suitability assessment
As a MiFID authorised firm, we are required to carry out a detailed suitability assessment in line with the MiFID Regulations. The Code requires information in addition to that required under MiFID including.

  - The length of time a consumer wishes to hold a product. This rule does not work in the context of an advisory managed portfolio where each component is not viewed as a standalone investment and instead it is the overall performance and risk of the portfolio that is important (rather than the performance of its constituent parts). It is also potentially misleading for a consumer to believe that they can dictate how long they hold a product for, the question instead should be focused on the time frame over which the consumer wishes to achieve his/her investment objective.
  - Health. We do not consider that it is appropriate to request this information from a consumer as a standalone piece of information. Instead it is important to consider the overall needs and objectives of a consumer. It is unclear how a firm would be expected to ask a specific question on a person's health and also what level of detail a firm is expected to request. Furthermore, we would point out that this may have implications under Data Protection requirements.
  - Potential future changes to his/her circumstances. A person may have any number of potential future changes to their circumstances and it is not practical to expect a consumer to provide for this at a point in time.

- **Rule 5.3**. The implication of this rule is that each time a firm offers, arranges or recommends a product a firm must update their file on the client. We recommend that

this rule is amended to explain that an investment firm shall be entitled to rely on the information provided by its clients unless it is aware that the information is out of date, inaccurate or incomplete.

- **Rule 5.17.** It is impossible to determine whether a consumer is able to meet the financial commitment associated with a product on an "ongoing basis". A firm is required to assess the suitability of a product of service based on the information it has available to it at the time. We strongly recommend that the term "on an ongoing basis" is removed from this rule.
- **Rule 5.18(a)** It is unclear what is meant by the term "most suitable from the range available to the regulated entity". This could be interpreted as the firm being required to research every single product in the marketplace on the basis that all of these products are "available". This is not workable in practice and we recommend that this rule instead refer to the product options offered by the regulated entity.
- **Rule 5.18(b).** The rule states that a firm must recommend the product that is "most suitable". This is in addition to the requirement to assess suitability. It is unclear what is intended by this rule and it may have the unintended consequence of placing an additional obligation on a firm to identify several suitable products and then select the "most" suitable.
- **Rule 5.22.** Statement of suitability. We recommend that the wording is amended to state that the product "may be suitable" rather than providing a definite statement that the product "is suitable"
- **Rule 5.24.** This Rule should be amended to reflect that where a product is recommended (i.e. advice provided) then a record should be maintained. It is not possible to record all instances where a client is simply seeking information which may or may not lead to a sale taking place.

6. Advertising

We have serious reservations about the proposed changes to the advertising requirements. We agree that the protection of consumers is essential to the development of a well functioning market and it is important that products are developed, marketed and sold to high standards. However we would caution against the overuse of prescriptive standard statements, the use of which can have the counterproductive effect of clients ignoring such statements. The risk warnings then lose any meaningful impact and instead serve only to detract from a consumer's ability to identify and understand the key features of a product. We reiterate our comments regarding the importance of the use of electronic media and the fact that these rules will detract from the ability to use this channel in an effective way. The existing regime regarding advertisements should be maintained. As pointed out throughout our submission, CPC should be closely aligned to MiFID.

We are happy to discuss the content of some or all of this submission in more detail with you if you consider that this would be beneficial.

Yours sincerely,

Ger Knowles

Head of Regulation & Compliance

DAVY

Appendix I: Additional comments on the Code

3.5	A ***regulated entity*** that is in direct receipt of a negotiable or non-negotiable instrument from a ***consumer*** as payment for a financial product or service must provide that ***consumer*** with a receipt. This receipt must include the following information: a) the name and address of the ***regulated entity***; b) the name of the ***consumer*** who furnished the instrument or payment, or on whose behalf the instrument or payment is furnished; the value of the instrument or payment received and the date on which it was received; d) the purpose of the payment; and e) in the case of an ***insurance intermediary***, that the acceptance by the ***insurance intermediary*** of a completed insurance proposal does not itself constitute the effecting of a policy of insurance, where relevant.	It is unclear why it would be necessary to include the purpose of the payment on the receipt. This should be removed.
3.19	A ***regulated entity*** may pay a fee, commission, other reward or remuneration in respect of the provision of ***regulated activities*** only to a ***person*** that is: a) a ***regulated entity***; b) a ***certified person***; c) an individual for whom a ***regulated entity*** has taken full and unconditional responsibility under the Investment Intermediaries Act 1995; d) an entity specifically exempted by law from requiring an authorisation, licence or registration to carry out the ***regulated activity*** in respect of which the fee, commission, other reward or remuneration is to be paid; e) an authorised credit intermediary (within the meaning of the Consumer Credit Act 1995 and the European Communities (Consumer Credit Agreements) Regulations 2010); or f) a former ***regulated entity***, where the fee, commission, other reward or remuneration is in respect of activities that the entity provided when it was regulated.	We request the clarification of this rule. ***A "regulated entity"*** means a financial services provider authorised, registered or licensed by the ***Central Bank*** or other EU or EEA ***Member State*** that is providing ***regulated activities*** in the State; This implies that a firm cannot pay another firm unless it has operations in the State.
3.26	Where conflicts of interest arise and cannot be reasonably avoided, a ***regulated entity*** must disclose the general nature and/or source of the conflicts of interest to the ***consumer***. A ***regulated entity*** may only undertake business with or on behalf of a ***consumer*** where there is directly or indirectly a conflicting interest, where that ***consumer*** has acknowledged, in writing, that he/she is aware of the	It is inevitable that conflicts of interest will arise; the requirement here should be aligned to those in MiFID whereby a firm is required to effectively manage conflicts of interest and where there is a risk of damage to client

	conflict of interest and still wants to proceed.	interest, to disclose the nature of the conflict. It is not workable to request a client to acknowledge conflicts each time he/she undertakes business with a firm. It is unclear whether it is intended that a firm write to a consumer each time a conflict has arisen or whether it is intended that this is covered off in a general way in the terms for example.
3.32	A ***regulated entity*** must not, for sales or marketing purposes, make an unsolicited personal visit or telephone call, at any time, to a ***personal consumer*** who is an existing ***consumer*** unless that ***personal consumer*** has given informed consent in writing to being contacted by the ***regulated entity*** by means of a personal visit or telephone call	We recommend that this section is amended to reflect the fact that a consumer can provide consent by other means (such as online, on the phone etc). This comment also applies to 3.33. In general we recommend that the term "durable medium" is used in place of "in writing"
3.38	Where a personal visit or telephone call to a ***consumer*** other than a ***personal consumer*** is as a result of a business lead or referral, a ***regulated entity*** must: c) disclose to the ***consumer*** the source of the business lead or referral supporting the contact, and d) retain a ***record*** of the business lead or referral	This rule would appear overly prescriptive, it is unclear how a firm would monitor this in practice
3.39	Premium handling	This section should be amended to reflect the fact that an account operated in accordance with the Client Asset Requirements, will meet the requirements set out in this section.
3.50	Within the first year of launching an ***investment product*** which is sold to ***consumers***, and annually thereafter, a ***product producer*** must update the information required under Provision 3.47 and provide that updated information to the intermediary. Where the ***product producer*** establishes that the ***target market*** of ***consumers*** for the ***investment product*** has changed, the ***product producer*** must: a) immediately update the information it provides under Provision 3.47 above; and b) notify the ***Central Bank***	It is unclear as to the purpose of notifying the Central Bank in the event that a target market has changed. In general we would reiterate our comments in respect to the "target market" of a product. We previously stated that we do not consider the identification of a target market to be the right approach and instead consider that the assessment of suitability at an individual consumer level should be the

		focus.
4.3	Where a ***regulated entity*** intends to amend or alter the range of services it provides, it must give notice to affected ***consumers*** at least one month in advance of the amendment being introduced	As stated in our previous response, this rule should only apply where increasing charges or a reduction in service.
4.4	Where a ***regulated entity*** intends to withdraw a product or service provided to a ***consumer***, the ***regulated entity*** must inform the ***consumer*** in writing two months in advance of the withdrawal, of the proposed withdrawal and the reason for the withdrawal	In general a product or service is offered for a certain period of time and not indefinitely. The requirement to provide a reason for withdrawal is not meaningful.
4.7	A ***regulated entity*** must ensure that, where it communicates with a ***consumer*** using electronic media, it has in place appropriate arrangements to ensure the secure transmission of information to, and receipt of information from, the ***consumer***.	It is impossible to ensure that the receipt of information from a consumer is secure, this rule should be amended.
4.12	A ***regulated entity*** must use a regulatory disclosure statement in either of the following formats, depending on the ***Member State*** where it has been authorised, registered or licensed: a) "[Full legal name of the ***regulated entity***, trading as (*insert all trading names used by the **regulated entity***)] is regulated by the Central Bank of Ireland" No additional text may be inserted into the wording of the regulatory disclosure statements as set out above	Where a firm has several trading names, this requirement will cause unnecessary complication for a consumer. Furthermore we would stress again the importance of having the ability to refer to regulatory authorisations from other jurisdictions as part of the regulatory disclosure statement (for example in the case of a firm with a UK business, it should be permitted to refer to the regulatory status under the FSA).
4.11	A ***regulated entity*** must have separate sections on any website it operates, for ***regulated activities*** and any other activities which it carries out	Where a firm provides the MiFID service of portfolio management and the client holds a portfolio of MiFID, IIA and "unregulated" products, it is impractical for a firm to differentiate at a product level to this extent. We consider the requirement to be unworkable.
4.15(d)	a statement that it is subject to the [insert names of the ***Central Bank's*** Code(s) of Conduct which the firm must comply with] which offers protection to ***consumers*** and that the Code(s) can be found on the Central Bank's website www.centralbank.ie;	This appears overly complicated. Is a firm required to refer to all codes for example, the CPC, Client Asset Requirements, MCRs, ICCL, Deposit Guarantee Scheme etc
4.16		This rule should be clarified to

	A ***regulated entity*** must provide its ***terms of business*** to a ***consumer*** as a stand-alone document.	confirm that the terms of business may be provided as part of an overall agreement with a client and therefore comprise several documents
4.25	Before offering, arranging or recommending a product, a ***regulated entity*** must provide information to the ***consumer*** in writing about the main features and restrictions of the product to assist the ***consumer*** in understanding the product.	The Code should be amended throughout to clarify that information can be provided in a durable medium. The requirement to provide certain information in "writing" could be construed as meaning in paper format, which is not compatible with an online service offering
4.62	Before offering, arranging or recommending an ***investment product*** the ***regulated entity*** must provide the ***consumer*** with the following information, where relevant, in a stand-alone document a) capital security	It is unclear what is meant by "capital security"
4.66	A ***product producer*** of a ***tracker bond*** must produce and issue a "Key Features Document" of a type referred to in Appendix A to this Code to any intermediary that offers that ***tracker bond*** to ***consumers***.	In relation to the Key Features Document, the prescribed table which splits out the allocation of funds between the deposit, the derivative and costs, appears to be written exclusively for trackers which embed an option, whereas some trackers are structured in the form of swaps or other. We would recommend that this section be reviewed to ensure that it caters for the different tracker structures available.
4.71	Before offering, arranging or recommending a Personal Retirement Savings Account ('PRSA'), a regulated entity must provide the consumer with the information set out in Appendix B to this Code. Where a non-standard PRSA is offered or recommended to a consumer the regulated entity must complete the declaration set out in Appendix C to this Code.	Appendix B states that "Charges on non Standard PRSAs are not capped and in most cases are higher than on Standard PRSAs". This is not necessarily the case and a more accurate statement is to state that "charges may be higher".
9.8	A ***regulated entity*** must ensure that small print or footnotes are only used to supplement or elaborate on the ***key information*** in the main body of the ***advertisement***. Where small print or footnotes are used, they should be of sufficient size and prominence to be clearly legible and should not be directly related to the product or service in the ***advertisement***	We are unclear as to the meaning of the second sentence and request clarification on this point

9.12	A ***regulated entity*** must ensure that all warnings required by this Code are prominent i.e. they must be in a box, in bold type and of a font size that is larger than the normal font size used throughout the ***advertisement***	See our comments in section one
11.1	A ***regulated entity*** must ensure that all instructions from or on behalf of a ***consumer*** are properly documented and the date of both the receipt and transmission of the instruction is recorded	The term "instruction" is too broad and should be amended
10	Errors	We reiterate comments made in our earlier submission
11.6	Details of individual transactions must be retained for six years after the date on which the particular transaction is discontinued or completed. All other ***records*** must be retained for six years from the date on which the ***regulated entity*** ceased to provide any product or service to the ***consumer*** concerned	We recommend that this rule is aligned with the data retention rules provided for in MiFID
Definition section	Tracker bond	There is an inconsistency between the Code and MiFID in terms of the definition of a tracker bond. ESME (formerly CESR), produced a document on MiFID in the form of a Questions and Answers document*. This document states that *"a deposit with an embedded derivative that has the potential of reducing the initial capital invested is a financial instrument under MIFID".* This is contradictory to the definition in the Code that states a tracker bond provides for *"a minimum payment",* this payment could be 80% for example. We request the Central Bank provide additional clarification.

Document may be found on:
http://ec.europa.eu/yqol/index.cfm?fuseaction=domain.show&did=6