



## **The Consultative Committee of Accountancy Bodies-Ireland**

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### **INVESTMENT FUNDS, COMPANIES AND MISCELLANEOUS PROVISIONS ACT 2005**

*This Memorandum has been prepared by the Consultative Committee of Accountancy Bodies – Ireland (“CCAB-I”) to highlight for the members of its constituent bodies those provisions of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (“the 2005 Act”) which substantially change detailed provisions of previous companies legislation or which introduce significant new statutory requirements for companies.*

*This Memorandum, which summarises significant provisions of the Act, does not deal in detail with individual Sections and cannot be regarded as a comprehensive guide to the Act’s detailed requirements. It should be read in conjunction with, and not as a substitute for, the Act.*

*Many provisions of this Act, which was passed by the Oireachtas in June 2005, have already been brought into force by Commencement Orders. The relevant details are set out in the Appendix.*

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## INTRODUCTION

1. The Explanatory Memorandum, issued with the initial draft of this legislation by the Department of Enterprise, Trade and Employment in July 2000, highlights that its main provisions include:
  - Providing for non-UCITS Common Contractual Funds (“CCF”)
  - Amending Part XIII, Companies Act, 1990, to permit cross investment and segregated liability for investment funds
  - Statutory changes to facilitate implementation in the Republic of Ireland of:
    1. The EU “Market Abuse Directive” (2003/6) and supplemental EU Directives
    2. The EU “Prospectus Directive” (2003/71) and related EU Regulations
  - Amendments to certain detailed requirements of the Companies Acts in the context of anticipated changed procedures at the Companies Registration Office – CRO.
2. Parts 3 to 6 of this Act are to be construed as one with the existing Companies Acts. The Acts are now cited as the Companies Acts, 1963 to 2005.

## COMMON CONTRACTUAL FUNDS, 1990 (*Part 2*)

3. Part 2 of the 2005 Act is the statutory framework for the non-UCITS Common Contractual Fund (“CCF”). The provisions of Part 2 will govern the operation of such non-UCITS CCFs.
4. Existing UCITS CCFs are governed by the European Communities (Undertakings for Collective Investment in Transferrable Securities) Regulations 2003 – S.I. 211 of 2003 (“the UCITS Regulations”).
5. Authorisation of a CCF under Part 2 is by the Central Bank and Financial Services Authority of Ireland (“the Bank”) which, amongst other criteria, requires to be satisfied as to the competence and probity of the management company, that the company has its registered office and head office in the Republic of Ireland, and that the deed of constitution contains a covenant on compliance with the 2005 Act (*Section 8*).
6. The Bank may impose such conditions for initial and continuing authorisation, whether generally, to a class of CCF, or on an individual CCF, “as it considers appropriate and prudent for the orderly and proper regulation of the business of common contractual funds.” (*Section 10*).

7. The conditions imposed by the Bank may provide for
  - (a) the prudential requirements of the investment policies of the common contractual fund,
  - (b) the borrowing policies of the common contractual fund,
  - (c) prospectuses and other information disseminated in relation to the common contractual fund,
  - (d) the safe-keeping of the assets of the common contractual fund,
  - (e) such other supervisory and reporting requirements and conditions relating to its business as the Bank considers appropriate and prudent.
8. Changes to the deed of constitution of a CCF, or replacement of its management company or its custodian, require the prior approval of the Bank (*Sections 12, 13*).
9. The custodian to which the assets of the CCF are entrusted for safekeeping must "...exercise due care and diligence in the discharges of its duties..." (*Section 17*). The custodian is liable, to the unit holders and the management company, for loss arising from failure to perform those duties.
10. Regulations 63, 77 to 85 and 98 to 105 of the UCITS Regulations shall apply to a CCF (*Section 18*).

#### **AMENDMENTS TO PART XIII, COMPANIES ACT, 1990 (*Part 3*)**

11. A sub-fund is defined as a separate portfolio of assets maintained by an investment company. An investment company with one or more sub-funds is an umbrella fund (*Section 22*).
12. The general requirement in Section 252, Companies Act, 1990 ("the 1990 Act"), - that an investment company can only purchase its own shares if they are fully paid up – will not prohibit acquisition by an umbrella fund of shares in a sub-fund for the account of another sub-fund (*Sections 23,24*)
13. Liabilities incurred by a sub-fund of an umbrella fund, which was authorised and commenced trading after 30<sup>th</sup> June 2005, shall be discharged solely out of the assets of that sub-fund (*Section 256A of the 1990 Act, inserted by Section 25*).
14. The assets of a sub-fund may be applied to discharge some or all of the liabilities of another sub-fund "on the grounds of fraud or misrepresentation" – particularly in circumstances governed by Section 286, Companies Act, 1963 ("the 1963 Act"), (fraudulent preference) and Section 139 of the 1990 Act (improper transfer of assets). (*Section 256E(7) of the 1990 Act, inserted by Section 25*)
15. *Section 28* entitles an investment company to prepare its annual accountants in accordance with Section 149A of the 1963 Act (inserted by the "IFRS Regulations" – S.I. 116 of 2005) and "an alternative body of accounting standards". An alternative body of accounting standards are defined as those promulgated by accounting standard setters in Canada, Japan, United States of America, or other country, that may be prescribed subsequently by the Minister for Enterprise, Trade and Employment in consultation with the Irish Auditing and Accounting Supervisory Authority.

## **MARKET ABUSE (*Part 4*)**

16. This Part contains enabling provisions to facilitate implementation in the Republic of Ireland of the EU Directive on Insider Dealing and Market Manipulation (2003/6) (“the Market Abuse Directive”) and the three supplemental Directives relating thereto (2003/124, 2003/125 and 2004/72)
17. *Section 31* repeals Part V, Insider Dealing, Companies Act, 1990, and the Companies (Amendment) Act 1999.
18. Criminal penalties and civil liability for breaches of Irish market abuse law are dealt with in *Section 32* and *33* respectively. A person who breaches the law is liable to pay compensation to any other party involved in the transaction who was not in possession of the relevant information for any loss suffered.

## **PUBLIC OFFERS OF SECURITIES (*Part 5*)**

19. Part 5 amends or repeals various detailed provisions of the Companies Act, 1963, governing prospectuses to facilitate implementation in the Republic of Ireland of the EU Directive on Prospectuses to be Published when Securities are Listed or Offered to the Public (2003/71) (“the Prospectus Directive”) and the related complementing Regulation (2004/809).
20. Specified persons, including the issuer of the prospectus, offeror of the securities, directors of the issuer, etc., will be liable to pay compensation to persons who suffer loss or damage because of untrue statements in, or omissions from, the prospectus (*Section 41*).
21. *Section 42* grants exemption from the general civil liability arising under *Section 41* in specific circumstances – for example, the summary of a prospectus taken in isolation, where the expert had withdrawn consent to the inclusion of their statement in the prospectus, where the person had reasonable grounds to believe and did believe the statement was true/the omission was proper, etc.
22. Subject to specific conditions, liability is further restricted by *Section 43* to the offeror, or the person seeking admission of the securities, if the prospectus solely relates to non-equity securities.
23. An expert’s statement may be included in a prospectus only if the expert has given, and not withdrawn, consent in writing to its inclusion (*Section 45*).
24. *Section 49* specifies the disclosures required in the prospectus, especially the fact that it is not prepared in accordance with the Prospectus Directive, where it relates to a “local offer” – one restricted to the public in the Republic of Ireland, total consideration is less than €2,500,000 and the securities are not in any of the categories specified in Article 1(2)(a) to (g) and (i) to (j) of the Prospectus Directive.

25. A prospectus is not an investment advertisement as defined in Section 23, Investment Intermediaries Act, 1995 (*Section 50*).
26. Any condition obliging an applicant for securities to waive compliance with any requirement of Part 5, or of EU prospectus law, is void (*Section 52*).

#### **MISCELLANEOUS COMPANY LAW AMENDMENTS (*Part 6*)**

27. Section 60 of the 1963 Act has been substantially amended (*Section 56*), including restricting the financial assistance a public limited company can give employees, or an entity holding shares on behalf of employer or former employee, or the provision of loans where lending is in the ordinary course of its business, to circumstances where:
  - (i) the company's net assets are not reduced; or
  - (ii) if the company's net assets are reduced, the financial assistance is provided out of profits available for dividend.

28. Other amendments to Section 60 will permit a company to pay,

- fees and expenses of advisers of a subscriber for its shares
- expenses incurred in the preparation and publication of a prospectus
- expense incurred to facilitate admission of its shares to a regulated market
- expense incurred in compliance with the Irish Takeover Panel Act 1997
- reimbursement, by the offeree company or its subsidiary, of the expenses of an offeror
- commission to allotment intermediaries, limited to 10% of the allotment proceeds.

A number of the changes made to Section 60 permit a company to pay costs incurred in relation either to its own shares or those of its holding company. A company may make or give representations, warranties or indemnities in relation to the purchase or subscription for its shares or those of its holding company.

29. As recommended in the First Report of the Company Law Review Group - CLRG - (Recommendation 7.5.1), *Section 57* allows a company to appoint an electronic filing agent. The agent, once formal notification of its authorisation has been made to the Companies Registration Office – CRO – by the company, can file documents (on the company's behalf) in electronic form. *Section 58* provides for withdrawal of the agent's authorisation.
30. *Section 59* implements Recommendation 7.3.3 of the First Report of the CLRG to permit the reservation of a company name, prior to incorporation of a company, for a period, generally, of up to 28 days.
31. *Section 62* amends Section 195 of the 1963 Act to provide that a single notification by a director of a change in name or address can be used by the CRO to change the details in respect of all companies of which he/she is a director.

32. The power of the Director of Corporate Enforcement to require production of documents is extended by *Section 67* to include circumstances where it appears that the affairs of a company are being/have been conducted in a manner which is unfairly prejudicial to some or all of its creditors.
33. *Section 70*, amending Section 166 of the 1990 Act, gives the Court discretion as to whether or not directors should file certain notices in civil and criminal proceedings.
34. *Section 91* implements Recommendation 7.6.2 of the First Report of the CLRG by expanding Section 242 of the 1990 Act to make it an offence to complete or sign a document containing false information which is sent to the CRO.
35. *Section 72* replaces references to “Iris Oifigiúil” with “Companies Registration Office Gazette” in stated detailed provisions of the Companies Acts.
36. *Section 73* repeals a number of erroneous detailed provisions in Schedule 2 to the Companies (Auditing and Accounting) Act 2003 and inserts corrected amended text to the 1963 and 1990 Acts. As with Schedule 2 to the 2003 Act, existing penalty provisions are changed from “liable to a fine” to “guilty of an offence and liable to a fine”.
37. *Section 73 (2)(d)* removes the offence of failing to file an annual return, or failing to file by the annual return date, from the list of indictable offences regarding which auditors have a statutory reporting obligation under Section 194(5) of the 1990 Act.

#### **MISCELLANEOUS AMENDMENTS (*Part 7*)**

38. *Sections 75 to 76* and *78 to 87* make miscellaneous amendments, some confined to increasing the maximum levels of fines on conviction for particular offences, others consequential to earlier Sections of this Act, to:
  - Central Bank Act 1942
  - Competition Act 2002
  - Consumer Credit Act 1995
  - Consumer Information Act 1978
  - Industrial and Provident Societies Act 1893
  - Irish Takeover Panel Act 1997
  - National Standards Authority of Ireland Act 1996
  - Package Holidays and Travel Trade Act 1995
  - Prices Act 1958
  - Restrictive Practice Act 1972
  - Sale of Goods and Supply of Services Act 1980
39. *Section 77/Schedule* amends the UCITS Regulations to provide for cross investments and segregated liability for sub-funds of UCITS investment companies in a manner consistent with the provisions of Part 3 of this Act.

APPENDIX

<b>Provision</b>	<b>Commencement Order</b>	<b>Effective Date</b>
<b>PART 1</b> Sections 1 to 5	S.I. 323 of 2005	30 <sup>th</sup> June 2005
<b>PART 2</b> Sections 6 to 21	S.I. 323 of 2005	30 <sup>th</sup> June 2005
<b>PART 3</b> Sections 22 to 28	S.I. 323 of 2005	30 <sup>th</sup> June 2005
<b>PART 4</b> Sections 29, 30 Section 31 (in part) 31 (in part) Sections 32 to 37	S.I. 323 of 2005 S.I. 323 of 2005 S.I.....of 2005 S.I. 323 of 2005	30 <sup>th</sup> June 2005 6 <sup>th</sup> July 2005 ..... 6 <sup>th</sup> July 2005
<b>PART 5</b> Section 38 Sections 39 to 45 Section 46 Sections 47 to 55	S.I. 323 of 2005 S.I. 323 of 2005 S.I. 323 of 2005 S.I. 323 of 2005	30 <sup>th</sup> June 2005 1 <sup>st</sup> July 2005 30 <sup>th</sup> June 2005 1 <sup>st</sup> July 2005
<b>PART 6</b> Section 56 Section 57 Section 58 Section 59 Section 60 Section 61 Section 62 Section 63 to 68 Section 69 Section 70 Section 71 Section 72 Section 73(1) 73 (2) (a)-(c) 73(2)(d) 73(3) 73(4) Section 74	S.I. 323 of 2005 S.I. 695 of 2005 S.I. 695 of 2005 S.I.....of 2005 S.I.....of 2005 S.I. 695 of 2005 S.I.....of 2005 S.I. 323 of 2005 S.I.....of 2005 S.I. 323 of 2005 S.I. 695 of 2005 S.I. ....of 2005 S.I. 323 of 2005 S.I. 323 of 2005 S.I. 323 of 2005 S.I. 323 of 2005 S.I. 323 of 2005 S.I. 323 of 2005 S.I. 323 of 2005	30 <sup>th</sup> June 2005 1 <sup>st</sup> December 2005 1 <sup>st</sup> December 2005 ..... ..... 1 <sup>st</sup> December 2005 ..... 30 <sup>th</sup> June 2005 ..... 30 <sup>th</sup> June 2005 1 <sup>st</sup> December 2005 ..... 30 <sup>th</sup> June 2005 30 <sup>th</sup> June 2005 1 <sup>st</sup> September 2005 1 <sup>st</sup> September 2005 30 <sup>th</sup> June 2005 1st July 2005
<b>PART 7</b> Sections 75 to 84 Section 85 Section 86 Section 87	S.I. 323 of 2005 S.I.....of 2005 S.I.....of 2005 S.I. 323 of 2005	30 <sup>th</sup> June 2005 ..... ..... 30 <sup>th</sup> June 2005