

Fit and Proper Regime

Governance, Accounting and Auditing Policy Division,

Policy and Risk Directorate

PO Box 559

College Green

Dublin 2.

20 May 2011

Dear Sirs,

EBS welcomes the publication of the Central Bank's Consultation Paper on The Fit and Proper Regime (CP51). We believe the ultimate code, combined with other CBI codes on Corporate Governance and Minimum Competency Requirements will help ensure that the individuals operating at all levels in financial services organisations have the necessary skills, experience, integrity and judgement to perform their respective roles.

EBS has worked closely with the Irish Banking Federation in preparing a detailed submission in relation to all elements of this consultation paper and we are fully supportive of the IBF submission. In this letter we have confined our comments to those areas where we have some specific areas of feedback / concerns regarding implementation.

1) The designation of CFs and PCFs:

Q. Do you consider any positions should be removed/included to the list of CFs and PCFs?

In relation to Controlled Functions, the Central Bank Reform Act specifically gives the CBI the power to prescribe CFs (S20.1). The Act further sets out in the broadest possible terms the criteria that must be met before the CBI may prescribe a function as a CF. However, it falls short of prescribing CFs in the Act. The Act therefore explicitly gives the CBI the scope to determine those functions it considers to be controlled functions within certain broad parameters.

The CBI states in its consultation paper that it is important, for example, that managers/ supervisors of call centres that have responsibility for ensuring proper processes and information to customers are caught within the CF definition rather than all call centre staff. We would agree with the CBI that the definition of CFs should be aimed at those who influence/control or have responsibility for a function, rather than applying to all positions within a function.

However, the CF definition as currently drafted in the proposed statutory instrument does not reflect the above intention. Therefore, we would suggest that this definition be amended to reflect the CBI's intentions - those responsible for relevant functions are deemed to be CFs only.

Organisations spend considerable time and effort in the recruitment of staff at all levels and rigorous processes are followed including reference checking (character and professional) and qualification checking. We believe that extending the CF role to staff levels below those who exercise influence or control in the organisation does not significantly enhance this 'vetting' and would place an unnecessary administrative burden on organisations in managing this process.

Furthermore, regulations 4-10 of the proposed statutory instrument appear to further extend, rather than refine/limit, the positions caught within the CF definition. The interpretation / meaning of "performance of the function" is open to interpretation. It appears to re-inforce the definition of a CF as someone who carries out a function - for example, the Head of the Function and all those staff within the function who carry out / "perform" the work of that function (even those who only act in accordance with the firm's prescribed processes and/or the instructions and directions of the Function Management).

Finally, the Central Bank Reform Act 2010 [Section 20(4)] states that the "a controlled function remains a controlled function if ... (b) it is carried on at an office or location of another person, whether or not the other person is a regulated financial service provider..". This may imply that third party firms, which act either as an intermediary or outsourced service provider for the regulated firm, would be considered CFs of the regulated firm. This requirement needs to be clarified in terms of (i) whether firms have to identify their outsource providers and intermediaries as CFs and (ii) if so required, how the firm would be expected to apply the fitness and probity standards (i.e. at entity level or individual level). We believe that this would be

a particularly difficult scenario with which to comply given that we understand that the firm would have no right to conduct the due diligence required by the new standards on staff employed by a separate firm (which itself may or may not also be a regulated firm). We believe that this issue needs to be resolved prior to the introduction of the new regime and that given that this requirement has been set out in the Central Bank Reform Act 2010, it needs to be adequately addressed and clarified in any statutory instrument/ standards issued by the CBI.

In summary, therefore, we recommend that the CBI be prescriptive in what a CF is and in so doing, limit it to those who exercise control in the firm.

2) Level of due diligence required

Q. Should the CBI formally exempt specific categories of staff from the definition of a CF?

Yes, for the reasons outlined in 1 above. Specifically, CFs of relevant functions should be limited to those who have responsibility for the function, rather than those persons who perform the activities of the function in line with management's / firm's processes and directions.

Q. Should the CBI provide non-statutory guidance to firms on the appropriate levels or types of due diligence which firms should adopt?

PCF Due Diligence:

The due diligence required for PCFs would appear, based on the high-level information provided in the consultation paper, to be similar to that required under the current regime (e.g. IQ completion, validation, etc.). However, further information on the new "IQ" process/requirements for PCFs prior to its introduction will be necessary to ensure that firms can meet the CBI's expectations in terms of information and validation required, etc.

Additionally, further consultation with firms on this process is required, if, for example, the CBI intends to expand due diligence requests for individuals to include Garda/police clearance checks and individual credit checks (outside of the standard checks for judgements, etc.). Additional requirements warrant further consideration to ensure that firms can meet these requirements practically, within reasonable

timeframes and, importantly, are not prohibited under other legislation from completing such checks.

CF Due Diligence:

In terms of due diligence requirements for CFs, the current statutory instrument and standards require firms to apply the same standards to CFs as well as PCFs. Until the definition of a CF is clarified, and the standards are finalised, it is difficult to determine the level of due diligence that may be appropriate. However, in general terms, we would expect more due diligence would be undertaken for PCFs than for CFs given the difference in responsibility and seniority of the functions. We would suggest including this flexibility in the proposed statutory instrument/standards to reflect the Central Bank Reform Act 2010's requirement that firms satisfy themselves on "reasonable grounds" that persons comply with the standards.

CFs of Third Parties:

As previously stated above, we would query whether (i) the intention is to include third party firms, or the staff of third parties, (e.g. IT service providers, regulated intermediaries) within the CF scope of an institution and (ii) to apply these standards at entity/individual level.

We believe the application of this to third parties would be very challenging, in particular, if an employee of a third party was found to not meet fit and proper guidelines, the firm does not have any control over the third party to take action, in extremis, by removing or otherwise that employee from the firm and may be forced to change suppliers to fulfil requirements.

3) Comments on the Standards:

The standards have been drafted so as to require PCFs and CFs to comply with each standard outlined regardless of relevance to the individual or position. We would suggest that this should be re-drafted to account for the fact that these standards may not be relevant to all persons/ positions in all cases. Therefore, a degree of flexibility is required. Also, the standards appear to be more relevant to PCFs than CFs.

Within the specific “competent and capable” standards, consideration needs to be given to the application of these standards for new entrants (e.g. graduates) to financial services and/or persons moving from a non-CF role to a CF role, etc. For example, the standards appear to require a person to have “experience” and “qualifications”. As the person must meet the standards prior to their appointment, it is difficult to determine how a graduate may be able to demonstrate their competence through training or experience gained in employment. Again, if the scope of the CF definition is refined as discussed previously, then this may be less of an issue.

Nonetheless, we would suggest that a degree of flexibility be allowed for institutions and individuals to “reasonably” interpret the standards and satisfy themselves that the person is “fit” for the role. For example, a firm could consider qualifications or experience for some roles, whereas in other roles, both may be required; MCR requirements are applicable to some roles and not others, etc. This should be left to individual institutions to determine and institutions should have a written policy in place outlining their approach.

Part 2 - General Considerations:

Timeframe for Implementation:

A transitional period is required between the publication of the final regulations and standards and their effective date. It is not possible to wholly comply with the final regulations and standards if the publication and implementation dates are the same (i.e. the final regulations and standards are likely to differ from the draft consultation paper).

The consultation paper states that institutions are expected to have satisfied themselves by 1 September 2011 that CFs meet the standards and have agreed to abide by these standards. This includes requiring firms by 1 September 2011 to have identified and maintained a record of individuals who are carrying out CFs together with the due diligence undertaken. However the definition of CFs is still unclear.

The consultation paper states that institutions will not be required to submit their list of PCFs as at 1 September 2011 to the CBI until the end of the year. However, as PCFs also fall into the definition of CFs (by virtue of their significant influence), institutions may also effectively be required to complete their due diligence of PCFs by 1 September 2010.

A sufficient period is therefore required between the publication and effective dates of the final regulations and standards. Rolling out an implementation programme based on draft requirements, before the final requirements are known, may lead to “Day-1” issues, such as:

- (i) incorrect identification of CFs and PCFs
- (ii) incorrect assessment of whether CFs/PCFs do, or do not, meet the new fit and proper regime requirements (and the consequences of making an incorrect assessment for both the firm and the individual concerned).

We would therefore recommend that the CBI includes a sufficient transition period between the publication of the final regulations and standards and their effective implementation, to allow firms to rollout the required compliance programme and to undertake and conclude the required due diligence based on the final requirements.

External Recruitment

One final aspect of the implementation of the Code warrants consideration in our view. This is the future challenge of recruiting someone to a PCF role where they work in another financial services firm. No offer can be made without certainty of approval, and no application can be made for approval whilst the individual is still working for another firm. This poses a significant recruitment challenge. We propose therefore that institutions be permitted to submit shortlisted candidates for preliminary review and feedback from the Central Bank. This has also been raised in the Industry submission.

Summary

EBS warmly welcomes this consultation process and is supportive of the Fit and Proper regime. We believe that, together with other Codes and Guidance, anyone with any level of responsibility in financial services organisations will be required to have sufficient expertise and experience to fulfil their roles and that standards are operating effectively.

Should you have any queries in relation to our submission please do not hesitate to contact Neil McKeever, Head of Regulatory Compliance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Neil McKeever', written in a cursive style.

Neil McKeever

Head of Regulatory Compliance