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17 July 2015

Consultation on Corporate Governance Requirements for Investment Firms (CP94)
Risk, Governance, Accounting and Auditing Policy Division
Central Bank of Ireland
Dublin 2

**Re: Consultation on Corporate Governance Requirements for Investment Firms [“CP94”]**

Dear Sirs,

We welcome the Central Bank’s commitment to see appropriate and effective levels of corporate governance among regulated financial services firms. We are grateful for this opportunity to comment on CP94.

Compliance Ireland Regulatory Services Limited is a regulatory affairs consultancy which advises regulated firms and applicants for authorisation on all aspects of regulatory compliance, corporate governance and strategy. The author of this letter is a Chartered Director and also serves as an independent non-executive director (“INED”) of a number of regulated firms, including investment firms which would be subject to the scope of the proposed Corporate Governance Requirements for Investment Firms 2015 (the “Requirements”).

As an overarching comment, we would note that the Central Bank intends to impose the Requirements on firms with certain PRISM ratings as determined by the Central Bank, regardless of size or complexity of the firm itself, contrary to the proportionality qualifiers of MiFID itself.

- Regulation 33 of the European Communities (Markets in Financial Instruments) Regulations [S.I. 60 of 2007] (the “MiFID Regulations”) imposes certain organisational requirements on investment firms.
- These organisational requirements are elaborated upon in MiFID Regulation 34(1).
- MiFID Regulation 34(2) clarifies that in carrying out the stated responsibilities *“an investment firm shall take into account the nature, scale and complexity of the business of the firm, and the nature and range of investment services and activities undertaken in the course of that business”*.

We believe that the proposed imposition of the Requirements without consideration of the nature, scale and complexity of the business of the firm, will impose unnecessary cost burdens on firms, decrease competitiveness and act as a barrier to entry with the end effect of making small firms less competitive and decreasing consumer choice.

**Section 1 Scope**

1.2 In the spirit of proportionality, the disapplication of the Requirements to firms with a low PRISM impact assessment is to be welcomed.

- However, in the event that the Central Bank re-classify a firm's PRISM impact to Medium Low rating or above, the Requirements would appear to become immediately binding on such a firm from the date of re-rating.
- We would suggest inserting a suitable time-frame, such as six months from the date of re-rating in which the Central Bank will allow the firm to arrange its affairs in an orderly manner to become compliant with the Requirements.
- The same observation extends to a firm re-rated High or Medium-High impact becoming subject to the additional requirements set out in Appendix 1 of the Requirements.

**Section 2 Definitions**

'Director independence': The definition of an independent director as a person capable of exercising sound judgement and decision-making independent of the views of others, with suggested characteristic criteria, rather than a more rigid codified definition is welcomed.

'Firm': This is defined as "*a firm authorised pursuant to MiFID*" or "*a non-retail investment intermediary authorised under Section 10 of the Investment Intermediaries Act 1995*".

- Section 10 of the Investment Intermediaries Act 1995 ("IIA 1995") generally provides for the authorisation of investment intermediaries (a "Section 10 Firm") and does not provide for the bifurcation of such firms into retail and non-retail intermediaries.
- A firm within the meaning of Regulation 5(3) of the MiFID Regulations, as amended would require to be authorised as a Section 10 Firm whether it dealt with retail or non-retail clients, or both.
- We suggest that this second limb of the definition be amended to "*an investment intermediary authorised under Section 10 of the Investment Intermediaries Act 1995, where such firm's authorisation has been limited by the Central Bank to the provision of services to non-retail clients*". This would ensure it was clear that the Requirements did not apply to Section 10 firms authorised to provide services to retail clients.

**Section 3 Legal Basis**

3.1 The precise legal basis upon which the Requirements are to be issued should be specified.

**Section 5 General Requirements**

5.1 The blank requirement that firms promote strong corporate governance (which is also effective) goes significantly beyond the requirement in Regulation 34(2) of the MiFID Regulations that in carrying out its responsibilities *"an investment firm shall take into account the nature, scale and complexity of the business of the firm, and the nature and range of investment services and activities undertaken in the course of that business"*.

- To require in excess of the MiFID Regulations may impose unnecessary costs on firms subject to the Requirements.
- We would suggest that this requirement be limited to the promotion of effective corporate governance alone without the requirement that the promotion also be strong regardless of need.

5.7 The imposition of a requirement to report any material concern in relation to corporate governance to the board with a mandatory direct reporting obligation to the Central Bank if not satisfactorily resolved within 5 business days, may not permit sufficient time to allow a board to satisfactorily and permanently correct any issues raised.

- These mandatory requirements appear to significant extend the responsibilities of directors beyond those set out in Part 5 of the Companies Act 2014 and appear to be disproportionate in relation to the perceived governance protection gained.

**Section 6 Composition of the Board**

6.2 The requirement that a board must be comprised of a majority of INEDs is nonsensical in the context of the owner-managed businesses which are typical of the Irish firms intended to be subject to the Requirements.

- Provision B.1.2 of the UK Corporate Governance Code which applies only to entities with a stock market listing makes such a requirement, but even this is tempered by only requiring two non-executive directors of a firm below the level of a FTSE350 firm.
- The purpose of such provisions are to protect a broad and diverse shareholder base from having their interests captured and subverted by management.
- In the context of an owner-managed business, this would require the owners of a business to remove themselves from the board and thus from setting the strategic direction of the firm, or alternatively to incur significant costs in hiring external parties to out-number them and overrule their own interests.
- If the Central Bank is desirous of having independent thought properly represented, we would recommend that the requirement for group subsidiaries of *"at least one independent non-executive director or such greater number as is required by the Central Bank"* be extended to all firms.

6.4 The Requirement states that "*A firm shall ensure that directors attend each board meeting in person wherever practicable*."

- It is the responsibility of the director alone to attend a properly convened board meeting.
- This is not the responsibility of the firm.
- While it is desirable that directors should attend in person, there is no legal requirement to do so.
- Modern technology means that it is often more effective to convene at short notice board meetings attended by teleconference or videoconference to deal with *ad hoc* matters than to delay their consideration until the next scheduled meeting at which the directors can attend in person.
- Section 161(6) of the Companies Act 2014 specifically permits board meetings where some or all of the directors are attending telephonically or electronically rather than in person.
- An imposition of a mandatory requirement of physical attendance by the Central Bank ignores this permission and would simply lead to an increase in the number of written resolutions or delegations to sub-committees of the board, obviating the ability of directors to discuss in full meeting between themselves the issue at hand, paradoxically reducing the effectiveness of the board.

**Section 7 Chairman**

7.3 The Requirement that a Chairman have relevant financial services expertise, qualifications and experience or to undertake relevant and timely comprehensive training is welcomed.

- Caution is however advised in the interpretation of 'relevant experience' in practice so as not to eliminate eligible candidates with previous work experience in other financial services sectors.
- Board effectiveness is greatly enhanced by a balance of directors having diversity of background and experience - lessons learned in other sectors can often be fruitfully transferred to investment services.

7.7 The Requirement that a Chairman be an independent non-executive director, or group director, is welcomed.

7.9 The Requirement for a Chairman to obtain prior approval of the Central Bank prior to the assumption of other non-group directorship roles is unduly restrictive.

- A Requirement to seek consent from the Central Bank prior to taking on any additional non-group directorships would act to deter a professional INED from taking up such a limiting position.
- The ability to properly discharge the role of the Chairman especially any perceived significant time commitment should be dealt with as part of the Chairman appointment process and the specification of likely time commitments at that stage.

**Section 8 Chief Executive Officer**

8.4 It should be stated that the Requirement that a Chief Executive Officer's contract be reviewed at least once every five years be "*without prejudice to any rights the CEO may have under employment legislation*".

**Section 12 Appointments**

12.9 The Requirement to have a written policy on diversity with regard to the selection of persons for nomination to become directors, is prejudicial to that group of persons in the absence of the legally-mandated application of such Requirements to the employees of a firm generally.

- The element or elements of diversity are not specified – are the Central Bank to propose mandatory targets or quotas in terms of gender, ethnicity, religious belief and sexual orientation?

**Section 16 Consolidated Supervision**

16.1 The term 'Consolidated Supervision' is a regulatory concept and may prove confusing when deployed in this context. We would suggest the term 'Monitoring of Activities of Subsidiaries' instead.

**Section 17 Committees of the Board**

17.1 Regardless of size or complexity of a firm, this Requirement imposes an obligation on the firm to form a risk committee and an audit committee of the board.

- We believe the imposition of a mandatory requirement to form risk and audit committees of the board without any application of proportionality is a disproportionate and unnecessarily burdensome measure.
- The purpose of a Committee of the board is to examine under delegation (see also Requirement 21.1) and report back to the full board (see also Requirement 18.8), using persons of appropriate expertise, certain matters of a technical nature or matters, such as internal audit, where it would be inappropriate to involve executive directors. These matters always remain the responsibility of the full board – the committee is merely a sub-set of the full board functioning under delegation and is obliged to account to the full board for its actions.
- The Central Bank's requirement in the instance of a three-person board, that the full board itself constitute its own sub-committees and hold separately minuted meetings are not sensible and would serve to imply that risk and audit matters are not a full board responsibility.
- We would suggest that risk and audit committees be required where appropriate taking into account the nature, scale and complexity of the business of the firm, and the nature and range of investment services and activities undertaken in the course of that business.
- We would further suggest in the instance of a three-person board or any firm where it has not been deemed appropriate to form separate risk and audit committees, that the full board consider and demonstrate in the minutes that the matters ordinarily falling into the remit of such committees have been adequately addressed.

17.6 This requirement requires the mandatory establishment of a remuneration and/or a nomination committee, where the firm deems it appropriate having had regard to the firm's corporate governance arrangements.

- We would note that the normal definitions of the roles of a remuneration committee and of a nomination committee differ with no overlap between their roles. We would therefore suggest that the intended ability to substitute one for the other may not result in the desired regulatory or corporate governance outcome.
- We would suggest that the discretion accorded to the firm to decide on establishing such committees be extended to take into account considering the nature, scale and complexity of the business of the firm.

17.7 We welcome the proposal that an audit committee and a risk committee should have at least one shared member.

- We concur that consideration of risk-related issues may be enhanced by members serving on more than one board sub-committee.

**Section 18 General Requirements of Committees of the Board**

18.6 We concur with the proposal that "*a firm shall ensure that cross-committee membership by an individual is managed by the firm to ensure that no one individual exercises excessive influence or control over the activities of one or more committees*."

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**Section 21 Risk Committee**

21.5 The distinction between "*internal capital*" and "*own funds*" is unclear.

- Neither term is defined in the definitions section.

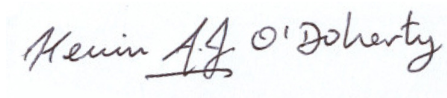
**Section 22 Remuneration Committee**

22.2 This Requirement stipulates that a majority of members of a remuneration committee be INEDs

- This requirement is not sensible in the case of owner-managed investment firms as the ability of shareholders working in the business to manage the flow of returns from their own property would be circumscribed.
- This requirement is not sensible in the case of group subsidiaries as it removes control of remuneration of group executives working in the Irish firm from the parent shareholder.
- We recommend that this Requirement be replaced with an obligation to ensure that membership of the Remuneration Committee be appropriate in the light of the firm's circumstances.

We thank you again for the opportunity to consult on your proposals and we commend you on the obvious effort and commitment involved in assembling and tailoring the Requirements thus far.

Yours sincerely,



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