

CP86 Final Consultation – Synopsis & Next Steps

The Central Bank of Ireland (CBI) has published its third and final CP86 consultation on fund management company effectiveness (the **Consultation**) relevant to:

- UCITS management companies;
- Self-managed UCITS investment companies/ICAVs;
- Authorised AIFMs; and
- Internally managed AIF investment companies/ICAVs (each referred to as a **Fund ManCo** and collectively **Fund ManCos**).

We set out below a synopsis of the information included in the Consultation, which closes on 25 August 2016 and an overview of the timelines for implementation of the CP86 related guidance. The Consultation can be accessed [here](#).

The Consultation in Brief

The areas of focus in the Consultation relating to a Fund ManCo are the following:

- **Governance** - how the directors perform their roles and guide the Fund ManCo;
- **Compliance** - how designated persons carry out their managerial functions; and
- **Supervisability** - engagement with the CBI and the CBI's access to records, directors and designated persons.

Governance

Part 1 of the Consultation summarises the guidance published by the CBI in November 2015 on governance in relation to delegate oversight, organisational effectiveness and directors' time commitments. In conjunction with that guidance, the CBI streamlined the managerial functions for Fund ManCos into:

- Investment Management;
- Fund Risk Management;
- Operational Risk Management;
- Regulatory Compliance;
- Distribution; and
- Capital and Financial Management (**Managerial Functions**).

Fund ManCos authorised before 1 November 2015 will have until the end of the transitional period outlined below to comply with these requirements other than the directors' time commitments guidance which is currently applicable to all Fund ManCos. Fund ManCos authorised after 1 November 2015 are currently required to comply with the guidance on organisational effectiveness.

Compliance - Managerial Functions Guidance

A Fund ManCo which delegates activities is required to identify a designated director or other designated person who will have responsibility for monitoring and overseeing the Managerial Function assigned to him/her (**Designated Persons** or **DP(s)**). This part of the Consultation focuses on the role of the DP and the interaction between the DP and the board of a Fund ManCo.

The Consultation includes draft guidance on Managerial Functions which describes in detail who may be a DP, the CBI's expectations

of DPs and how they should carry out their roles, as well as setting out measures to be employed by a Fund ManCo to ensure compliance with its regulatory obligations.

Who may be a DP and can the DP be located outside of Ireland?

The draft guidance provides that a DP can be a director or employee of the Fund ManCo, or can be seconded to the Fund ManCo, on a full or part-time basis, from another firm, such as the asset manager or a firm which specialises in the provision of DPs.

The draft guidance proposes to allow a Fund ManCo to appoint DPs based outside of Ireland. This would be a change to the CBI's existing policy whereby DPs who are not directors must be based in Ireland and would allow asset managers to appoint their own personnel as DPs, subject to certain constraints outlined under "**Supervisability and Operational Issues Guidance**" below.

DP Role and Capacity

While a director can also be a DP, the draft guidance distinguishes between the role of a director being part of the governing body which is not involved in managing the Fund ManCo on a day-to-day basis and that of a DP which is described as the Fund ManCo's line of management between the board of directors and its delegates.

The draft guidance details the role and capacity of a DP and, in brief, provides that DPs should:

- monitor and oversee compliance by a Fund ManCo with its obligations and ensure that the strategies, policies and directions issued by the board are acted upon and complied with;
- report to the board on a regular basis and escalate issues where pre-defined parameters agreed with the board are exceeded or where the DP judges that immediate escalation is warranted;
- monitor and oversee Fund ManCo employees or delegates who carry out the tasks which fall within the scope of their responsibility and review their work on an ongoing basis in a manner agreed with the Fund ManCo;
- have experience and expertise in the Managerial Function and enough knowledge of the area to constructively challenge both information received and the people providing it;
- be sufficiently senior in their role vis-a-vis delegates and engagement with the CBI; and
- have enough time available to them to carry out their roles thoroughly and to a high standard.

The draft guidance also covers:

- the manner in which DPs should ensure oversight of regulatory obligations;
- the frequency of monitoring and oversight based on the activities of the Fund ManCo and its funds under management;
- the frequency and format of DP interaction with delegates, including reporting, meetings/calls, on-site visits, the appropriate level of challenge and engagement and records of engagement; and
- the role of the DP in designing, implementing and reviewing required policies/procedures, structures and limits and the board's involvement.

Fund ManCo Measures

Draft guidance is included for a Fund ManCo in relation to the following areas:

- **Delegates:** written agreements with delegates should specify what is being delegated and, where applicable, the regulatory requirements to be complied with;
- **Policies:** where reliance is placed on the substance of a Fund ManCo's delegate's/group's policies/procedures, the Fund ManCo's own policies/procedures should document this and how the Fund ManCo has satisfied itself that it can comply with the applicable requirements by such reliance, how it will test that the policies/procedures are being complied with, the frequency of review and the role of the DP; and
- **Allocation of regulatory obligations to managerial functions:** in order to ensure that there is a DP with responsibility for overseeing regulatory obligations, a section has been included identifying the obligations of a Fund ManCo under the UCITS and AIFMD regimes and providing a suggested allocation of these to individual Managerial Functions.

Supervisibility and Operational Issues Guidance

Location of Directors and DPs

The Consultation includes a proposal to introduce requirements regarding the location of directors and DPs based on the CBI's Probability Risk and Impact System (**PRISM**) rating of a Fund ManCo.

The Consultation proposes that a Fund ManCo which has a PRISM impact rating of **Low** would be required to have:

- at least two Irish resident directors; and
- at least two thirds of its directors in the EEA; and
- at least two thirds of DPs in the EEA;

and that a Fund ManCo which has a PRISM impact rating of **Medium Low or above** would be required to have:

- at least three Irish resident directors or at least two Irish directors and one DP based in Ireland; and
- at least two thirds of its directors in the EEA; and
- at least two thirds of DPs in the EEA.

All Fund ManCos which are self-managed UCITS or internally managed AIFs have a PRISM rating of Low.

While the proposals relating to the location of directors may impact upon clients' ability to control the boards of their Irish subsidiaries that are AIFMs or UCITS management companies, which does not seem appropriate to us, the flexibility to have DPs based outside of Ireland is to be welcomed. We will be proposing that the requirements be amended to allow for arrangements to be agreed with non-EEA promoters that do not have a presence in the EEA but are located in jurisdictions which are considered to have a regulatory regime equivalent to that in Ireland. We will also propose that the guidance should expressly permit a Fund ManCo to take into account the nature, scale and complexity of its business when implementing the final version of the guidance. We intend to address these matters in our response to the Consultation.

Record Retention, Archiving and Retrievability

The draft guidance outlines the CBI's minimum expectations with respect to the retention, maintenance, security and accessibility of the documentation and records pertaining to a Fund ManCo and its funds under management (**Relevant Documents**). In brief,

the draft guidance provides that a Fund ManCo should have immediate and unfettered access from Ireland to all Relevant Documents, which should be available on request by the CBI without undue delay. Relevant Documents would include agreements, reports, documents filed with the CBI, board minutes, policies and procedures, financial statements, minutes of meetings etc. The draft guidance also provides that a Fund ManCo must have a record management policy and procedures appropriate to its nature, scale and complexity as well as a clearly defined records retention schedule. Relevant Documents can be maintained in hard or electronic format.

Fund ManCo Email Address

The draft guidance requires a Fund ManCo to maintain a designated and monitored email address for correspondence with, and responding to information requests issued by, the CBI. Guidance is included in relation to the operation and monitoring of the email address, which must be capable of being checked daily. A single address can be maintained for all funds under management or for each fund under management. The CBI may periodically test the effectiveness and efficacy of the designated email address.

Timing and Transitional Period

The CBI envisages providing a one year transitional period for Fund ManCos to become compliant with the final guidance and requirements to be issued following completion of the Consultation. Accordingly, it may be Q4 2017 before Fund ManCos will need to be in compliance with such final guidance and requirements.

Compliance will at a minimum entail review and overhaul of existing business plans/programmes of activity and directors' letters of appointment, putting in place letters of appointment for DPs, review of the allocation of Managerial Functions, identification of a director responsible for organisational effectiveness and review of certain of the Fund ManCo's existing material contracts.

Responses to the Consultation must be submitted to the CBI by **25 August 2016**. Please let your usual contact at A&L Goodbody know if you have any feedback which you would like us to include in our response to the Consultation. We will also be contributing to industry responses to the Consultation.

We would also encourage clients and other interested parties to make their own responses to the Consultation, as it will be important for the CBI to hear directly from asset managers on these proposals.

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