USA:
A GUIDE TO INTERNATIONAL FUND DISTRIBUTION

irishfunds.ie

irish funds

ABOUT
IRISH FUNDS

Established in 1991 the Irish Funds Industry Association (Irish Funds) is the representative body of the international investment fund community in Ireland. We represent the fund promoters / managers, administrators, custodians, transfer agents and professional advisory firms involved in the international funds industry in Ireland, with more than 14,000 funds and net assets of more than €5.2 trillion. The objective of Irish Funds is to support and complement the development of the international funds industry in Ireland, ensuring it continues to be the location of choice for the domiciling and servicing of investment funds. Through its work with governmental and industry committees and working groups, Irish Funds contributes to and influences the development of Ireland's regulatory and legislative framework. Irish Funds is also involved in defining market practice through the development of policy and guidance papers and the promotion of industry-specific training.

Our Mission

We are the voice of the Funds and Asset Management industry in Ireland.

Our Vision

Ireland will be the premier location to enable and support global investing through its reputation for trust, capability and innovation.

Our Values

- **Collaboration** – we succeed together and in working with others
- **Commitment** – to achieving better outcomes for investors
- **Dedication** – to member interests
- **Excellence** – in delivering and enhancing our capabilities
- **Integrity** – in everything we do
- **Society/Community engagement** – we give back
- **Transparency** – In who we represent, our interests and our decisions

CONTENTS

MARKET OVERVIEW

The United States is the largest market in the world in which to raise third-party capital for investment funds.

The marketing of investment products and services, however, is subject to significant registration. The sale of shares of an Irish fund to a resident of the US will trigger licensing and/or fund registration issues under the laws of the United States. Likewise, there may be additional licensing associated with the sale of shares of an Irish fund for any entity marketing it to a resident of the US or from the US to any investor wherever located.

KEY DISTRIBUTION CHANNELS

The following are the three primary distribution channels in the United States for Irish funds:

US INVESTORS EXEMPT FROM US TAXATION
under the US Internal Revenue Code of 1986, as amended (the "Code") ("US Tax-Exempt Investors")

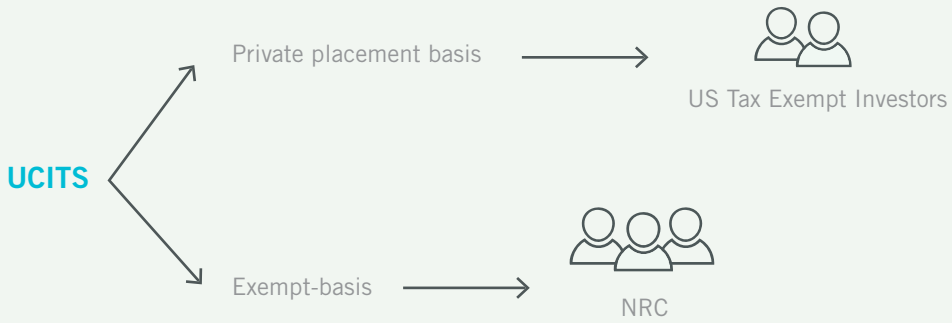
US INVESTORS SUBJECT TO TAXATION
under the Code ("US taxable investors")

NON-RESIDENT ALIEN CLIENTS ("NRC") OF US FINANCIAL INTERMEDIARIES
which are not resident or subject to taxation in the United States but have a brokerage or other account in the United States.

DISTRIBUTING UCITS AND AIFS IN THE US

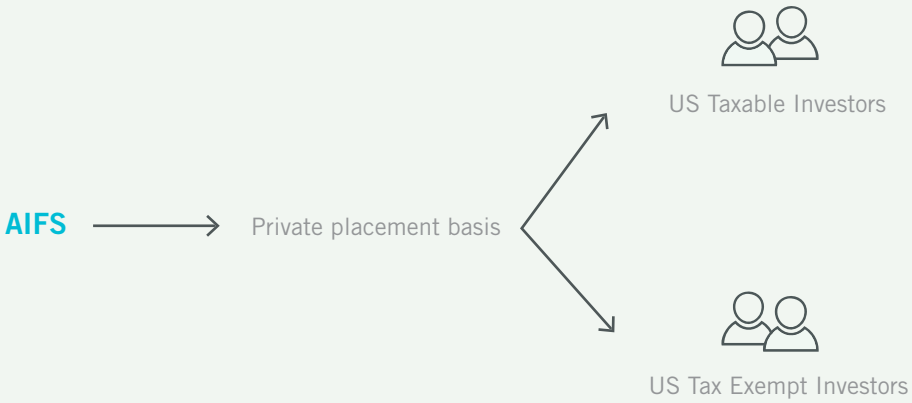
UCITS

Irish funds regulated as UCITS are sold primarily to US Tax-Exempt Investors on a "private placement" basis and to non-resident clients (NRC) on an "exempt basis".



AIFS

Irish funds regulated as AIFs are sold primarily to US Taxable Investors and US Tax-Exempt Investors on a "private placement" basis.



REGULATORY AUTHORITIES

Unlike in Europe, the United States operates under a multi-regulator model depending upon the security being offered in the United States and the specific activities being conducted in the United States.

US SECURITIES AND EXCHANGE COMMISSION

As a general matter, the US Securities and Exchange Commission (the "SEC") oversees the marketing, distribution and sales activities of shares of a fund in the United States.

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.

The Financial Industry Regulatory Authority, Inc. ("FINRA"), which is a private corporation that acts as a self-regulatory organization, regulates brokerage activities (including the sales of shares/units of a fund) and markets in the United States.

US COMMODITIES FUTURES TRADING COMMISSION

To the extent that an Irish fund offers or sells interests to US persons and is permitted to invest in "commodity interests", it will be regulated by the US Commodities Futures Trading Commission ("CFTC").

US EMPLOYEE RETIREMENT INCOME SECURITY

To the extent an Irish fund is sold to "benefit plan" investors, it will also be subject to regulation under the US Employee Retirement Income Security Act of 1974, as amended ("ERISA"), which is promulgated by the US Department of Labor.

Finally, each of the individual 50 US states has a right to charge a fee for sale of shares of residents of that state and to regulate any entity operating from that US state.

REGISTRATION / DISTRIBUTION REQUIREMENTS

REGULATORY REQUIREMENTS

Overview of Applicable Securities Laws

The most significant US federal securities laws covering the sale of shares/units of a fund in the United States are: (i) the US Securities Act of 1933, as amended ("Securities Act"); (ii) the US Investment Company Act of 1940, as amended ("Investment Company Act"); (iii) the US Investment Adviser Act of 1940, as amended ("Advisers Act"); (iv) the US Securities Exchange Act of 1934, as amended ("Exchange Act"); and (v) the US Commodity Exchange Act ("CEA").

Securities Act: The Securities Act governs the offer and sale of securities (for example, shares/units of a UCITS or AIF) and generally requires the registration of securities with the SEC. Securities sold in an exempt or private offering, however, need not be registered with the SEC under the Securities Act. For example, Regulation S promulgated under the Securities Act provides a territorial exception to registration commonly used by funds to offer and sell units/shares through US professional fiduciaries.

Investment Company Act: The Investment Company Act generally requires the registration with the SEC of "investment companies" (generally any type of collective investment scheme, including a UCITS or AIF) that "publicly offers" shares in the US and regulates the activities of registered investment companies. Sections 3(c)(1) and 3(c)(7) of the Investment Company Act provide exemptions from the definition of "investment company" (and thus almost all of the requirements of the Investment Company Act).

Advisers Act: The Advisers Act generally provides that it is unlawful for any "investment adviser" to engage in the business of advising others without registering with the SEC, including advising funds with any US resident investors. Section 202(a)(11) of the Advisers Act defines the term investment adviser to mean: "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." It is important to note the broadness of the definition, which covers both US and non-US investment advisers and applies to both discretionary and non-discretionary activities. The term investment adviser does not make a distinction between the commonly used terms "adviser", "investment manager" or "management company" as is the case in many foreign jurisdictions.

Exchange Act: The Exchange Act (which also governs both the registration and the reporting of US "public" companies) regulates "brokerage activity" in the United States as well as reporting for certain funds that offer and sell shares to US residents, including with respect to Section 13 of the Exchange Act.

Commodity Exchange Act (CEA): If a fund offers or sells its interests to US persons and it is permitted to invest in certain derivatives, the laws of the CEA are implicated and the rules and regulations of the CFTC may apply to the fund, its operator and its investment manager.

Other Laws: The sale of shares of a fund in the United States also raises potential issues relating to the ERISA and state securities law issues in the US states in which the beneficial owner of shares/units may be resident.

Exceptions from the Securities Act

Section 5 of the Securities Act makes it illegal to offer or sell unregistered securities throughout the United States through any means of US interstate or international commerce unless the security or the transaction is exempt from registration with the SEC.

Funds can typically rely upon Regulation S, Section 4(a)(2) and Regulation D of the Securities Act for transactions in their shares in order to avoid the registration provisions under the Securities Act.

Regulation S: The SEC historically has taken the position that the registration requirements of the Securities Act

REGISTRATION / DISTRIBUTION REQUIREMENTS

do not apply to offers and sales of securities made abroad when the offers and sales are made with only incidental US contacts and are made in such a way as to reasonably preclude redistribution of the securities in the US. Regulation S represents an attempt by the SEC to clarify the extraterritorial application of the Securities Act. When offers and sales of securities are deemed to occur outside the US for purposes of the Securities Act, the shares/units of a fund will not be subject to registration under Section 5 of the Securities Act.

To clarify when offers and sales will occur outside of the United States for purposes of the Securities Act, Regulation S provides two non-exclusive "safe harbor" provisions in Rule 903 (issuer safe harbor) and Rule 904 (safe harbor for resales).

If the offer and sale satisfy the conditions of either of the safe harbor provisions, such transaction will be deemed to have occurred outside of the US and outside the reach of Section 5. Many Irish funds rely on Regulation S, and in particular the issuer safe harbor, when offering shares to non-US persons through US-based intermediaries. The Regulation S safe harbor is available when the offer or sale is made in the US to a discretionary account (other than an estate or trust) held by a US professional fiduciary for the benefit of a non-US person. Such offers and sales of securities are deemed to be "offshore transactions" and contacts with such fiduciaries are permitted under Regulation S. The Regulation S safe harbor is generally not available for direct sales to US persons. The definition of who is (and who is not) a US person for this purpose is in Regulation S and is very detailed, though generally, if a natural person is resident outside the United States he or she would not be considered a US person.

Section 4(a)(2): Section 4(a)(2) of the Securities Act exempts from registration any security offered or sold by the issuer in a transaction "not involving any public offering." SEC Staff interpretations and court cases have provided some guidance regarding what constitutes a private offering, but the scope of the private offering exemption under Section 4(a)(2) remains subject to ongoing judicial and regulatory interpretation. As such, many funds rely on the provisions of Regulation D when offering shares/units directly to US investors (e.g. US Tax-Exempt Investors) to avoid registration of its shares under the Securities Act.

Regulation D: Safe Harbor: An offer made in accordance with the provisions of Rule 506(b) is deemed to have complied with Section 4(a)(2). Generally, Rule 506(b) provides that an offering is deemed to comply with Section 4(a)(2) if: sales are made only to "accredited investors" (as defined in the Securities Act) and up to 35 non-accredited investors (although the sale to non-accredited investors will trigger additional disclosure requirements to investors); there is no general solicitation or advertising involved with the offering; and the investors buy the securities for investment and not for resale.

Regulation D also technically requires a fund to file a short notice (Form D) with the SEC within 15 days of the first sale of interests in a fund to US persons. The notice is generally also filed with the US states in which a beneficial owner of shares/ units may be resident.

Regulation D makes the safe harbor unavailable if certain persons (e.g. managers or placement agents, but even some large fund shareholders) have been the subject of specific sanctions, so called "bad actors." In addition, Rule 506(c) now permits general solicitation but limits sales exclusively to accredited investors and requires independent verification (other than through self-certification by the investor) of accredited investor status. Due to uncertainties about the new rule, use of Rule 506(c) is uncommon.

Investment Adviser Licensing Requirem ents

Section 202(a)(11) of the Investment Advisers Act generally defines the term "investment adviser" to be any person who, for compensation, is engaged in the business of providing advice to others or issuing reports or analyses regarding securities.

REGISTRATION / DISTRIBUTION REQUIREMENTS

The Advisers Act generally requires persons that meet the definition of investment adviser to register with the SEC, unless an exemption from such requirement applies. There are several exemptions from the Advisers Act registration, including two that could be useful to advisers that wish to offer UCITS or AIFs to US institutional investors.

Foreign Private Adviser Exemption: Under Section 202(a)(30), a "foreign private adviser" is defined as an investment adviser that: (i) has no place of business in the United States; (ii) has, in total, fewer than 15 US clients and US investors in private funds advised by the investment adviser (such clients and investors, "US Persons"); (iii) has aggregate assets under management attributable to US Persons of less than $25 million (the SEC is granted authority to increase this threshold); and (iv) neither (a) holds itself out generally to the public in the US as an investment adviser, nor (b) advises investment companies or business development companies registered under the Investment Company Act.

Private Fund Adviser Exemption: An exemption exists for investment advisers that solely manage "private funds" (and not, for example, separately managed accounts for US persons) with assets under management in the US of less than $150 million. In applying this exemption, Rule 203(m)-1 under the Advisers Act requires non-US advisers (that is, advisers with their "principal office and place of business" outside the US to count only private fund assets that are managed from a "place of business" within the United States toward the $150 million threshold (while it requires US advisers to consider all of their asset management activities worldwide). A non-US adviser can qualify for this exemption regardless of the size or nature of its activities outside of the United States, provided that all of its clients that are US Persons are qualifying private funds as (as defined by the exemption).

Investment advisers that rely on the "private fund adviser exemption" are called "exempt reporting advisers" under SEC rules, and are required to submit to the SEC, and update at least annually, certain reports on Part 1 of Form ADV disclosing, among other things, organizational and operational information, information about potential conflicts of interests, as well as other detailed information about the private fund. These advisers are required to have insider trading policies and are subject to the SEC rules limiting the campaign contributions that an adviser and its personnel can make if investors include government entities.

Broker-Dealer Licensing Requirements

"Broker-dealer type licensing" means a requirement on a fund distributor, placement agent or other third party to hold a licence either: (i) to engage in the business of effecting transactions in shares in a fund (including marketing activities related thereto) for the account of others; or (ii) to engage in the business of buying and selling shares in a fund for its own account, through a broker or otherwise.

Offering and selling interests in a fund in the United States generally require that the fund engage an entity registered as a broker-dealer with the SEC and that is a member of FINRA. The licensed broker-dealer may be either an affiliate of the fund manager or an independent third party. Some fund managers rely on the so-called "issuer exemption." The SEC has adopted a safe harbor under Rule 3a4-1 of the Exchange Act, which provides that an "associated person" of an issuer that performs limited securities sales of the issuer (e.g., a Fund) would not be deemed to be a 'broker' under Section 3(a)(4) of the Exchange Act and thus not be required to register with the SEC and FINRA.

Limits on the Number of Investors

Section 7(d) of the Investment Company Act prohibits an investment company organized outside the United States from making a public offering of its securities in the United States unless the SEC has issued an order permitting the foreign fund to register under the Investment Company Act. No such order has been issued in decades. As a result, to avoid registration under the Investment Company Act, and Irish fund will typically seek to come under one of the private fund exceptions from the definition of investment company, which are found in Sections 3(c)(1) and 3(c)(7) of the Investment Company Act and not engage in a public offering in the United States.

REGISTRATION / DISTRIBUTION REQUIREMENTS

Section 3(c)(1): Generally, Section 3(c)(1) requires that: (i) the outstanding securities of a non-US fund must not be beneficially owned by more than 100 US Persons (as defined in Regulation S of the Securities Act); and (ii) the fund must not make or propose to make a public offering in the US of its securities. An owner of shares of a fund who is not a US Person at the time of purchasing shares in it is not required to be counted towards the 100 person limit described above even if the owner later becomes a US Person (e.g., by taking up residence in the United States). However, the owner should be counted towards the 100 person limit if the owner subsequently purchases additional shares or makes exchanges between sub funds of the fund after becoming a US Person.

Definition of "Accredited Investors"

Under both Sections 3(c)(1) and 3(c)(7), investors are, as a practical matter, limited to "accredited investors" as defined in Rule 501 of the Securities Act.

On August 26, 2020, the SEC adopted amendments to the definition of "accredited investor" in Rule 501 of the Securities Act to add new categories of investors (both for individuals and entities) and codify longstanding SEC staff interpretations intended to improve the definition to more effectively identify institutional and individual investors that have the knowledge and expertise to participate in offerings not registered under the Securities Act.

Section 3(c)(7): In order to rely on the Section 3(c)(7) exception, a fund must not conduct a public offering of its securities in the United States (essentially imposing the Regulation D requirements). In addition, US beneficial owners of the fund must be limited exclusively to persons who, at the time of their investment, are "qualified purchasers."

A qualified purchaser is generally defined in Section 2(a)(51) of the Investment Company Act and the rules promulgated there under to include the following: (i) natural persons who own at least $5 million in "investments" (as such term is defined for purposes of the Investment Company Act); (ii) certain family- owned companies, partnerships, trusts or similar entities that own at least $5 million in investments; (iii) certain trusts that are not formed to acquire the interests in the Section 3(c)(7) fund if the trustee or other person authorized to make decisions for the trust, and each settler or other person who contributed assets to the trust, is a qualified purchaser; (iv) entities that, in the aggregate, own and invest on a discretionary basis at least $25 million in investments; (v) entities that are beneficially owned by qualified purchasers; and (vi) most "qualified institutional buyers" (as defined in Rule 144A under the Securities Act), which term generally encompasses institutions with at least $100 million of investment securities.

Funds with a large number of US investors could become subject to reporting under the Exchange Act.

In addition, there are "look-through" provisions applicable to a Section 3(c)(7) analysis that require a private investment fund (that is, private for US purposes) to "look-through" an investor that is an entity formed for the specific purpose of making the investment to determine whether beneficial owners of the investing entity are, in fact, qualified purchasers. A similar look- through applies under Section 3(c)(1) to determine the number of beneficial owners for purposes of counting the 100 person limit to rely on the exemption from public mutual fund status under the Investment Company Act.

Additional State Law Requirements

Although an offering of shares/units of a fund may be exempt from registration under US federal securities laws, the US states may have different requirements. Many US states have enacted private placement exemptions from their state registration requirements. These exemptions often mirror US federal law, in particular Regulation D under the Securities Act. Once sales in a state begin, a fund should be particularly diligent about compliance with these filing requirements post sale. An exception to the post sale filing requirement is New York which requires a filing prior to the first sale. Failure to timely make the required state filings can result in civil liability (for example, rescission offers plus interest) and regulatory action by the state securities regulator (for example, penalties and injunctive relief against the issuer). State limitations and registration requirements (for example as a lobbyist) may apply when dealing with government entities, such as state pension funds, which are not detailed in these survey materials.

REGISTRATION / DISTRIBUTION REQUIREMENTS

TIMELINE

Note: Under Section 7(d) of the 1940 Act, a non-US domiciled investment fund must apply to the SEC for an exemption to register for public offer and sale. As a practical matter, all sales to the target market in the United States (as noted above) occurs on a private placement or otherwise exempt basis through Regulation D and/or Regulation S under the 1933 Act.

COSTS – INITIAL AND ON-GOING

Since all sales are conducted on a private placement or exempt basis, there is no registration cost in the United States. Any costs associated with any offering to the target market in the United States will reflect legal expenses and expenses associated with filing certain notifications in the individual member states in which investors are resident or domiciled.

DETAILS OF LOCAL TAXATION REQUIREMENTS

There are important US tax considerations impacting US investors in Irish funds. Generally, a foreign person (i.e. a business entity or individual) is subject to US federal income tax on passive income sourced to the US or business income that is "effectively connected" with a "trade or business" in the United States ("ECI") carried on by such person (or, in the case of a partner in a partnership, if carried on by the partnership). The term "trade or business within the United States" includes "the performance of personal services within the United States at any time during the taxable year."

Passive income sourced to the US (e.g. income derived from an office that is deemed a "permanent establishment" in the US) is taxed (through withholding) at a flat rate of 30%, subject to a reduction of that rate to the extent that the US has an applicable tax treaty with the foreign person's home jurisdiction. For example, the tax treaty between the US and Ireland, if applicable, could reduce the withholding tax on dividend income to 5%. ECI is subject to the standard US income tax rates and requires that a US income tax return be filed.

A foreign person also may be deemed engaged in a US trade or business by using an agent in the US if such agent is deemed to be engaging in a US trade or business in the US as a result of its activities. If the agent is determined to be a dependent agent, the agent's activities conclusively will be imputed to the principal. If, however, an agent is determined to be independent, his activities are not imputed to the principal.

Please note there are also tax reporting requirements imposed by the Foreign Account Tax Compliance Act ("FATCA"), which requires any entity in the broadly defined class of "foreign financial institutions" ("FFIs") to comply with an expansive reporting regime. If an FFI does not comply, it will be subject to a 30 percent withholding tax on (i) most US source payments made to the FFI and (ii) proceeds from the disposition by the FFI of investments generating such US source income. These requirements will generally apply to non-US investment funds, including Irish funds, and will be effective for payments to, or dispositions by, such funds after December 31, 2012. While the specific impact of FATCA on Irish funds organized in various jurisdictions is yet to be determined, no plan to offer Irish funds to US persons should be considered without reviewing the impact of FATCA on the fund and its existing non-US retail investor base.

ADVANTAGES OF DISTRIBUTING AN IRISH FUND

A UCITS Irish fund provides a tax-efficient accumulation structure for Non-resident Clients (NRC) clients who would otherwise be subject to 30% dividend withholding on distributions if invested directly in a US mutual fund, which is a distributing structure (i.e. the shareholders are required to pay tax each year on their allocable share of gains). As a result, a UCITS fund is much more tax-efficient than a US mutual fund for the NRC market.

With respect to AIFs, the ICAV now provides an efficient "on-shore" structure that is tax-efficient for US taxable investors and for investment managers that wish to create a master fund structure in Ireland for sale outside of the United States with a feeder fund structure for US high-net worth sales.

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