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BY EMAIL:

MIFID 2 – Public Consultation,
Financial Services Division,
The Department of Finance,
Government Buildings,
Upper Merrion Street,
Dublin 2.

21st September 2016

Dear Madam/Sir,

Re: Public Consultation on national discretions in the Markets in Financial Instruments Directive ("MIFID 2") incorporating elements of the Insurance Distribution Directive ("IDD")

The Irish Funds Industry Association ("Irish Funds") is the representative body of the international investment funds community in Ireland, representing fund managers, depositaries, administrators, transfer agents, professional advisory firms and other specialist firms involved in the international fund services industry in Ireland.

Ireland is a leading centre for the domiciliation, administration and provision of depositary services to collective investment schemes. Industry companies provide services to collective investment schemes with assets totalling in excess of €3.8 trillion. The funds industry is highly regulated and the ability to provide a well-regulated environment for investment funds and investment fund services is a substantial and proven part of Ireland's international financial services offering. Our industry has been a consistent and growing part of the internationally traded financial services landscape in Ireland for over twenty-five years.

We welcome the Department's invitation to comment on the Public Consultation on national discretions in the Markets in Financial Instruments Directive ("MIFID 2") incorporating elements of the Insurance Distribution Directive ("IDD") paper. In responding to the specific questions contained in the consultation our responses are in relation to questions 1 (a) & (b), 3 and 5 which we have set out below. We have also attached an appendix which identifies some of the gaps between MIFID II and the IIA.

We hope you find these comments helpful, and we remain at your disposal to discuss the issues raised in this response further.

Yours faithfully,

Pat Lardner
Chief Executive

Question 1:

A: The Minister is minded to exercise the discretions provided for in Article 3 (1) (a) – (c). Do you agree with this approach? If not, please outline your reasons.

Irish Funds agrees with the Minister that the discretion provided for in Article 3 (1) (a) – (c) should be exercised.

B: If persons described under Article 3 (1) (a) – (c) are exempted from MiFID, what provisions of MiFID, in your opinion, have no corresponding domestic rules/requirements which are at least analogous, in accordance with the list set out in Article 3 (2). Please specify the amended domestic rules that would be required.

As noted in the MiFID II Public Consultation Paper (the "**Consultation**") the persons currently exempt under Article 3 (1) (a) - (c) of the European Communities (Markets in Financial Instruments) Regulations 2007) (as amended) (the "**Regulations**"), will primarily be retail investment intermediaries authorised under the Investment Intermediaries Act 1995 (as amended) (the "**IIA**").

It should be noted that certain entities authorised by the Central Bank of Ireland, under the IIA, to provide fund administration services to collective investment schemes ("**Fund Administrators**") also avail of the exemption available under Article 3 (a) - (c) of MiFID 1 on the basis that they are authorised to carry on the investment business service of "*receiving and transmitting, on behalf of investors, of orders in relation to one or more investment instrument*" as set out in paragraph (a) of Section 2 (1) of the IIA.

By way of background, prior to the transposition of the Regulations into Irish Law effective 1 November 2007, Fund Administrators were invariably authorised to provide the investment business service of *"the administration of collective investment schemes, including the performance of valuation services or fund accounting services or acting as transfer agents or registration agents from such funds"* as set out in paragraph (g) of the definition of *"investment business service"* in Section 2(1) of the IIA. This investment business service was not one set out under the Investment Services Directive (92/33/EEC) (the "**ISD**") and as such could not be passported to other Member States under the ISD.

Accordingly, in order to avail of an ISD passport, certain Fund Administrators also sought an additional IIA authorisation to carry on the investment business services set out under paragraph (a) of Section 2(1) of the IIA. On that basis this category of Fund Administrators were eligible to be exempted from the requirement to seek authorisation under Regulation 5 (3) of the Regulations and will, we understand, be eligible to avail of a similar exemption under the legislation which will transpose Article 3(1) (a) - (c) of MiFID II into Irish law.

Given the *"at least analogous"* requirement in Article 3 (2) of MiFID II, Fund Administrators currently availing of the exemption under Regulation 5 (3) of the Regulations will be subjected to more onerous requirements than those Fund Administrators authorised pursuant to paragraph (g) of the IIA only.

Should the Minister decide to exercise the discretion provided for under Article 3 (1) (a) – (c) we would ask that the Minister liaise closely with the Central Bank to ensure that Fund Administrators, regardless of the types of authorisation held, will continue to be subjected to a level playing field from a regulatory perspective.

As noted in the Consultation, Fund Administrators and other firms authorised pursuant to the IIA are already subject to a robust regulatory regime which includes the provisions of the IIA together with Central Bank rules and codes (the "**IIA Regime**").

Other firms of relevance in this regard include entities authorised by the Central Bank under paragraph (h) of Section 2(1) of the IIA to provide "custodial operations involving the safekeeping and administration of investment instruments" ("Fund Depositaries").

In cases where there are no requirements under the IIA Regime at least analogous to those listed in Article 3 (2) (a) –(c) of MiFID II, we believe that caution should be exercised in introducing any amendments to the IIA Regime. We have attached in Appendix I to this submission a summary overview of the gaps between MiFID II and the IIA. This overview does not purport to identify the full spectrum of potential analogous requirements but does provide for a possible interpretation of the term "at least analogous" in arriving at a conclusion that the IIA regime approximates the MiFID II requirements sufficiently so as not to merit any additional amendment to the domestic IIA rules.

We see merit in the approach proposed by the Financial Conduct Authority in the UK, which would proposes that UK Article 3 firms will only be subject to some MiFID II requirements as guidance rather than as rules, thus ensuring that such firms are able to determine whether or not to comply with the requirements. This approach recognises that firms may be justified in not meeting particular requirements based on the nature, scale and complexity of their activities.

Question 3:

A: In light of:

- **the new MiFID and IDD rules,**
- **their divergence in key respects (as outlined above),**
- **the national discretions provided therein (as outlined above), and**
- **the need for appropriate levels of protection for consumers of investment products, whoever they may deal with, do you consider that there should be level playing field rules in relation to the distribution of, and advice on, functionally equivalent retail investment products?**

B: If not, can you please explain why level playing field rules should not be followed?

As a general principle, it is desirable to offer a similar level of protection to all investors regardless of where and/or how they purchase investment products, be it from an investment firm or an insurance intermediary. A level playing field in this regard will also contribute to a more coordinated regulatory environment.

A key aim of MiFID II is the increased level of investor protection proposed, amongst other measures, via the prohibition of independent advisers receiving commissions etc., as discussed in the Consultation. If similar investors are not offered a level playing field for functionally equivalent investment products then there is a risk that the spirit of the regulations will not have been applied.

Irish Funds believes that further investigation should be undertaken in order to ascertain what differences exist between insurance and investment products as well as the manner in which they are respectively sold. This will identify any pertinent implications of applying a consistent legislative approach in respect of applying the relevant MiFID rules to entities that are currently outside the scope of MiFID.

C. Which option, if any, do you think best addresses the interests of retail investors and why?
If your preference is for option 2 can you please specify whether you agree with the suggested criteria ((a) to (h) as outlined above

In terms of the options presented in the Consultation, we believe that if Option 1 is to be applied then it is advisable that a thorough investigation, as described in criteria (a)-(h) of Option 2, as well as an industry consultation are undertaken first. This will ensure that there are no inadvertent effects on MiFID firms through the imposition of rules under MiFID II and IDD, i.e. similar to the MiFID/CPC overlap previously seen with regard to investor classification. It is key to avoid unnecessary duplication of obligations for firms as well as any contradictory or overlapping requirements.

Question 5:

A: The Minister is considering the policy options in relation to this national discretion. Please provide any views you may have on this issue, including supporting rationale for or against imposing a branch requirement.

We would advise that this option not be exercised within the Irish implementation and would not seek to impose such a requirement on MiFID firms exercising their rights to passport into Ireland. Such a requirement would not in our view increase investor protection and would only serve to increase costs and administrative burden. It would also create a competitive disadvantage for Ireland, as we understand that other jurisdictions will not made this election, e.g., the UK has indicated that it will not exercise this discretion either for retail or elective professional clients. While this requirement may only have limited application in the context of investment funds, as the client is generally the fund and therefore a retail client may not be involved, our preference would generally be not to impose additional requirements not being imposed in other jurisdictions that will be administratively and financially burdensome and that will not achieve the end goal of increased investor protection.

B. Do you agree with that branches of third country firms should be brought within the scope of the MiFID 2 regulations? If not, please provide reasons why you do not favour this approach

IF agrees with the proposed clarification of the existing MiFID I position to one where MiFID II regulations will apply to branches of third country firms (based on the principle of equal treatment with EU firms, so a third country credit institution wishing to provide investment services in/from Ireland via a branch would be subject to the MiFID II provisions described in article 1(3) and 1(4)).