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Our ref	ng	Your ref		Date	11 December 2012

AIFMD Consultation
Markets Policy Division
Central Bank of Ireland
Block D
Iveagh Court Harcourt Road
Dublin 2

Re. CP 60

Dear Sir or Madam,

We welcome the opportunity to respond to the consultation on the implementation of the Alternative Investment Fund Managers Directive (**CP60**) and set out our responses below. We have contributed to the response of the Irish Fund Industry Association (**IFIA**) to CP60 and endorse the response other than as outlined in this letter. To avoid unnecessary repetition, we do not propose to repeat the reasoning and responses set out in the IFIA response, unless we are of the view that this adds value. We adopt the defined terms used in CP 60.

Question 1

We support the proposal to eliminate the promoter approval process with the coming into force of the AIFMD regime, on the basis that under the AIFMD greater reliance is placed on the AIFM.

We do not consider the proposal to specify in more detail the obligations of directors when an AIF gets into difficulties to be the correct approach. We refer you to the IFIA response and echo the reasoning therein.

In particular, directors already have regulatory obligations, company law and common law obligations which apply to their functions and duties as directors at all times including where a fund or management company of which they act as director is dealing with a "distressed situation" and/or "gets into difficulty". Specifically it is well established that a director may be in breach of his/her duties if he/she resigns at the first sign of trouble. It is these company law and common law duties and standards which should govern the conduct of directors in such situations and we do not see how investors' interests can be strengthened by the Central Bank seeking to prescribe rules about directors' conduct in such situations.

Consequently we suggest the removal from the draft AIF Handbook of all references to boards (or board chairs) forming views about the impact of a directors resignation having regard to the current and prospective financial state of the fund or management company / AIFs under management and related footnotes seeking to impose conditions surrounding directors' resignations save where this relates to an obligation on a company to explain to the Central Bank the reasons for a director's resignation in instances where the director has not confirmed that the resignation is unconnected to the operation of the company or its board.

Question 2

We do not agree with this approach or the new proposals. We believe that is imperative (as proposed in CP60) to place "optimal reliance on European regulatory requirements set out in AIFMD".

We refer you to the IFIA response and the reasoning therein. We believe that if the new QIAIF and RIAIF rules are more restrictive than the main competitive jurisdictions then we will lose the majority if not all of this business.

We recognise that the Central Bank has a policy concern to ensure that Irish funds are not capable of being used as regulated "wrappers" for unregulated funds. We endorse the suggestions set out in the IFIA response.

Question 3

We welcome this proposal. We believe that it is appropriate that QIAIFs should have the ability to side pocket up to 50% of NAV while still being regarded as being open-ended. We suggest that QIAIFs which want to have the flexibility to treat more than 50% of their NAV by side pocketing those assets should be regarded as being open-ended QIAIFs with limited liquidity, with appropriate disclosure requirements. We believe that no limit should apply as such but that QIAIFs which treat or want to have the flexibility to treat 100% of their NAV in this way should be regarded as closed-ended. We agree with the need for appropriate disclosure of the abilities of QIAIFs in this regard to ensure that investors are adequately informed prior to their investment.

Question 4

We believe that an initial offer period (**IOP**) of up to two years during which shares/units can be issued at a fixed price after the Fund has started to make investments should be permitted for all QIAIFs, subject to full disclosure.

We believe that the 2 year limit on IOPs for private equity (**PE**) funds is too restrictive in the current market. This limit does not facilitate the large funds which operate on multiple closings or sponsor commitments during the "investment period" which can be up to 6/7 years investment. Moreover, in the current market the second or subsequent closes can be delayed. Almost all PE funds we are familiar with have specific rebalancing mechanism to ensure incoming and existing investors are fairly treated in the event of subsequent investment. The same considerations apply in respect of real estate funds.

Question 5

We believe that it is appropriate to maintain the PIF category of funds and the ability to establish PIFs as new single or umbrella funds or as new sub funds to existing umbrellas. Promoters with authorised investment funds in Ireland should be able to continue operating within the regulatory category of funds which they originally identified as suitable for their investor base. It also is in those investors' interests to continue as investors within the existing regulatory PIF structure. As regards the future of the PIF as a regulatory category, it differs from the QIF because there is no requirement for investors to meet the QIF qualifying investor criteria. This means that there may be a demand in the future for PIF structures. We are of the opinion that a separate chapter in the AIF Handbook relating to PIFs along the lines of the existing Non-UCITS Notice 12 should be included.

Question 6

We believe it is imperative to create a regime for retail investment funds that have a different risk profile to UCITS. Firstly retail investors should not be limited to investments in UCITS which are subject to a variety of rules on eligible assets, leverage, diversification, and so on.

Secondly, it is worth noting that other jurisdiction operate regimes for retail non-UCTS funds which do not have the same risk profile as UCITS and yet are seen as properly regulated and appropriate for retail investors (registered funds or 1940 Act funds in the US, Non-UCITS retail schemes (NURS funds) in the UK or German retail funds).

Finally, following the implementation of AIFMD in Ireland, Irish retail funds will be capable of being marketed on a cross-border basis without a passport subject to the domestic laws of the Member State where the marketing occurs. Accordingly, it will be possible for Irish RIAIFs to be sold in Europe on a level playing field with foreign domestic funds. We believe that it will be extremely important that the Irish funds industry be able to avail of this opportunity.

Question 7

We believe that RIAIFs should be able to provide for the issue of partly paid units, particularly where the RIAIF is established as a venture capital or private equity fund. We believe that retail investors are capable of understanding the nature of partly paid shares or commitment agreements, provided that appropriate disclosures are made. We understand that it is common practice that the application form completed by the investor contains a specific acknowledgement and commitment in this regard. Many financial products available on a retail basis operate on the principle of partial payment up front with further payments to follow; a purchase backed by a loan is a common feature of the retail market at present and, in essence, a partly paid share or a commitment agreement coupled with the requirement for later capital contributions is founded on the same principles.

Question 8

We agree with this approach and welcome the approach whereby applicable rules would be regularly updated to take account of the dynamic and constantly evolving financial markets and to reflect market practice. We would also suggest that the Central Bank consult and engage with risk managers to draft appropriate guidelines to apply where RIAIFs invest in FDI.

Question 9

We welcome the proposal for the Central Bank to set out requirements for commodities as an asset class. We believe that RIAIFs should be entitled to acquire commodities directly.

Some of the safeguards which might be considered would be as follows.

- Require that regular market prices are available.
- Require that the RIAIF be able to demonstrate that there are significant daily market volumes in the commodities in question.

- There should be no limit on the type of amount of a commodity held, provided that the requirements can be met. Single commodity products are available on the market (Switzerland and the US for example) and there is no compelling reason to limit them here. A RIAIF should be able to hold, for example, a precious metal directly (via a physical segregated holding with its custodian or a sub-custodian) which removes any issuer risk as the precious metal is actually held in the RIAIF's custody network. In addition a RIAIF could hold precious metals via an unallocated account and this should be treated like any other deposit and subject to the same limits as to counterparty exposure as for cash deposits with financial institutions.
- Require the RIAIF to hold multiple different bars/coins of a type ordinarily traded on the market (e.g., London Good Delivery Bars).

Question 10

We do not believe it is appropriate for the Central Bank to require any specific risk disclosures. We believe this is a matter which is better left to the general first principles which are set out in Chapter 1, Part 1, Section 5, xiii of the draft handbook. This position is also consistent with the position in the UK. We believe that the investment manager is best placed to judge the relative riskiness of investment in various markets which meet the Central Bank's requirements. There are also inherent difficulties in defining what is meant by emerging markets.

Similarly, we do not believe that it is appropriate for the Central Bank to mandate any specific risk disclosures for investment in gold.

For the same reasons, we do not believe that it is appropriate for the Central Bank to mandate any specific risk disclosures for other asset classes.

Question 11

We do not believe that this the correct approach.

AIFMD seeks to regulate AIFMs and not the products themselves, which is what the Central Bank is seeking to do in this instance. The exemption was provided for so as to avoid imposing undue costs and administrative burdens on small AIFMs which are not considered to contribute to the systemic risk of the financial markets. This approach does not take account of the nature, scale and complexity of such AIFs and AIFMs.

AIFMD specifically facilitates the smaller AIFM/ AIF. The sub-EUR100/500m market is important for Ireland in that it provides a steady inflow of new managers into the jurisdiction and, in addition, these managers often go on to be much larger. For this reason, adopting the approach proposed in CP60 may dissuade the next generation of AIFMs that may develop into large AIFMs from setting up funds in Ireland.

Question 12

An Exempt Unit Trust (**EUT**) is a trust-based structure used to facilitate investment by all types of Irish pension schemes. The structure can also be utilised by Revenue-approved charities.

EUTs are not within the scope of the Unit Trusts Act 1990 as they do not provide facilities for participation by the public. This is a crucial point. They are therefore not currently subject to authorisation or supervision by the Central Bank under that Act.

The pension funds themselves will be subject to oversight and may be bound by laws in respect of pension fund investments or laws relating to charities. We believe that imposing this regulatory regime to EUTs at product level is unnecessary and would potentially conflict with the existing regulatory requirements applicable to qualifying investors in EUTs.

In addition, there would be a significant negative cost impact of applying further regulatory requirements on trusts that are not, by their nature, offered to the public.

Question 13

We endorse the response of IFIA on this point.

Question 14

We endorse the response of IFIA on this point.

Question 15

We endorse the response of IFIA on this point.

Question 16

We suggest that the following topics also be provided for.

Inward Marketing Rules

The current requirements contained in NU 19.6 "Inward marketing of schemes established in other jurisdictions" have not been incorporated in the AIF Handbook. Notwithstanding the introduction of the passport, there will still be a need for these rules to cater for inward marketing on a private placement basis. Rules will also be required to regulate the inward marketing of non-EU or EU AIF into Ireland on a private placement basis.

Ireland as Member State of Reference

In due course, the AIF Handbook should provide specific rules where a non-EU AIFM applies for authorisation under the AIFMD using Ireland as its member state of reference. We note that this step is contingent on ESMA issuing an opinion in 2015 that the passport ought to be extended to non-EU AIFM.

Authorisation Procedures

The AIF Handbook does not set out timelines for authorisation but this process should be clarified and material aspects of the current fast-track / self-certification process applicable to QIFs should be retained. This could involve standard checklists, application documents and "programme of activity" / business plan templates in order to ensure that the authorisation process is as efficient as possible.

Self-Managed AIFs

The AIF handbook should specifically set out the requirements for self-managed AIFs. Given that the majority of Irish AIFMs are expected to be constituted as internally-managed AIFs, it would be helpful if a section of the AIF Handbook were dedicated to the self-managed AIF.

Exemptions for closed-ended funds

The provisions of Article 61(3) and 61(4) which permit AIFMs of certain closed ended funds to continue to manage such AIFs without authorisation have not been dealt with in CP 60.

Qualifying Investors v Professional Investors

The AIF Handbook provides that an investor in a QIAIF must be:

(a) an investor who is a professional client within the meaning of Annex II of Directive 2004/39/EC (Markets in Financial Instruments Directive); or

(b) an investor who receives an appraisal from an EU credit institution, a MiFID firm or a UCITS management company that the investor has the appropriate expertise, experience and knowledge to adequately understand the investment in the QIAIF; or

(c) an investor who certifies that they are an informed investor by providing the following:

- Confirmation (in writing) that the investor has such knowledge of and experience in financial and business matters as would enable the investor to properly evaluate the merits and risks of the prospective investment; or
- Confirmation (in writing) that the investor's business involves, whether for its own account or the account of others, the management, acquisition or disposal of property of the same kind as the property of the QIAIF.

In AIFMD, "professional investor" is defined as "an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2004/39/EC." The availability of the passport under the AIFMD only applies where the AIF is marked to professional investors in the EU. The ability to market to investors in QIAIFs that fall into categories (b) and (c) will depend on private placement rules as applied under Article 43 of the AIFMD – Marketing to Retail Investors.

We suggest that the Central Bank clarify its position on this point. At a minimum, it should be confirmed that QIAIFs may be marketed to investors in categories (b) and (c) on a private placement basis and that the introduction of the new rules will not impact marketing to existing investors that fall into these categories.

Varying dealing frequencies between share classes

We welcome the move to requiring fair treatment of investors and suggest that the Central Bank clarify its requirements for varying dealing frequencies between share classes.

Lending by QIAIFs / Issuance of debt securities by AIFs

We welcome the statement in CP60 that the Central Bank will look at the question of lending by QIAIFs, and in particular the ability for them to engage in commercial loan origination transactions which are currently prohibited. We understand that this asset class is available to regulated funds in Luxembourg. In addition, there are a number of asset managers in the market who have significant experience in this area. To date they have either used Luxembourg funds or unregulated structures, be it in Ireland or elsewhere. Accordingly, they have built up significant experience in the area of loan origination and, critically for investors, the risks associated with it. As a result, allowing for such funds in a regulated structure would not be opening up a new asset class for the market but rather just a new asset class for a regulated QIAIF/QIF structure.

The key risk for an investor that invests in a fund that invests in loans (whether they originate those loans or acquire them in the secondary market) is default by the borrower and allowing funds originate loans does not change that and would materially add to the risks of the investment proposal. In any event, as with other asset classes, it would be a matter of highlighting any such additional risks so that an investor could make an informed judgement of the risks and rewards of the investment proposal offered to them.

Precluding Irish regulated QIAIFs from engaging in commercial loan origination merely acts to drive that business to other jurisdictions with the asset managers then being in a position to offer such funds on a passport basis (assuming they are an EU AIFM and an EU AIF) to Irish investors so there is no reason why Irish funds should be prohibited from engaging in loan origination.

We would urge the Central Bank to engage on this point as soon as possible as business is being lost to other jurisdictions.

SPECIFIC CHAPTERS IN THE AIF HANDBOOK

Chapter 1-Retail Investor AIF Requirements

Part 1-General Rules

Section 6 – General Operational Requirements

1. <u>**Dealing (page 83 ii)**</u>

__Paragraph 2__: Requirement that units may not be issued, or if issued must be cancelled, unless the equivalent of the net issue price is paid into the assets of the RIAIF within a reasonable time, which is specified in the prospectus.

We suggest that the Central Bank allow for Director discretion in determining if and when units would be cancelled, rather than prescribing that units 'must be cancelled'. It may not always be in the interests of the investors to cancel units, particularly if the price of those units has reduced since they were created.

Chapter 2 – Qualifying Investor AIF requirements

Part 1: General Rules

Section 1: Qualifying Investor AIF restrictions

2. General Restrictions (page 132 i)

***Paragraph 4**: Where a Qualifying Investor AIF invests in units of an investment fund managed by the same management company of by an associated or related company, the manager of the investment fund in which the investment is being made must waive the preliminary/initial/redemption charge which it would normally charge.*

It would be helpful if the Central Bank would consider permitting the manager of the investment fund in which the investment is being made to charge a preliminary / initial / redemption charge where such charge is paid into the assets of the underlying fund and upon sufficient disclosure in the investing fund documentation and. Protection of investors should be ensured by sufficient disclosure about charging at the investing fund level and also the fact that the charge is not being paid out of the fund to the manager or other third party thus remaining as fund assets.

3. Constitutional Documents (page 134 ii) (also p147 para iv)

***Paragraph 5**: Replacement of Depositary.*

It would be helpful if the Central Bank would specifically provide for the retirement of depositary upon revocation of fund authorisation – the current procedure is onerous

4. Valuation (page 135 iii)

***Paragraph 5:** Units shall be redeemed or repurchased at a price arrived at by dividing the net asset value of the Qualifying Investor AIF by the number of units outstanding; such price may be decreased by duties and charges. The maximum charge relating to the redemption or repurchase of units as provided for in the constitutional document or prospectus may not be increased without approval on the basis of a majority of votes cast at general meeting. In the event of an increase in the redemption or repurchase charge a reasonable notification period* *must be provided by the Qualifying Investor AIF to enable unitholders redeem their units prior to the implementation of the increase.*

We submit that it would be sufficient to give Qualifying Investors notice of the proposed increase of redemption/repurchase charge and a notification period within which they can request redemption without incurring the increased charge rather than putting the fund and investors to the expense of convening a meeting to vote on the increase.

5. Umbrella Qualifying Investor AIFs (page 136 vi)

Paragraph 4: *Where a sub-fund within an umbrella Qualifying Investor AIF invests in the units of another sub-fund within the umbrella the investing sub-fund must not charge an annual management fee in respect of that portion of its assets invested in other sub-funds within the umbrella. This provision is also applicable to the annual fee charged by an investment manager where this fee is paid directly out of the assets of the Qualifying Investor AIF.*

We suggest that there should not be a blanket ban on such charging structures. It should be possible to build in charges at different levels in different sub-funds within the same umbrella where there is adequate disclosure at the investing sub-fund level about the impact of such charges. Qualifying Investors should be able to make their own informed choice about their investment decision where there is adequate disclosure. The Central Bank could also require specific disclosure about the charging structure in subscription documentation for added transparency.

In particular, this rule is unfair where there are different investment managers at the investing and receiving sub-fund level. Even where there is the same investment manager, the investment manager at investing sub-fund level may be dynamically allocating investment into the underlying sub-fund as part of an overall strategy (and therefore entitled to a fee for this work) and not just "passively" directing investment into a sister sub-fund. At underlying sub-fund level, the investment manager would also be entitled to a fee for the management mandate it is undertaking for that sub-fund. The current and proposed rule also creates a situation where promoters/investment managers who want to cross invest within umbrellas and charge a fee for the work done at both levels cannot do this in the same umbrella, but could achieve the desired charging structure result by setting up a separate Irish fund and investing into it (thereby incurring unnecessary expense) or setting up a non-Irish domiciled structure in which the Irish sub-fund could invest. Finally, we submit that there is nothing in the investment funds legislation preventing the ability to establish this kind of charging structure.

Section 5: Prospectus requirements

6. General requirements (page 152 i)

Paragraph 5*: A change to the investment objectives, or a material change to the investment policies of a Qualifying Investor AIF, as disclosed in the prospectus, may not be effected without the prior written approval of all unitholders or without approval on the basis of a majority of votes cast at general meeting. "Material" shall be taken to mean, although not exclusively:*

"changes which significantly alter the asset type, credit quality, borrowing or leverage limits or risk profile of the Qualifying Investor AIF".

In the event of a change of investment objectives and/or investment policy, on the basis of a majority of votes cast at a general meeting, a reasonable notification period must be provided by the Qualifying Investor AIF to enable unitholders redeem their units prior to implementation of these changes.

Advance notification to investors for material change of investment policies should be sufficient as opposed to approval. Article 23(b) of the AIFMD states that "a description of the procedures by which the AIF may change its investment strategy or investment policy, or both" should be provided to investors before investing in the AIF. There is no reference to, or requirement for, approval when changing investment policy and no distinction between material or non-material changes. This section should therefore be revised to remove the requirement for investor approval for changes to investment policy. This will also eliminate the expense of convening investor meetings for such approval. We refer to the IFIA industry submission on this point and echo the point made there that a requirement for advance notice rather than approval would be consistent with requirements in place in other jurisdictions.

Chapter 6 – AIF Depositary Requirements

7. Depositary tasks (page 283 iii)

***Paragraph 6**: "Where a depositary acts in relation to a Retail Investor AIF or Qualifying Investor AIF which invests more than 30% or 50% of net assets respectively in another investment fund, it must confirm in writing to the Central Bank that:*

- *the authorised AIF has procedures in place to ensure that the underlying investment fund meets the Central Bank's regulatory requirements; and*

- *it will regularly review the operation of these procedures to ensure that the underlying investment fund continues to meet the Central Bank's regulatory requirements."*

This requirement is in addition to AIFMD requirements and will involve compliance costs on investors. We therefore suggest that it should not be included. These matters will already be attended to as part of procedures to avoid breach of Central Bank requirements.

We trust that the above is clear and of assistance. If you require any clarification on any points made in this letter please do not hesitate to contact us at ngreene@algoodbody.com

Yours faithfully

A&L Goodbody

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