BNY MELLON

The Bank of New York Mellon (Ireland) Limited

Governance, Accounting and Auditing Policy Division
Policy and Risk Directorate
Central Bank of Ireland
PO Box 559
College Green
Dublin 2

Re: **Consultation Paper 51: The Fit and Proper Regime in Part 3 of the Central Bank Reform Act 2010 (CP 51)**

Dear Sir/Madam

The Bank of New York Mellon Corporation ("BNY Mellon") welcomes the opportunity to respond to the consultation paper on the Fit and Proper Regime in Part 3 of the Central Bank Reform Act 2010. This submission is made on behalf of the following BNY Mellon regulated subsidiaries in Ireland which will be impacted by the proposed regulations and code:

1. The Bank of New York Mellon (Ireland) Limited, a Credit Institution,
2. BNY Mellon International Bank Limited, a Credit Institution,
3. BNY Mellon Fund Services (Ireland) Limited, authorised under Section 10 of the Investment Intermediaries Act, 1995,
4. BNY Mellon Trust Company (Ireland) Limited, authorised under Section 10 of the Investment Intermediaries Act, 1995,
5. BNY Mellon Investment Servicing (International) Limited, an Investment Firm, and
6. Alcentra Management (Ireland) Limited, authorised under the Investment Intermediaries Act, 1995.

BNY Mellon appreciates the rationale for the proposed changes to the Fitness and Probity regime, however we do have a number of concerns we would like to highlight.

Timeframes

The implementation timeframe proposed by the Central Bank is extremely challenging. BNY Mellon requests that the Central Bank give proper consideration to the practicalities of the implementation of the regulations and code for our firms. To implement the code, we may need to identify staff that are captured by the regulations and code and consider such employee's contracts in light of the requirements, which may require liaison with our legal counsel. Our recruitment policies may have to be examined, and changes made where appropriate. Processes for the ongoing monitoring of fitness and probity may have to be re-designed and in larger organisations, such as ours, this may require amendments to online self declarations requiring IT development and testing periods. We may have to engage external providers who can provide the necessary background checks required by the code, and the identification of suitable providers and the negotiations of contracts could take some time. In addition, we may be required to inform our staff of changes and their new obligations in terms of compliance, which may necessitate a consultation period.

BNY Mellon is committed to compliance with their legal and regulatory obligations and suggest that a period of at least six months be allowed in which we can review the final regulations and code and prepare appropriate policies and procedures which will need to be approved by the Boards of all our regulated firms. This suggested timeframe reflects the significant amount of work we expect will be required to produce appropriate policies and procedures that satisfy the Board of Directors. When these policies and procedures are approved, we will be in a position to start to apply them to the recruitment of new staff.

The "Transitional Arrangements" outlined in Section 6 (34) of the Consultation Paper proposes that firms will have to provide the Central Bank with a list of PCFs by 31 December 2011 and the Board of the firm will have to be satisfied that the PCFs are fit and proper in accordance with the code. As noted above there may be a considerable body of work involved in producing the policies and procedures in compliance with the regulations and code and we believe it would be appropriate to extend the date in Section 6 (34) of the Consultation Paper to 1 March 2011. In relation to the assessment of existing CFs, depending on the number of functions in scope and the information required, such an assessment could take considerably longer.

Scope of the proposed changes

BNY Mellon supports a more intensive approach in relation to the fitness and probity of nominees to key positions and key office holders within certain regulated financial services providers and those who "exercise a significant influence on the conduct of the affairs of a regulated financial service provider", however the proposed scope of controlled functions appears extremely broad in relation to the provisions outlined in Appendix 2, Section 3 of the Consultation Paper. Whilst the Central Bank Reform Act 2010 ("the Act") has used the word "customer", the Dáil debates cited issues raised by the Financial Services Ombudsman (FSO), such as bonds being sold to vulnerable customers. It is noted that the FSO only deals with complaints from "consumers" as defined in the Consumer Protection Code, and therefore this may indicate that the Dáil had "consumers" in mind when they added this provision. In addition the Dáil debates with regards to this provision referred to , which again indicates that this was intended to capture advice to "consumers". It is noted that in point 13, on page 13 of the consultation paper, that the Central Bank mentions "consumer protection" and capturing persons who "give advice to consumers". It would be helpful if the Central Bank were to align the definitions in the proposed code with those provided in the Consumer Protection Code and the Minimum Competency Requirements, and clarify that the provisions of Appendix 2, Section 3 refer to those providing advice and assistance in relation to "retail financial products" to "consumers". We believe that the use of the word "customer" could result in the proposed code applying to all staff in a regulated financial service firm who deal with any type customer of the firm, even where those customers, are for example, institutional clients or "eligible counterparties" under MiFID, which does not appear to be the rationale behind the provision.

In relation to the requirements outlined in Appendix 2, Section 3, where a reference is made to the dealing in, or having control over, the property of a customer, we believe that it would be helpful if it were clarified that these sections only relate to situations where firms manage customer's property on a discretionary basis. Specifically, it should be confirmed that the provision of custodial services, where the service provider exercises no free power over the assets, remains outside the scope of this provision.

In relation to persons who exercise a significant influence on the conduct of the affairs of a regulated entity, it is our suggestion that the Central Bank would allow firms to discuss the functions that should be deemed CFs within their firm with their Central Bank supervisors. Such an approach would ensure that the designation of CFs is appropriate to a particular institution taking into account is size and the nature of its activities.

We interpret the requirement in Appendix 2, Section 2, to capture only a firm's Compliance Officer, MLRO or senior compliance staff rather than any staff member who has a responsibility to ensure the firm's compliance with their regulatory obligations and would appreciate if the Central Bank could confirm that this is correct.

In addition, we believe that the Central Bank should make it clear that only staff who are employed by the regulated financial service provider are in scope as it would be impractical to suggest that firms would have to assess the fitness and probity of suppliers of outsourced services in the same way that they assess the fitness and probity of their own staff. Given that such arrangements are often with legal entities and not individuals there would also be practical difficulties with such a requirement.

It is noted that, in its current form, the proposed regime will apply to all service providers regulated by the Central Bank of Ireland and will extend to such entities as Management Companies and UCITS Self Managed Investment Companies ("SMICs"). We believe the inclusion of such entities within the scope of this consultation is unnecessary and that they should be excluded. Similar requirements do not exist in other jurisdictions, and we believe that these requirements could significantly reduce Ireland's competitiveness within a global funds industry.

PCF Approval Process

The requirement to have PCFs approved by the Central Bank raises the need for an agreed turn-around time from the Central Bank in relation to the processing of applications and conducting of interviews where necessary. We would view a 10 working day period as an acceptable turn-around time for the processing of applications. In relation to interviews, it is expected that the Central Bank will be able to conduct such interviews in a timely manner and at a time convenient to the parties involved. In addition, we believe it would be helpful if it could be clarified if interviews can be held over the phone in certain circumstances, for example if the candidate lives outside the State.

In relation to the Central Bank's Regulatory Transactions Department (RTD) it would be helpful if the Central Bank could indicate the area in the Central Bank in which this department will reside and what interaction it will have with existing supervision teams. From a practical perspective, it is unclear whether firms will deal directly with the RTD in relation to any issues or questions with regard to the IQ process, or whether the RTD would refer queries to the firm's supervisor. In addition, if there are questions raised by the Central Bank that require candidates to make amendments to the form, it is unclear whether a new form would have to be re-submitted or whether amendments of the original form will be permitted. Further clarity is required as to how candidates, particularly external candidates, will be granted access your system in order to complete the IQ. We will want to review any information provided by a candidate prior to it being submitted to the Central Bank to ensure that it is consistent with information provided to us and meets with our internal standards.

If the Central Bank is considering refusing the appointment of a candidate that we have identified as being suitable, it is suggested that you engage in an open dialogue with us to ensure that there are no misunderstandings. In addition, clarity is required as to whether in the event of a refusal the Central Bank will inform the candidate of the refusal, or will they inform the firm, who will then in turn explain to the candidate, or both the candidate and the firm simultaneously? To ensure a fair and transparent appeals process, the regulations should state that the Central Bank will make clear the grounds for the refusal so that the candidate can appeal the decision. In addition, it should be made clear that any employment law issues created in respect of the Central Bank's refusal to appoint a candidate who we have identified as being suitable are a matter for the candidate to address with the Central Bank.

Comments on Appendix 2

General

In relation to the standards that staff and candidates are required to demonstrate, the Central Bank's expectations of our responsibilities to verify this information is unclear. In the absence of publicly available external sources of information it is assumed that it would be acceptable to rely on declarations or information from staff or candidates and it would be appreciated if the Central Bank could clarify this point.

BNY Mellon is committed to filling roles in our organisation with people who are suitable and qualified. However it is important that the measures to assess such suitability are appropriate and relevant to the responsibilities of individual roles. Given the potentially broad scope of the regulations and code, we believe that a one-size-fits-all approach to assessing fitness and probity is not appropriate or practical. It is therefore suggested that the Central Bank allow firms to consider the responsibilities of particular roles, and to decide which requirements in Appendix 2 are relevant and appropriate for assessing fitness and probity for such roles.

We believe that some of the sensitive information required in accordance with Appendix 2, which in the absence of this code, we may not otherwise deem necessary in assessing suitability for a role, may make our organisation vulnerable to vexatious claims from unsuccessful candidates.

We are of the opinion that a number of the fitness and probity standards outlined in Appendix 2 should include a time limit that is appropriate to the standard, particularly where only more recent occurrences would be relevant. In addition, practical difficulties may arise in obtaining or verifying historical information because of legislative requirements restricting retention.

Section 3. Conduct to be competent and capable

The current wording in Section 3.1 would require qualifications ***and*** experience, and in some cases depending on the job or the person, qualifications may be less important than experience and may not be a requirement. The use of the word "and" in the current wording instead of the word "and/or" would seem to insist that experience and qualifications are required every time. It is suggested that Section 3.1 be redrafted as follows: *"A person shall have the relevant qualifications and/or experience, competence and capacity appropriate to that function."*

Section 3.2 would seem to require that a person meets all the criteria in this section because of the use of the word "and". Again it is suggested that this section be amended to reflect that only the sub-sections that are relevant to the person or the function would be required. The wording in Section 4.1 states "a person must be able to demonstrate that his or her ability to perform the relevant function is not adversely affected to a material degree where one or more of the following may be applicable…", similar wording could be incorporated into Section 3.2, as it takes into account that fact that not all of the subsections in Section 3.2 will apply.

With regards to Section 3.2(a), further to the points above, this should refer to qualifications or experience.

In relation to Section 3.2(b) and (c), the requirement to have experience would seem to cause an issue if entry level functions (e.g. call centre staff, junior operation type roles etc) are considered CFs by the Central Bank. Again the point about relevance to the person or the function could be added to Section 3.2 so as to clarify that experience is only required if it is appropriate.

We request that Section 3.2(c) is amended to ensure that persons who have not held a CF previously, are not prohibited from taking up a CF position if they are deemed suitable by the firm.

We believe Section 3.2(c), which requires firms to consider whether staff members who were ever employed by a regulated financial service provider that received State financial support, "contributed for the necessity for such State financial support", is unworkable from a practical perspective, as an unrelated regulated firm would not be able to conduct such an investigation or assessment. We suggest that this be amended to require persons to declare if a regulated financial service provider that received State financial support and/or the Central Bank determined that their performance contributed to the necessity for State financial support. We suggest that such determinations should also be available publicly to allow firms to consider the determination.

In relation to Section 3.2 (d) and (e) whilst we agree with the reasoning behind such requirements, it would be impractical for firms to have to provide such training to potential

candidates for positions before they are appointed. It is suggested that the wording be amended to require the successful candidate to undertake training in this regard following their appointment.

The requirement in Section 3.2 (f) requires a firm to investigate a person's physical and mental health and assess whether the person would be capable of performing the function on a continual basis. We believe that this requirement should only apply to PCFs. In addition, we believe it should be made clear that the person should only be obliged to provide such information if that person deems that it is material. Firms should not be required to have a medical assessment conducted on employees as any requirement for a candidate to provide information which they know to be immaterial or irrelevant seems excessively intrusive to us.

Section 4. Conduct to be Honest, Ethical and with Integrity

In relation to Section 4.1(b) which requires firms to consider any complaints that the person has been subject to relating to activities that are regulated by the Central Bank or equivalent authority in another jurisdiction. It is our suggestion that this requirement be removed as it extremely broad and we feel cannot practically be applied. A more practical and relevant indicator might be where a complaint was made against an employee which led to disciplinary action being taken by their employer. Persons could be required to declare whether they have been subject to disciplinary action on foot of a complaint relating to activities that are regulated by the Central Bank or an equivalent authority in another jurisdiction. If the person makes such a declaration they could be required to provide details so that an assessment can be made by the firm.

With regards to Section 4.1(c), "professional bodies" should be amended to "professional bodies as they relate to the financial services industry", as while this was likely the intention, the current wording would include any professional body, for example the Football Association of Ireland etc. The term "government bodies or agencies" is extremely broad, further clarity should be provided here in relation to the actual bodies or agencies intended by the Central Bank to be in scope, or at the least guidance on the type of bodies and agencies which should be in scope. Coillte, Breast Check and Teagasc are examples of Government agencies; would the Central Bank consider these in scope?

It is our view that the wording proposed in Section 4.1(g) is too broad and could cover minor offences such as road traffic offences etc. We suggest that the wording used in the current version of the IQ is more appropriate to roles in financial services. In addition, the wording in Section 4.1(h) and (i) the wording "which may lead to such a conviction, under any law in any jurisdiction" and "there are reasonable ground for considering that any such judgement may be made" respectively need to be removed. We do not see how it would be possible for a person to determine in advance whether they will be convicted of one of the offences listed or whether a particular judgement will be made against them. The wording in the current IQ is more appropriate, and does not seek to anticipate the outcome of any proceedings.

In relation to 4.1(j), clarity around what type of government agencies would be in scope is required.

In respect of 4.1(l) we believe it should be specified that only "regulatory authorities" relating to financial services be considered.

With regards to Section 4.1(m) it is assumed that where a person was untruthful or provided misleading information to the Central Bank or been uncooperative in any dealings with the Central Bank, that the Central Bank would have taken the appropriate action. Therefore the requirement in Section 4.1(j) which would detail disciplinary action taken by the Central Bank against a person negates the requirement for Section 4.1(m), could be removed.

We believe the term "position of influence" in Section 4.1(n) is too broad, and may be impractical for us to determine whether a person's role in a company would be in scope for this requirement. Also it is not currently specified that the information is only relevant when the person held that position at the time the issue arose. In addition, the current wording in this section could bring into scope all types of organisations. The scope needs to be narrowed to organisations which are relevant. The term "onerous condition" is very

subjective and additional clarity could be provided. This section should also be amended to reflect that withdrawals or terminations made on a voluntary or by specific request of the entity should not be in scope. It also appears that Section 4.1(o) is meant to be read in conjunction with 4.1(n).

We believe that Section 4.1(p) should be removed because as previously noted, the term "position of responsibility or influence" is far too broad, and could potentially cover every employee of any business. The fact that a business has been investigated could bear no relation to that person, and furthermore we do not believe that it should be up to an unrelated business to determine that person's role in any investigation etc. We believe that the word "criticised" should be removed, as disciplinary action which is already listed in this section, is a more appropriate measure. It is also possible some employees may remain unaware of the fact that a business was investigated, disciplined, or criticised, perhaps due to the role they held, or their level within the organisation. This is even more likely if such investigations, disciplinary actions or criticisms were made "privately". Furthermore, an investigation could take place in relation to events that happened prior to the person becoming an employee of the business in question, and therefore the fact that the business has been investigated has no relevance to their conduct. The wording in the current IQ on this matter specifically states "by reason of any matter relating to a time when you were so concerned", clarifies that such matters are only relevant where they can be attributed to the person.

Section 5. Financial Soundness

We believe that Section 5 is excessive in its scope and could be interpreted as an unnecessary intrusion into people's personal lives, particularly in today's economic climate, where there are people experiencing financial difficulty for many reasons. Such difficulties should not necessarily reflect negatively on their characters. The wording in the current IQ which asks: "In the last ten years, have you been the director of an entity, in the State or elsewhere, which has gone into liquidation, receivership or examinership and, in such circumstances, entered into any arrangements with its creditors which gave rise to a loss to the creditors either while you were a director or within one year of your ceasing to be a director?" and "Have you at any time, in the State or elsewhere, been declared bankrupt, or entered into any compromise with creditors related to bankruptcy or insolvency or are you currently the subject of bankruptcy proceedings? Are you aware of any such proceedings pending?", is in our view sufficient and goes far enough. We recommend that Section 5.1 and 5.2(a), (b) and (c) should be removed as they appear excessive and could be viewed as an unnecessary invasion of people's privacy.

In relation to Section 5.2(c) it is suggested that the wording in the current IQ, which states: "Have you at any time failed to satisfy a judgement debt under a Court Order made in the State or elsewhere within one year of the making of the Order?" is more appropriate and we request that the proposed wording be amended in this regard.

It is suggested that points 6 and 7 be moved to Section 2 as they are quite general in their nature.

Conclusion

In consideration of the points outlined above, it would be useful if following the initial consultation, the Central Bank would produce a second draft of their proposed regulations and code providing further clarity, particularly around controlled functions and the Central Bank's expectations in relation to tests of fitness and probity. This would give BNY Mellon the opportunity to contribute in a more informed and practical manner. BNY Mellon would also very much like to have sight of the proposed Individual Questionnaire form so we could begin to better appreciate the impact for our firms, for matters such as data collection, data management and data protection.

In conclusion, BNY Mellon welcomes in general the aims of this Consultation Paper and the Part 3 of Central Bank Reform Act 2011, however we believe that the final code and regulations should ensure that the focus remains on functions of significant influence and in that regard we would request that the Central Bank give due consideration to the concerns we have raised in this submission.

We would welcome the opportunity to meet with the Central Bank to discuss any of the issues raised in this submission.

Yours sincerely

Joe Duffy
BNY Mellon Country Executive for Ireland