



STATUTORY INSTRUMENTS.

S.I. No. 407 of 2015



INVESTOR COMPENSATION ACT 1998 (RETURN OF INVESTOR
FUNDS OR OTHER CLIENT PROPERTY) REGULATIONS 2015

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I, MICHAEL NOONAN, Minister for Finance, in exercise of the powers conferred on me by section 33B of the Investor Compensation Act 1998 (No. 37 of 1998) (as amended by section 80 of the Central Bank (Supervision and Enforcement) Act 2013 (No. 26 of 2013)), and following consultation with the Central Bank of Ireland and the Investor Compensation Company Limited, hereby make the following regulations:

Part 1

Preliminary and General

Citation

1. These Regulations may be cited as the Investor Compensation Act 1998 (Return of Investor Funds or Other Client Property) Regulations 2015.

Commencement

2. These Regulations shall come into operation on the date of their making.

Interpretation

3. In these Regulations—

“Act of 1995” means the Investment Intermediaries Act 1995 (No.11 of 1995);

“common fund” shall be read in accordance with Regulation 9(3);

“general assets” shall be read in accordance with Regulation 10;

“Insolvency Officer” shall be read in accordance with Regulation 4(2).

Part 2

Scope of Regulations and Preliminary Steps to be taken by Insolvency Officer

Application

4. (1) These Regulations shall apply to any case in which a person, being the liquidator, receiver, the Official Assignee or a trustee in bankruptcy of the firm, is appointed as administrator to an investment firm.

(2) The liquidator, receiver, the Official Assignee or a trustee in bankruptcy of the firm is referred to subsequently in these Regulations as the “Insolvency Officer”.

Notice of the making of this Statutory Instrument was published in “Iris Oifigiúil” of 29th September, 2015.

(3) In taking the steps required or permitted by these Regulations to be taken by him or her, the Insolvency Officer shall co-operate fully and in a timely fashion with the Bank.

Ascertainment of client monies, client instruments, etc. and claims of clients in relation to them

5. (1) As soon as practicable after being appointed, an Insolvency Officer shall take all steps that are open to the Insolvency Officer to identify, record, and to the extent necessary reconcile, the transactions of the investment firm with a view to identifying—

- (a) the client monies, client investment instruments, or documents of title in respect of such investment instruments which are held or which ought to be held on behalf of clients by the investment firm or by a nominee;
- (b) the claims of the clients of the investment firm against those client monies, client investment instruments or documents of title in respect of such investment instruments (whether or not such client monies, client investment instruments or documents of title continue to exist).

(2) The steps to be taken by the Insolvency Officer under paragraph (1) shall include the Insolvency Officer consulting with approved operators of a relevant system under the Companies Act 1990 (Uncertificated Securities) Regulations 1996 (S.I. No. 68 of 1996) and with approved operators of a designated system under the European Communities (Settlement Finality) Regulations 2010 (S.I. No. 624 of 2010).

Part 3

Provisions relating to distribution of client monies, client investment instruments, etc

Distribution of client monies, client investment instruments or documents of title in respect of them

6. Subject to Regulations 157 and 158 of the European Communities (Markets in Financial Instruments) Regulations 2007 (S.I.No.60 of 2007), and to section 52(7) of the Act of 1995, the Insolvency Officer shall distribute client monies, client investment instruments or documents of title in respect of such investment instruments, as expeditiously as possible, in accordance with the provisions of this Part.

Cases where specific client can be identified as owner of investment instruments, etc

7. (1) Where—

- (a) the investment firm or its nominee has held, administered or managed investment instruments or documents of title in respect of such investment instruments (whether in writing or in electronic form), and

(b) it is possible to identify a specific client as the owner thereof,

the Insolvency Officer shall, subject to the subsequent provisions of this Part, take all such steps as may be necessary to transfer the investment instruments or the documents of title to the client or, where the Insolvency Officer so requires, to a broker who is nominated by the client.

(2) Where the Insolvency Officer requests the client to nominate a broker to facilitate the return to that client of investment instruments or documents of title in respect of them, and the client does not nominate a broker within such time as may be fixed by the Insolvency Officer, the Insolvency Officer shall be at liberty to sell those investment instruments and to pay the proceeds (net of any costs of sale or other expenses incurred) to the client.

(3) Neither the Insolvency Officer nor the investment firm shall be liable for any loss incurred as a consequence of the sale or return referred to in paragraph (2).

(4) Where—

(a) the value of investment instruments to be returned to a client (or the documents of title in respect of them) does not exceed €1,500, or

(b) where the costs of retaining investment instruments would exceed the value of the investment instruments,

the Insolvency Officer may, at his or her discretion, elect to sell those instruments and return the proceeds of sale to the client (net of any costs of sale).

(5) Neither the Insolvency Officer nor the investment firm shall be liable to the client for any loss incurred as a consequence of the sale or return referred to in paragraph (4).

Cases where instruments not identified under Regulation 7: classification of them and ranking of claims

8. (1) With the exception of the investment instruments, or documents of title in respect of them, identified in accordance with Regulation 7, all client investment instruments or documents of title in respect of them held by an investment firm or its nominee shall be classified, in so far as practicable, by the Insolvency Officer by reference to an identified class of investment instruments issued by an identified issuer of those investment instruments.

(2) All claims against each such class of investment instruments shall then rank equally among themselves against such instruments.

(3) To the extent that the claims of clients against any class of investment instruments to which paragraph (1) applies are not satisfied, or to the extent that there are insufficient investment instruments in any one class to satisfy the claims of clients against that particular class of instruments, the client claims to the investment instruments within that class shall abate rateably.

(4) In such circumstances, any shortfall suffered by the clients shall be dealt with as if it were a claim against the client monies (other than any common fund referred to in Regulation 9(3)) held by or on behalf of the investment firm or by a nominee.

(5) The value of a claim in respect of such a shortfall shall, as far as possible, be calculated according to the market value of the investment instruments concerned on the day that the determination concerned made under section 31 of the Investor Compensation Act 1998 takes effect in accordance with subsection (3) of that section or, as appropriate, on which the ruling concerned was made.

Claims in respect of client monies — general rule and exceptions to it

9. (1) Save in cases where a client's monies have not been mixed with any other client monies of an investment firm, all claims of clients in respect of client monies shall, subject to paragraph (3), rank equally among themselves against the client monies held by or on behalf of the investment firm or by a nominee, and in the event that such client monies are insufficient to meet such claims, the claims shall abate rateably.

(2) For the avoidance of doubt, claims against client monies for the purposes of these Regulations include—

- (a) each instance of a client having given money to the investment firm and the purpose for which the money was so given having failed;
- (b) any claims against client monies arising under Regulation 8(3); and
- (c) any other proprietary claim in respect of investment instruments where there are insufficient instruments available to satisfy that claim.

(3) Notwithstanding, paragraph (1), where an Insolvency Officer is satisfied that a particular account or fund of an investment firm represents the proceeds of monies provided by an identifiable body of clients of the investment firm for an identifiable class of investment instruments (referred to subsequently in this Part as a “common fund”), the common fund shall be dealt with in the same manner as if it were a class of investment instruments of the kind to which Regulation 8(1) applies.

(4) Accordingly, the claims of all persons who contributed to the common fund shall rank equally among themselves against the common fund.

(5) To the extent that—

- (a) the claims of clients against the common fund are not satisfied, or
- (b) there are insufficient monies available in the common fund to satisfy the claims of clients against that common fund,

the claims of clients against the common fund shall abate rateably and any shortfall suffered by the clients may then be claimed against the client monies (other than other common funds) held by or on behalf of the investment firm.

(6) Nothing in this Part shall prevent a client of an investment firm from seeking the return of monies held by or on behalf of the investment firm or by a nominee where such monies have not been mixed with any other client monies of the investment firm.

Cases in which claims remain unsatisfied after operation of preceding provisions

10. Any claim of clients of an investment firm which remains wholly or partly unsatisfied after the operation of the foregoing provisions of this Part shall rank as an unsecured claim against the non-client assets of the investment firm (referred to subsequently in these Regulations as the “general assets”).

Payment of dividends or other income derived from client monies or investment instruments

11. Any dividends or other income derived from client monies or client investment instruments held by or to the order of an investment firm shall be paid by the Insolvency Officer to such of the clients of the investment firm as are entitled pursuant to this section to those monies or investment instruments.

Insufficiency of general assets to meet Insolvency Officer’s reasonable expenses

12. (1) Where the general assets of the investment firm are insufficient or are shown by an Insolvency Officer to be likely to be insufficient to meet the reasonable expenses of the Insolvency Officer as referred to in Regulation 158 of the European Communities (Markets in Financial Instruments) Regulations 2007 or section 52(7) (b) of the Act of 1995, the following provisions shall have effect:

- (a) the reasonable expenses shall be allocated rateably between all client monies and client investment instruments of the investment firm other than those mentioned in Regulation 7(2) and (4);
- (b) the Insolvency Officer may, with the sanction of the Court, sell such proportion of the investment instruments held by or to the order of the investment firm or by a nominee as will generate sufficient monies to enable effect to be given to subparagraph (a);
- (c) in the event of any sale directed pursuant to subparagraph (b), the date on which investment instruments are to be valued for the purposes of calculating any contribution to be made in respect thereof towards the reasonable expenses of the Insolvency Officer shall be determined by reference to the date of sale of the investment instruments.

(2) Neither the Insolvency Officer nor the investment firm shall be liable for any loss incurred as a consequence of the sale referred to in paragraph (1) (b).

Cases where return or restoration of investment instruments cannot be effected

13. (1) If, after all reasonable efforts have been made, the Insolvency Officer is unable to effect a return, or the restoration otherwise, of investment instruments to any client, the Insolvency Officer may, with the sanction of the Court, sell those investment instruments and pay the proceeds thereof into the account referred to in subsection (1) of section 623 of the Companies Act 2014 (No.38

of 2014) and thereafter the monies so lodged shall be dealt with in the manner provided for by that section.

(2) Neither the Insolvency Officer nor the investment firm shall be liable to the client for any loss sustained by the client as a consequence of the sale or of the payment of the proceeds of sale into the account specified in paragraph (1).

Form of investment instruments — immaterial whether in written or electronic form

14. For the purposes of these Regulations, no distinction shall be made between investment instruments in written form and investment instruments in electronic form.

Time within which claims must be submitted, exclusion of claims, etc

15. (1) In this Regulation “client assets” means the client monies, client investment instruments, or documents of title relating to such investment instruments which are held or ought to be held on behalf of clients by the investment firm or by a nominee.

(2) The power conferred by paragraph (3) may be exercised in relation in some or all of the client assets as the Insolvency Officer, in his or her discretion, thinks fit.

(3) In order to expedite the return of client assets, the Insolvency Officer may fix a time within which clients of the investment firm are to submit to the Insolvency Officer a proof of their claims against client assets.

(4) The time so fixed shall be a reasonable one (but in any event shall not be less than 90 days).

(5) A client who fails to submit a proof of claim or claims against client assets within the time fixed under paragraph (3) shall, without prejudice to the powers of the Court under Regulation 16, be excluded from the benefit of any distribution of client assets that is made before the time that proof of those claims of the client come to be submitted.

(6) The Insolvency Officer shall give notice of the time fixed under paragraph (3) by pre-paid ordinary post to—

(a) all clients of whose claim in respect of the client assets the Insolvency Officer is aware, or

(b) if the power under paragraph (3) has been exercised in relation to some only of client assets, all clients of whose claim in respect of those assets the Insolvency Officer is aware,

and whom, in either case, the Insolvency Officer has a means of contacting (and, for this purpose, the last known address of clients as shown in the records of the investment firm shall be used).

(7) In addition, the Insolvency Officer shall use electronic communication to give notice of the time so fixed to a client where the client has provided an email address to the investment firm for the purpose of communication (and, for this purpose, the last known email address of the client as shown in the records of the investment firm shall be used).

(8) Notice of the time fixed under paragraph (3)—

(a) shall be advertised by the Insolvency Officer in at least two national daily newspapers; and

(b) may be advertised in such other manner as the Insolvency Officer thinks fit.

(9) Notice of the time fixed under paragraph (3) shall be sent, without undue delay and in any event before the advertisements mentioned in paragraph (8) are published, to—

(a) the Bank, and

(b) the Investor Compensation Company Limited.

(10) Upon receipt of the notice mentioned in paragraph (9), the Bank shall promptly upload the notice to its website and ensure that the notice appears thereon in a prominent place for a period that ends not earlier than the expiry of, as appropriate—

(a) the time fixed under paragraph (3), or

(b) the time, so fixed, as extended under Regulation 16(7).

Provisions supplemental to Regulation 15

16. (1) In this Regulation “client assets” has the same meaning as it has in Regulation 15.

(2) Where the power under Regulation 15(3) has been exercised in relation to some only of client assets, references in this Regulation to client assets shall be read as references to those of the client assets in relation to which that power has been exercised.

(3) Where proof of a claim is submitted after the time fixed under Regulation 15(3) but before any distribution or return of client assets is made, the Insolvency Officer shall treat the proof of claim as if it had been made before the time fixed under that provision.

(4) Where client assets are returned by the Insolvency Officer, being client asset proofs in respect of which—

(a) have been submitted within the time fixed under Regulation 15(3), or

- (b) are treated under paragraph (3) of this Regulation as having been submitted within that time,

the person to whom the assets are returned acquires good title to them.

(5) Where proof of a claim is submitted by a client after the time fixed under Regulation 15(3) and after any distribution or return of client assets has been made, the Insolvency Officer shall determine whether the client would have received client assets as part of the distribution.

(6) If—

- (a) the Insolvency Officer determines that, in such a case, the client would have received client assets as part of the distribution, and

- (b) some or all of those client assets are still available to be distributed,

then the client assets so available shall be returned by the Insolvency Officer to the client as soon as reasonably practicable.

(7) The Court may, on application by the Insolvency Officer—

- (a) vary or extend the time fixed under Regulation 15(3) (and any such variation or extension shall be advertised and notified to clients as the as the Court shall direct), and

- (b) in consequence of that variation or extension, give such supplemental directions as the Court thinks appropriate in relation to the distribution or return of client assets.



GIVEN under my Official Seal,
23 September 2015.

MICHAEL NOONAN,
Minister for Finance.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

These Regulations set out rules which will provide greater legal clarity following investment firm failures. The purpose of these rules is to improve the outcomes for investors in the recovery of their assets following such a failure.

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