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Feedback Statement on CP60 – Consultation on implementation of Alternative Investment Fund Managers Directive

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Introduction

1. On 30 October 2012 the Central Bank of Ireland (the "Central Bank") published Consultation Paper CP60 *Consultation on implementation of Alternative Investment Fund Managers Directive* ("CP60"). The closing date for comments was 11 December 2012 and 17 responses were received.

2. CP60 relates to the implementation in Ireland of Directive 2011/61/EU on Alternative Investment Fund Managers ("AIFMD").

3. CP60 sets out the Central Bank's proposals for a revised framework for the regulation of non-UCITS investment funds which fall to be regulated under domestic legislation. The proposed framework for the regulation of non UCITS investment funds continues to place significant reliance on the regulation of their service providers and, therefore, includes a range of requirements applying to those service providers.

4. CP60 also contains proposals for how the Central Bank will regulate alternative investment fund managers ("AIFMs"). These proposals now include some additional specifications of the managerial functions for AIFMs in light of the recently published Commission Delegated Regulation supplementing the AIFMD ("AIFMD Level 2"). In relation to this item alone, we are happy to consider further submissions.

5. CP60 raised 17 specific questions for respondents to address. The section headed "Feedback on questions posed in CP60" sets out a summary of the responses received to each question along with the Central Bank's comments and decisions.

6. This paper is accompanied by a revised, second draft AIF Handbook. This document has been amended to incorporate changes resulting from the consultation process, the publication of AIFMD Level 2 and to make other amendments necessary for consistency and drafting purposes. As now published, it provides industry with a clear description of the regime which will apply to non UCITS investment funds in Ireland.

7. The purpose of publishing this revised, second draft AIF Handbook is to assist AIFMs in planning for the implementation of the AIFMD which will come into effect on 22 July 2013. The revised draft AIF Handbook will be subject to a further technical examination to refine drafting. This is separate from the policy review which has now been concluded, although, of course, we must reserve the right to make further changes to our approach prior to finalising the legal text of the AIF Handbook. The final AIF Handbook will set out in definitive form the conditions which the Central Bank is imposing and which are additional to those imposed directly by legislation.

8. The Central Bank will keep its requirements under review at all times and welcomes on-going discussion on how best to protect investors, while facilitating management of the costs arising. In particular, it will be attentive to possible refinements applicable to retail investor AIFs ("RIAIFs").

9. The Central Bank is separately reviewing its requirements in relation to reports of transactions with connected parties. The relevant provisions contained in of the draft AIF Handbook have been retained but will be amended in the final AIF Handbook to reflect the outcome of the Central Bank's considerations.

10. The final AIF Handbook will be effective from 22 July 2013. Nothing in this feedback statement should be read with, seen as a clarification of or a supplement to the AIF Handbook. This feedback statement is published to promote understanding of the policy formation process within the Central Bank and is not relevant to assessing compliance with regulatory requirements.

Feedback on questions posed in CP60

Question 1: The Central Bank has previously placed significant reliance on the Promoter to underpin the formal regulatory regime by ensuring that only sizable entities with relevant experience could establish AIFs in Ireland, entities who could support AIFs in difficulty. To this end, the Central Bank has had a promoter approval process. We are now proposing to eliminate the promoter approval process and place reliance instead on the AIFM, taking into account the obligations on AIFM which the AIFMD imposes on them. For this to work, we are proposing to elaborate in more detail to clarify the obligations of directors when an AIF gets into difficulties. Is this the correct approach? The proposed qualifying investor AIF ("QIAIF") requirements differ significantly from the Qualifying Investor Funds ("QIFs") requirements previously in place. A number of requirements will no longer be applied because in our judgement, the AIFMD provides an appropriate level of protection, through the requirements applied to the AIFM or, through the AIFM, on the AIF. Do you agree with this approach?

11. Respondents universally agreed with the proposal to dispense with the promoter regime.

12. Many respondents did not agree with the inclusion of provisions to clarify the obligations of directors when an AIF gets into difficulties. The Irish Funds Industry Association ("IFIA") believed that it was for the individual board members, bearing in mind their substantive regulatory obligations and those under company law and common law, to manage the AIF in all scenarios including when the AIF is in a distressed situation or gets into difficulties. A&L Goodbody did not see how investors' interests could be strengthened by the Central Bank seeking to prescribe rules about directors' conduct in such situations. Dillon Eustace stated that the original and current purpose of the promoter approval regime was as a form of reputational safeguard for Ireland and was not designed to support AIFs in difficulty. In their view the additional safeguards and enhanced protection contemplated by AIFMD are far greater than any investor protections which might have been perceived to exist under the current non-UCITS/promoter approval regime. Matheson was of the view that it was dangerous for requirements within the AIF Handbook to incorporate prescriptive rules regarding the obligations of directors when an AIF gets into difficulties. If the Central Bank was not satisfied with how a particular director acted in a distressed situation, it could communicate this to the relevant board at the time and could also take this into account in future fitness and probity applications.

Central Bank: The Central Bank notes that respondents have embraced the proposal to discontinue the promoter regime. However, many of the responses suggest to us that we have not been as successful in the past as we would like to have been in promoting understanding of how the promoter regime has worked in practice - there does not seem to be broad understanding of how it operated. There is a widespread view that the promoter regime did not enhance investor protection because promoters did not have contractual obligations to assist investment funds in difficulties. This was not the case. Many promoters did intervene when their investment funds encountered difficulties. The reason we have decided now to drop the promoter regime is because obligations on the AIFM set out in the AIFMD would be duplicative and the investor protections in the AIFMD are sufficient.

The purpose of the Central Bank's text was to elaborate on considerations relevant to the current Fitness and Probity Standards and the current legal requirements, to identify specific standards of behaviour and to clarify what is expected of directors of AIFs in difficulties. Our supervisory experience suggests that the behaviour of directors is critical to a good outcome for investors.

The only specific harm suggested in the responses has been that articulating such standards might amount to pre-judging specific situations. We believe we can articulate good standards in this way without pre-judging any particular situation and we will always keep an open mind and be open to assessing the particular circumstances of an investment fund and its directors. If anything, the responses reinforce the concern which led us to conclude that it would be helpful if we were to provide guidance of this type. This text is also important as it puts all directors on notice that the Central Bank views the actions of a director of an AIF in difficulties as matters relevant to the fitness and probity of that person which can be taken into account when making any future assessments of the fitness and probity of that individual. Accordingly, the Central Bank has retained the draft text as something we want AIF and AFIM directors and potential directors to be aware of.

Question 2: QIFs authorised under the existing regime are not subject to investment and borrowing restrictions. However, in order to avoid circumvention of the Irish regulatory regime, they may not invest more than 50% of net assets in a single unregulated investment fund. The Central Bank is not proposing to change this limit of 50%. Indeed it is proposed to tighten the regime slightly by adding a provision to prohibit investment in excess of 50% in unregulated investment funds which are identical in terms of management and strategy. Do you agree with this approach? Do you think it is necessary to further address possible circumvention through investment in clone funds?

13. Other than BlackRock, respondents disagreed with the Central Bank's proposal. The IFIA commented that the proposal was not consistent with the master/feeder provisions of the AIFMD and would have implications for the competitiveness of Ireland as a funds jurisdiction. It recognised that the Central Bank had a policy concern to ensure that Irish AIFs are not capable of being used as regulated wrappers for unregulated funds. However, it believed that the Central Bank's proposal would go too far. It strongly urged at the very least that the 85% limit be adopted and that alternative safeguards be considered in the interests of investor protection. The IFIA referenced the Irish Stock Exchange's ("ISE") requirement for control agreements between feeder and master funds as an example of a possible safeguard. Matheson believed that any safeguards introduced for investments of between 50% and 85% in a single unregulated fund should be proportionate and should not be more onerous than those applied under the AIFMD to those funds above the 85% threshold. Further, there may be a need for national rules to address concerns in respect of QIAIFs that do not have an AIFM which is authorised under the AIFMD (a "Full AIFM"). Finally, while question 2 relates to QIAIFs, Matheson believes that similar consideration may apply to RIAIFs (for which a 30% limit applies). The ISE believed that a 50% limit would not be appropriate and that the Central Bank's concerns could be addressed by insisting that key essential features of QIAIFs are also met by master AIFs. It advised that it operates a long established master feeder regime designed to satisfy similar concerns whereby a fund that invests greater than 40% into another fund must demonstrate how it can control the underlying fund. Control agreements are normally used to demonstrate this.

14. BlackRock agreed with the Central Bank's proposed approach. However, it would not advocate a change to the rules applicable to QIF feeder funds, particularly the derogation which permits a QIF feeder fund to invest into an unregulated investment fund in certain circumstances.

Central Bank: The Central Bank recognises that responses were motivated mainly by concern that different EU jurisdictions may adopt different approaches. While some jurisdictions may continue to impose limits directly on AIFs, others may choose to rely solely on the AIFMD constraint on marketing by AIFMs. The Central Bank understands that significant differences in regulatory requirements within the EU can have a major impact on location choices. However, the Central Bank's obligation under domestic legislation is to design a regulatory regime that is robust and coherent.

With this in mind, the Central Bank has retained the current prohibition on QIAIF investing more than 50% in any one unregulated investment fund, but has amended the circumstances in which this prohibition will not apply. The draft AIF Handbook now provides that a QIAIF can disapply this prohibition where it has a minimum subscription limit of €500,000 and where its prospectus contains a detailed and prominent disclosure which identifies on an item-by-item basis those obligations and conditions which apply to the QIAIF and its AIFM but which do not apply to the underlying unregulated investment fund and its manager.

Question 3: The Central Bank has permitted both QIAIFs and RIAIFs to use share classes in order to side pocket assets which have become distressed, subject to certain safe-guards. We are considering if open-ended QIAIF should be permitted to purchase assets and immediately place these in side-pockets. In that case the QIAIF would, in effect, no longer act as an open ended fund for the totality of the portfolio and investors would lose redemption rights in respect of part of their total holding. If suitable disclosure is provided do you consider that this option should be available to QIAIFs? Should a limit apply to such side-pocket arrangements? Can the QIAIF continue to be regarded as an open-ended AIF?

15. Respondents considered that open-ended QIAIFs should be allowed to purchase assets which are immediately placed in side-pockets. The IFIA suggested that QIAIFs which applied a limit of up to 50% for side pocketed assets could still be regarded as open-ended; QIAIFs which applied limits of greater than 50% could be treated as open-ended with limited liquidity; QIAIFs which provided for the ability to invest 100% in illiquid assets should be regarded as closed-ended. BlackRock thought that there were some benefits arising from the Central Bank's proposal, subject to clear disclosure and capping the ability to immediately side pocket assets at a reasonable percentage (e.g. 33%). Dillon Eustace believed that it was not necessary to impose a limit on the amount that can be side pocketed.

Central Bank: The draft AIF Handbook has been amended to provide that QIAIFs can purchase assets and immediately place these in side pockets. The Central Bank has not placed a limit on the amount of assets which can be side pocketed in this manner.

Once assets are side pocketed, only unitholders existing at the date of creation of the side pocket are issued with units in that side pocket. Accordingly, only existing unitholders are entitled to a pro-rata share in the side pocketed assets and their side pocket units are not redeemable at the unitholder's request.

In effect, this means that something amounting to a separate closed-ended investment fund is established each time that a side pocket is created. Given the impact which this has on a unitholder's ability to redeem (his/her investment in the QIAIF will redeemable but his/her holding of side pocket units will not), a QIAIF which includes the flexibility to purchase distressed or illiquid assets and immediately side pocket these will not be permitted to describe itself as "open-ended". It must describe itself as a QIAIF which is 'open-ended with limited liquidity'.

Question 4: QIFs authorised under the existing regime are subject to requirements in relation to initial offer periods. In the case of QIFs which are real estate or private equity funds this period can be extended for a period of up to one year. We are considering if this period can be longer, up to 2 years, provided that the arrangement and the terms to apply to investors who invest after the investment strategy has been initiated are both clearly outlined at the commencement of the offering as the capital raising period. Do you consider that this should be permitted and what are the risks for investors who subscribe at the outset, particularly where the QIAIF has commenced investing?

16. Respondents agreed that the Central Bank should permit initial offer periods of up to 2 years. The IFIA stated that an initial offer period of up to 2 years during which units could be issued at a fixed price after the QIAIF has started to make investments should be permitted. For QIAIFs making private equity investments, an initial offer period of 2 years would be too short. Many such QIAIFs would have multiple closings during the investment period which can last six or seven years. These QIAIFs operate rebalancing mechanisms to ensure incoming and existing investors are treated fairly. Dillon Eustace believed that closed-ended QIAIFs investing in private equity, venture capital, real estate and infrastructure should be given a period of 2 years from first closing to final closing. During this period shares could be issued at a fixed period with investors coming in after the first closing being required to pay an additional charge (either to the QIAIF or to the existing investors) intended principally to recognise the cost of monies subscribed/committed in first or subsequent closings. Dillon Eustace stressed the need to use terminology that the closed-ended fund industry is familiar with as this would remove ambiguity. For example, the terms ‘first closing’ and ‘final closing’ should be used instead of ‘initial offer period’. LGT Capital Partners (Ireland) Limited (“LGT”) also favoured a two year initial offer period. It was important to clarify that this period would commence not when the QIAIF was authorised but after the first closing occurs.

Central Bank: The Central Bank wishes to clarify that its proposal to allow a longer initial offer period relates to QIAIFs investing in illiquid assets including real estate and private equity. The concern is that even if arrangements are in place to compensate earlier investors, the longer the offer period the more difficult it becomes for early investors to assess the importance and adequacy of those arrangements. The Central Bank recognises that some QIAIFs will continue to seek investors for longer periods.

Accordingly, the draft AIF Handbook has been amended to provide that these types of QIAIFs may have initial offer periods of up to 2 years and 6 months. This period will commence as soon as the first closing has occurred. We will keep this under review. Any investors who believe they have been disadvantaged by such an offer period should contact us as their experience can be valuable in informing further reviews of this matter.

Question 5: The Central Bank is proposing to discontinue the Professional Investor Fund ("PIFs") regime. This will mean that no new PIF structures will be authorised but the Central Bank will consider allowing existing PIFs to establish new sub-funds. What are stakeholders' views concerning the grandfathering provisions which should apply to PIFs? Should existing umbrella funds be permitted to establish new sub-funds where this category of AIF will not be provided for in the AIF Handbook?

17. The majority of respondents considered that the PIF regime should be retained. The IFIA suggested retaining the PIF regime on the basis that it may be of interest to investors who meet the €100,000 minimum investment limit but not the qualifying investor criteria for QIAIFs. A&L Goodbody, Dillon Eustace, LGT and State Street International ("State Street") agreed with this approach.

18. BlackRock had no issue with the Central Bank's proposal provided grandfathering was provided for.

19. The ISE believed that existing PIFs should be allowed to continue and to add new sub-funds. Conversions to RIAIFs or QIAIFs should be encouraged but not mandatory.

20. Matheson recommended that existing PIF umbrellas should be permitted to continue to launch new sub-funds (and not just for a limited grandfathering period). It should not be necessary to incorporate the existing PIF rules into the AIF Handbook as no new umbrella PIFs will be launched.

Central Bank: In the absence of concrete, specific arguments, the Central Bank was not convinced by respondents' assertions that the PIF regime should be retained. The Central Bank does not accept that the costs of adapting to the new regime are disproportionate. The Central Bank considers that the RIAIF and QIAIF regimes will adequately cover the universe of non-UCITS investment funds. Accordingly, the Central Bank is discontinuing the PIF regime.

PIFs in existence as at 22 July 2013 will be permitted to continue. Existing PIFs will not be permitted to establish new sub-funds or new share classes from 22 July 2013 onwards. Existing PIFs are encouraged but not required to convert to RIAIFs or QIAIFs.

The draft AIF Handbook has been amended to include a new chapter concerning grandfathering arrangements. This chapter outlines the requirements which will apply to existing PIFs including a condition that they comply with the provisions of their prospectuses. Each PIF must have an AIFM who will be subject to either Part I or Part II of the AIFM chapter. Where a PIF has a management company which is not a Full AIFM, that management company must comply with the AIF management company chapter. Fund administrators of PIFs must comply with the fund administrator chapter. Depositaries of PIFs must comply with the depositary chapter with the exclusion of the AIFMD depositary liability rules. The current PIF depositary liability rules will apply instead.

Question 6: The proposed RIAIF Requirements allow for the creation of an investment fund which is subject to less investment and eligible asset restrictions than the UCITS regime but is more restrictive than the QIAIF regime. In particular, key limits on investment in unlisted securities, single issuers and other investment funds have been raised. Do stakeholders agree that it is correct to create a different risk profile for RIAIFs compared with UCITS?

21. Respondents, including the IFIA, agreed that it was appropriate to create a regime for retail investment funds that have a different risk profile than UCITS. Dillon Eustace believed that an argument could be made to have no restrictions on RIAIFs but to rely on investor education and disclosure instead. State Street commented that the regulated market definition needed to be re-examined otherwise retail loan funds would not be permitted. Further, the RIAIF product should be flexible enough to allow for long-term investment funds of the nature contemplated in the UCITS VI consultation (assuming that these are not provided for under UCITS). BlackRock was of the view that the RIAIF regime should be closely aligned to the Commission's Green Paper (UCITS VI). It was important to consider the liquidity profile for any such vehicle. The ability to take advantage of existing distribution channels would be key to the success of RIAIFs.

Central Bank: The Central Bank notes that respondents viewed the proposed RIAIF Requirements favourably. Accordingly, these provisions have been retained.

Question 7: Should RIAIFs be permitted to provide for the issue of partly paid units, particularly where the RIAIF is established as a venture capital or private equity fund? Notwithstanding that full disclosure may be provided regarding the capital commitments and drawdowns would retail investors readily grasp the nature of the obligation they have entered into?

22. Respondents, other than BlackRock, believed that RIAIFs should be able to issue partly paid units. The IFIA noted that many financial products available on a retail basis operate on the principle of partial payment up front with further payments to follow. Dillon Eustace considered that significant additional warnings and disclosures could be provided explaining to retail investors the consequences of investing in partly paid units. State Street supported the proposal for partly paid units subject to appropriately robust disclosures.

23. BlackRock did not believe that it was appropriate for RIAIFs to be permitted to provide for the issue of partly paid units.

Central Bank: The Central Bank is not convinced that RIAIFs should be permitted to issue partly paid units. Accordingly, it is not including this provision in the AIF Handbook at this time. The Central Bank is open to reviewing this position at a future date should there prove to be market demand for such arrangements. The Central Bank would want, in particular, to get a good sense of the potential market for such funds.

Question 8: UCITS are permitted to invest in financial derivative instruments subject to detailed requirements including those relating to risk management procedures. It is intended that RIAIFs should, at least, be provided with the same possibilities in relation to derivatives. It is proposed to make that change now. We will also be open to discussing whether these can be extended where appropriate as the AIF Handbook is further developed in future. Do you agree with this approach? How should the rules on the use of financial derivative instruments differ for RIAIFs as compared with UCITS?

24. Respondents agreed that RIAIFs should be provided with the same possibilities to invest in financial derivative instruments as UCITS. The IFIA suggested that the Central Bank consult with risk managers to draft appropriate guidelines to apply where RIAIF invest in financial derivative instruments. BlackRock viewed the UCITS standard as a good reference point for developing RIAIF derivative rules. It suggested considering allowing a RIAIF to take fully covered short positions. This would require a RIAIF to be able to borrow stock to meet its commitments. State Street was of the view that the restrictions on financial derivative instruments needed to be relaxed. Counterparty limits, leverage limits, etc. currently replicate the UCITS limits – these should be less restrictive in order to differentiate RIAIFs from UCITS.

Central Bank: The Central Bank notes that respondents viewed this proposal favourably.

The Central Bank wishes to draw attention to the fact that it has been favourably disposed, given that UCITS can create short positions otherwise, to allowing UCITS to engage in physical short selling but that ultimately such arrangements have not proven practical within the confines of the UCITS legal framework. Similar difficulties do not exist within domestic non-UCITS investment fund legislation. With this in mind and considering that RIAIFs are intended to have a risk profile which is more flexible than UCITS, the draft AIF Handbook does not contain a prohibition on short sales by RIAIFs. AIFMs are reminded of their obligations under the Short Selling Regulations (Regulation (EU) No 236/2012 of the European Parliament and the Council of 14 March 2012 on short selling and certain aspects of credit default swaps)

Other restrictions on financial derivative instruments have been retained without amendment. The Central Bank will consider amending these to permit additional flexibilities as and when specific detailed proposals assessing the risks to investors are received.

Question 9: RIAIFs may invest in gold subject to appropriate disclosure requirements. However the markets for different commodities vary significantly. You are invited to provide views on whether the Central Bank should set out requirements for commodities as an asset class or wait for an application to consider this matter. You are also invited to indicate what type of safe-guards should be considered in that context.

25. Respondents agreed that RIAIFs should be able to get exposure to commodities. The IFIA believed that RIAIFs should be able to get exposure to any commodity through financial derivative instruments. RIAIFs should also be allowed to invest directly in any precious metals. Direct investment in other commodities should be subject to a separate application to the Central Bank. A&L Goodbody agreed that RIAIFs should be able to acquire commodities directly, subject to certain safeguards such as obligations in relation to liquidity and proper valuation. Dillon Eustace considered that RIAIFs should be permitted to invest directly in commodities where there is a recognised method of valuation and the depositary can take custody. It also considered that it should be acceptable to allow RIAIFs which offer exposure to a single commodity with appropriate recommendations as to the benefits of diversifying an individual's investment portfolio. LGT commented that restrictions for individual commodities should be agreed under a separate consultation process. State Street believed that the Central Bank should differentiate between precious metal commodities and other commodities; precious metals should be permitted; other commodities should be permitted on a case-by-case basis where they are sufficiently liquid.

Central Bank: RIAIFs are permitted to get exposure to any commodity through financial derivative instruments and the relevant provisions of the draft AIF Handbook as currently drafted do not prohibit this. RIAIFs are also permitted to invest directly in gold. The Central Bank is minded to permit RIAIFs to invest directly in other commodities but more detailed information about matters such as liquidity, custody and valuations would be required before these can be included in the AIF Handbook. These will be considered as and when specific proposals are received.

Question 10: The Central Bank has a requirement for a risk warning in relation to RIAIFs which invest in emerging markets. Is this still appropriate? As mentioned in paragraph 9, it is proposed to include specific risk disclosures for RIAIF gold funds. Is the proposed text suitable in this regard? Are there other asset classes for which a risk warning would be appropriate?

26. Respondents considered that the Central Bank should not mandate any risk disclosures including those related to particular asset classes. Dillon Eustace considered that it should be left to the RIAIF to draft and incorporate into its offering documentation the risk factors which it wishes to bring to the attention of investors. However, it was not opposed to the development of a non-obligatory list of suggested risk factor topics.

Central Bank: The submissions made were not judged to amount to a basis for a change of approach. The Central Bank notes the general requirement under the AIFMD for an AIFM to disclose all risks associated with an AIF. Notwithstanding this, the Central Bank is of the view that specific risk disclosures should be required in certain circumstances, including on an asset-type basis where relevant. Accordingly, the requirements for an emerging markets risk warning and for a specific risk warning for gold RIAIFs have been retained in the draft AIF Handbook. The Central Bank will look further at the precise wording.

Question 11: AIFMs falling below the thresholds specified in the AIFMD, as referenced in footnote 5, are subject to registration requirements only. The Central Bank considers that RIAIFs and QIAIFs should be subject to all AIFMD requirements as they are authorised investment funds. Do you support this approach?

27. Other than BlackRock and, to a lesser extent, LGT, respondents did not agree with the Central Bank's proposal. The IFIA expressed strong concerns regarding proposed treatment of RIAIFs and QIAIFs with below threshold AIFMs. It is argued that this proposal effectively imposes the AIFMD regime on below-threshold AIFMs and non-EU AIFMs indirectly through the AIF. For the former, the AIFMD specifically excluded these from the full authorisation regime on the basis that small AIFMs were not considered to contribute to the systemic risk of the financial markets. It is further argued that to take the approach suggested is to ignore the nature, scale and complexity of such AIFs and AIFMs. It appears to some to be inconsistent with the general intention of the AIFMD regime as set out in Recital 17 of the AIFMD. For non-EU AIFMs, the proposal is going to be a problem for these AIFMs to adopt the Full AIFM provisions rather than rely on the existing private placement regime. The IFIA proposed that the Central Bank consider the approach followed in Luxembourg whereby existing AIFs with below threshold AIFMs will remain subject to a large extent to requirements similar to those applicable under their current regime.

28. AIMA believed that the proposed approach was disproportionate. It suggested that AIFs targeting professional investors should be required to register and not opt-in to the AIFMD. The ISE commented that the Central Bank's proposal would impose an unnecessary regulatory and financial burden on smaller managers. This did not represent a proportionate regulatory regime. LK Shields believed that the proposal was at odds with the spirit and principle of the AIFMD having regard to the nature, scale and complexity of AIFMs and AIFs. State Street was concerned that if the Central Bank failed to recognise the thresholds, it would subject Irish domiciled funds to more onerous regulatory requirements than their European counterparts affecting competitiveness for little perceived benefit. A registration and reporting regime was more appropriate for this small subset of AIFMs.

29. BlackRock supported the Central Bank's approach to provide consistency of approach for the benefit of end investors. LGT agreed with the Central Bank proposed approach. However, it did have reservations that this approach may restrict the ability of new below-threshold AIFMs to launch product and agreed with IFIA response on this particular point.

Central Bank: The Central Bank notes that many respondents to CP60 were strongly opposed to our proposals for QIAIFs with no Full AIFM. They objected because of what they saw as inconsistency with the AIFMD. The underlying concern was clearly competitive issues. The Central Bank acknowledges that what respondents were focusing on was the impact on small QIAIFs, particularly in their start-up phase.

However, many of the flexibilities which the Central Bank is introducing for QIAIFs (e.g. discontinuing the promoter regime) are based on the premise that these will have a Full AIFM. The approach is consistent with our obligations under domestic law to operate a regime governing all funds.

Having given the matter due consideration, the Central Bank is moving forward with an alternative approach which offers start-ups room for small AIFM to grow before falling under the full AIFM chapter of the AIF Handbook. The Central Bank will also give recognition to the fact that existing QIAIFs have promoters who were approved by the Central Bank by allowing existing small QIAIFs to continue under the current rules.

Accordingly, the draft AIF Handbook has been amended to provide as follows:

1. QIAIFs authorised after 22 July 2013 with AIFM below the threshold:

- No promoter regime will apply to these QIAIFs.

- These QIAIFs will be subject to a condition that they must have a Full AIFM within two years from the date of launch i.e. the date when the initial offer period closes or, where there are multiple closings, the date of first closing.

- During those initial two years, these QIAIFs will effectively be subject to the current QIF regime.

  To explain this in more detail, Part III of the QIAIF chapter sets out those provisions of the AIFM chapter which apply to QIAIFs which do not have a Full AIFM. This part has been amended to apply: (i) only those provisions of the AIFM chapter which are equivalent to or replace requirements which currently apply to QIFs; and (ii) the AIFMD depositary rules excluding the AIFMD depositary liability regime. The current QIF depositary liability regime (i.e. negligence, fraud, bad faith, wilful default or recklessness) will apply during this period. This means that during the initial two years, QIAIFs will not be subject to, for example, the AIFMD rules on remuneration or risk management.

2. QIAIFs authorised before 22 July 2013:

- These QIAIFs have promoters who were approved by the Central Bank.

- These QIAIFs will effectively be permitted to operate under the current QIF regime plus the AIFMD depositary requirements indefinitely.

  To explain this in more detail, only those provisions of the AIFM chapter which are equivalent to or replace requirements which currently apply to QIFs together with the AIFMD depositary rules will apply to these QIAIFs.

3. All RIAIFs will be required to have a Full AIFM.

Question 12: The AIFMD defines AIFs as collective investment undertakings which are not UCITS. Exempt Unit Trusts are not currently subjected to the domestic regulatory regime although as AIFs they will be subject to certain requirements under the AIFMD. Where the AIFM of the Exempt Unit Trust falls below the thresholds referenced in footnote 5 the AIFM will be subject to registration requirements. If the AIFM is above the threshold, the full AIFMD regime will apply. The Central Bank will in the near future look at the option of extending the domestic regulatory regime to Exempt Unit Trusts. What issues will arise from the extension of the regulatory regime to these Exempt Unit Trusts? In your view are there potentially unforeseen consequences which could arise?

Central Bank: The Central Bank will consider the responses received to this question as part of a separate work stream which will run in tandem with the implementation of the AIFMD.

Question 13: We currently require that the calculation of performance fees payable by RIAIFs and QIAIFs must be verified by the depositary. We are leaning towards amending this rule to allow that a party other than the depositary could carry out the verification, provided it is a party independent from any party involved in or benefitting from the operations of the AIF or the AIFM. Do you agree with this change and who do you consider could carry out this role?

30. Most respondents (IFIA, A&L Goodbody, Dillon Eustace, ISE LGT and Matheson) agreed that an entity other than the depositary could verify performance fees. The IFIA suggested that this could be done by an independent party with sufficient expertise selected by the board/manager of the AIF. Dillon Eustace queried whether the verification requirement added anything from a control perspective. For instance, management fees often exceed performance fees but management fees do not require depositary verification. Dillon Eustace suggested that it might instead be considered beneficial to require the AIFM to have the performance methodology checked by the auditors at set up stage rather than having a separate verification process.

31. BlackRock advised that in its experience it was satisfied with the rigour which was supplied by the depositary in this process and did not have any other obvious candidate in mind to oversee this process.

32. State Street stated that the current requirement confuses the depositary's role of oversight of net asset values with a duty (that does not exist) to ensure accuracy of net asset values. The requirement is contrary to the objective of establishing a harmonised regulatory framework for AIFs. Additionally it places far too onerous responsibility (with associated costs) on depositaries to review performance fee calculations on an on-going basis. State Street suggested that the fund be required to appoint an appropriate third party (e.g. auditor, manager, third party vendor) to verify the calculation. The depositary could, as in the current Competent Person requirements set out in Guidance Note 1/00, approve that appointment of the third party adding a further check or control.

Central Bank: While the Central Bank does not agree with the distinction State Street has sought to draw, the draft AIF Handbook has been amended to provide that the verification of performance fees can be performed by a suitable independent party appointed by the AIFM.

Question 14: RIAIFs and QIAIFs must comply with requirements in relation to the content of periodic reports, including a requirement to include a detailed portfolio statement which lists each investment. We are considering if a condensed portfolio statement should be permitted, which lists positions/exposures greater than 5% of net asset value. We are only considering this for QIAIFS. Do you agree with this approach? Do you consider that the full list should be available to unitholders and potential investors on demand?

33. The IFIA believed that a full portfolio statement should be made available on demand. If a full statement was made available to unitholders and potential investors on demand there was no reason to require inclusion of portfolio statements, either full or condensed, in periodic reports of either RIAIFs or QIAIFs. As a compromise, RIAIFs could include a condensed portfolio statement in periodic reports. QIAIFs would not include any portfolio statement if a full statement was available on demand.

34. BlackRock agreed with the proposal concerning condensed portfolio statements. However, a detailed portfolio statement should not be available upon request, as the reality is that detailed portfolio statements would then be offered to all investors, negating any benefit of condensed portfolio statements.

35. Dillon Eustace supported a condensed portfolio statement with full portfolio statement (as at audit date) being available upon request. The ISE also supported the condensed portfolio statement. The full portfolio statement should be available for current investors but AIFMs should be able to decide whether to make this available to potential investors.

36. Matheson supported the proposal to permit the inclusion of a condensed portfolio statement in periodic reports for QIAIFs and believed that this should be extended to RIAIFs.

37. State Street agreed with the Central Bank's proposal. However, if a full schedule was available on request to investors there should be no need to include a schedule of investments. The full list should be available on request to investors; the manager/promoter should decide if it should be available to potential investors.

Central Bank: Having considered respondents' views, the Central Bank has amended the draft AIF Handbook to provide that RIAIFs and QIAIFs can include a condensed portfolio statement in their periodic reports which lists positions/exposures greater than 5% of net asset value. RIAIFs and QIAIFs must make the full portfolio statement available to unitholders on demand. This can be made available to potential investors at the RIAIF's or QIAIF's discretion.

Question 15: Requirements applicable to fund administrators specify that the final check and release of each investment fund net asset value (NAV) is a core administration activity which must be performed by the fund administrator. Are there measures or protections which could be put in place to allow the Central Bank permit that fund administrators may publish a net asset value prior to the final check?

38. Many respondents supported allowing fund administrators release a net asset value for dealing purposes prior to the final check being performed by the fund administrator the following day. The IFIA believed that this was consistent with the draft AIF Handbook and with current practice where it was understood that there were numerous cases provided for under exceptional circumstances to allow an outsourcing service provider to release the NAV for dealing prior to final checking by the fund administrator the following day. There should also be greater recognition and flexibility where outsourcing is being carried out by intra-group entities. State Street suggested that section 3.2 in Annex II of Chapter 5 of the AIF Handbook should be amended to read that "outsourcing service provider" can release the net asset value rather than saying that the "fund administrator" must do this. This would be consistent with the wording in footnote 53.

39. BlackRock commented that the ability to issue a net asset value before final sign-off could be beneficial to shareholders while facilitating operational processes. However, it would be important to look at the appropriateness of such provisions in the context of an AIF's investment policy and to require a clear disclosure policy as to when the indicative and official NAV will be published so as not to mislead investors.

40. The ISE considered that the publication of a net asset value should be done only after the necessary checks were completed. It could cause confusion if a number of prices were released for the same security.

Central Bank: The calculation of the NAV is a core activity. We do not believe that any further liberalisation of the rules regarding calculation of the NAV would be appropriate. We recognise that further liaison with industry regarding the current regime would be useful. We will engage in discussions on this matter shortly.

Question 16: Are there any other initiatives, options or changes which we should consider?

41. The following items were suggested:

 a. detailing inward marketing rules for AIFs marketing into Ireland on a private placement basis. The current NU 19 could be used as a template for these requirements (IFIA);

 b. setting out specific rules where a non-EU AIFM applies for authorisation under AIFMD using Ireland as its Member State of reference. It was noted that this step was contingent on ESMA issuing an opinion in 2015 that the passport ought to be extended to non-EU AIFM (IFIA);

 c. setting out timelines for authorisation and streamlining authorisation procedures to the fullest extent possible. In particular, a form of authorisation process should be agreed by April 2013 at the latest to ensure that the AIFMD authorisation can issue in July 2013 (IFIA);

 d. AIF Handbook should specify which sections apply to internally managed AIFs (IFIA);

 e. the provisions of Articles 61(3) and (4) of the AIFMD which permit AIFMs of certain closed ended funds to continue to manage such AIFs without authorisation have not been addressed in CP60 (IFIA);

 f. Central Bank to confirm the position regarding the marketing of QIAIFs to investors who do not meet the professional investor definition in AIFMD (IFIA);

 g. Central Bank to clarify whether it intends to include specific disclosure requirements in relation to varying dealing frequencies between share classes (IFIA);

 h. noted that the Central Bank will look at lending by QIAIFs/issuance of debt securities by AIFs in 2013 (IFIA). Concerning the origination of loans, A&L Goodbody advised that it understood that Luxembourg regulated funds could engage in this activity. In addition, there were a number of asset managers in the market who have significant expertise in this area. A&L Goodbody urged the Central Bank to engage on this point as soon as possible as business was being lost to other jurisdictions;

 i. the Central Bank should not introduce minimum credit rating requirements for over-the-counter counterparties because in volatile markets, counterparties can become ineligible. Also, rating requirements can lead to a small pool of eligible counterparties. Further, as this was not a requirement of the AIFMD, such a step would represent gold plating by the Central Bank which does not reflect the maximum harmonisation objectives of the AIFMD and may place Ireland at a competitive disadvantage with comparable fund jurisdictions (Alternative Investment Management Association ("AIMA"));

 j. the proposed obligations on AIF management companies were unnecessarily onerous. Further it was duplicative to impose additional operating and

organisational requirements on these. It should be sufficient that the AIFM is subject to requirements of this nature (Arthur Cox);

k. the AIF Handbook should have sections dedicated to private equity AIFs, venture capital AIFs, real estate AIFs and infrastructure AIFs. Areas to be addressed were suggested (Dillon Eustace);

l. consideration should be given to how leverage was to be calculated in the AIFMD environment (Dillon Eustace);

m. RIAIFs and QIAIFs which benefitted from a transition period (e.g. open-ended QIF plcs managed from the US that are not marketed in the EU) should not be subject to the new regime if and until the European Commission applies the AIFMD to third countries (Dillon Eustace);

n. the absence of specific requirements for directors of AIFs was a major oversight and should be addressed, in particular the lack of a requirement for any independent directors. The requirement for 2 Irish resident directors practically guarantees an insufficient breath of experience around the board table for many funds. Independence, capacity and experience of directors were not addressed in CP60 (HedgeDirector); and

o. the voting requirements and the requirement that non-voting unitholders be compulsorily redeemed should be revisited and removed from the amalgamation rules for RIAIFs and QIAIFs (IFIA).

Central Bank: The Central Bank has considered these items and advises as follows:

a. The Central Bank is not mandated to set rules concerning private placement of AIFs marketing into Ireland.

b. Closer to the start date for this regime, the Central Bank will consider what rules to apply to non-EU AIFMs which wish to apply for authorisation using Ireland as their Member State of reference.

c. The Central Bank is currently preparing new application forms for RIAIFs, QIAIFs and AIFMs for use under the AIFMD regime.

d. The areas where the AIFMD distinguishes between internally and externally managed AIFMs are in relation to permitted activities and minimum capital. Information in relation to qualifying shareholders is also not relevant in relation to internally manged AIFMs. These distinctions are set out in the AIFM chapter.

e. The application of the derogations set out in Article 61(3) and (4) will be a matter to be addressed in national legislation which implements the AIFMD. The new chapter of the AIF Handbook which deals with grandfathering arrangements provides that AIFs which are authorised by the Central Bank and which meet the criteria set out in Article 61(3) and 61(4) will be required to comply with the terms of their prospectuses.

f. The criteria for unitholders in a QIAIF in the QIAIF chapter have been amended to provide that a unitholder must be a professional investor.

g. The AIFMD requires an AIFM to disclose the procedure and conditions for the issue and sale of units of an AIF. This disclosure should include details in relation to varying dealing frequencies between share classes.

i. These requirements apply in relation to RIAIFs as the Central Bank considers that they are an important protection for retail investors. The AIFMD is not a product directive and the regulation of investment funds is a matter for each Member State. As such, the imposition of these requirements by the Central Bank is not inconsistent with the objectives of the AIFMD.

j. These conditions are imposed on AIF management companies which are not Full AIFMs. These conditions impose important requirements in the context of RIAIFs and QIAIFs that have no Full AIFM. They are also important in the context of AIF management companies that have appointed a Full AIFM. In that situation, while the Full AIFM will be responsible for investment management, responsibility for administration (and possibly distribution) remains with the AIF management company and it is important to ensure that they have the appropriate controls and procedures in place to manage their business.

k. In general terms, the draft AIF Handbook aims to move away from the current practice of having notices which apply to non-UCITS investment funds which pursue a particular investment strategy. Instead, the draft AIF Handbook imposes conditions on all RIAIFs and QIAIFs and their service providers. It should be possible for private equity AIFs, venture capital AIFs, real estate AIFs and infrastructure AIFs to operate within the structure of the draft AIF Handbook.

l. Articles 6 to 11 of the draft Commission Delegated Regulation supplementing the AIFMD set out rules concerning the calculation of leverage by AIFMs.

m. The Central Bank's new regimes for RIAIFs and QIAIFs apply to those AIFs by virtue of their regulation by the Central Bank. The domicile of the AIFM is of no consequence in that regard. Accordingly, all RIAIFs and QIAIFs will be subject to the AIF Handbook from 22 July 2013 onwards.

n. In relation to specific requirements for directors of AIFs, particularly regarding their capacity and experience, the Central Bank refers to sections 22 and 23 of the Central Bank Reform Act 2010 and to S.I. No.s 437 and 615 of 2011. Under this legislation, the role of a director of a regulated financial service provider is designated as a pre-approved control function. RIAIFs and QIAIFs fall within the definition of designated financial service providers. A person may not be appointed to perform a pre-approved control function unless the Central Bank approves this appointment. As part of its approval process, the Central Bank considers the fitness and probity of the proposed appointee. In order for a person to be considered as fit and proper, he/she is required to be competent and capable; honest, ethical and to act with integrity; and financially sound. As these requirements are located separately, the Central Bank has not repeated them in the draft AIF Handbook.

   In relation to independent directors, both RIAIFs and QIAIFs are required to appoint depositaries which carry out both a safekeeping role and an oversight role. The Central Bank places reliance on the key independent role played by depositaries and does not impose a separate requirement that RIAIFs or QIAIFs appoint independent directors.

   Finally, the Central Bank notes that in April 2010 it invited the IFIA to consider developing a voluntary corporate governance code for financial services firms in the investment funds industry in Ireland. The IFIA's corporate governance code for collective investment schemes and management companies was published in December 2011 and the transitional period for its adoption expired in December 2012.

   The Central Bank will be monitoring the implementation and effectiveness of this code. It is not currently considered desirable to replicate or add to these corporate governance requirements in the draft AIF Handbook. Regarding the requirement to have two Irish resident directors, this has proven an important requirement in the past. Accordingly, this has not been amended in the revised draft AIF Handbook. However, we are open to considering other ways to achieve the same regulatory outcome.

o. The Central Bank has reviewed its voting requirements for amalgamations. These are important protections and are being retained. The Central Bank has also reviewed its requirement that non-voting unitholders in an amalgamation situation be compulsorily redeemed. It considers that the removal of this requirement is a useful refinement of the amalgamation rules for both RIAIFs and QIAIFs.

Transitional arrangements: Are there any transitional measures that we should consider to facilitate an orderly transition for existing non-UCITS investment funds to the new regime?

42. Respondents raised the following points:

a. Article 61(1) should be interpreted to mean that existing AIFMs have until 22 July 2014 to comply with the AIFMD and submit applications for authorisation. (IFIA, Arthur Cox, LK Shields, McCann Fitzgerald, State Street)

b. The AIF Handbook should contain a separate section dealing with transitional arrangements. (IFIA, Arthur Cox, Northern Trust (Ireland) Limited, State Street)

c. It may be necessary to retain NU Notices and Guidance Notes for the transitional period of 1 year. (IFIA)

d. The Central Bank should accept applications for authorisation under AIFMD 3 months in advance of 22 July 2013. (IFIA, AIMA, Arthur Cox, LGT, LK Shields)

e. The Central Bank should provide clarity on its statement that existing AIFs will automatically move to being regulated under the AIFMD regime. (IFIA)

f. The Central Bank should confirm that non-UCITS are AIFs and that non-UCITS management companies are considered to be AIFMs. (IFIA)

g. Existing umbrella AIFs whose AIFMs are not yet AIFMD compliant should be able to continue to launch new sub-funds during the 1 year transitional period. (IFIA)

h. What will happen to AIFMs who make an application but are not authorised by 22 July 2014? (IFIA)

i. Can the Central Bank clarify the transitional provisions for which apply to depositaries? (IFIA)

j. The Central Bank should introduce enhancements which are unrelated to AIFMD and which do not rely on protections introduced by AIFMD before 22 July 2013. (IFIA, Arthur Cox, McCann Fitzgerald)

k. The Central Bank should consider position of Irish AIFs with non-EU AIFMs. The existing rules should apply to these AIFMs. (IFIA)

Central Bank: The Central Bank has considered these items and advises as follows:

a. ESMA is planning a Questions and Answers document to provide guidance on the transitional arrangements for those provisions of the AIFMD where the precise effective date is unclear.

   The response to questions a, b, c, e, g and k will depend on the content of ESMA's Questions and Answers document.

d. The Central Bank is working towards having authorisation processes and procedures in place well in advance of 22 July 2013 so that applications for authorisation under the AIFM can be received and processed prior to that date (of course, authorisation under the AIFMD cannot come into effect until 22 July 2013 at the earliest). It is planned that these processes and procedures will be in place by the end of quarter 1 of 2013.

f. Non-UCITS are AIFs. It will be up to each AIF to determine who its AIFM is. This may or may not be its management company.

h. Article 61(1) requires existing AIFMs to submit an application for authorisation before 22 July 2014. It does not require that they are authorised prior to that date. However, the authorisation process will be prompt.

i. There are no transitional provisions for depositaries. From the effective date, depositaries must comply with the provisions of the AIFMD.

j. The measures and enhancements contained in the draft AIF Handbook are considered to be a single package. These will not be introduced in a piecemeal manner.

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