

20 May 2011

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*Submitted by email to [fitandproper@centralbank.ie](mailto:fitandproper@centralbank.ie)*

## **HSBC IRELAND RESPONSE TO THE CONSULTATION PAPER 51: THE FIT AND PROPER REGIME IN PART 3 OF THE CENTRAL BANK REFORM ACT 2010 ("CP 51")**

Dear Sirs,

We refer to the Central Bank of Ireland's ("CBI") consultation paper on The Fit and Proper Regime in Part 3 of the Central Bank Reform Act 2010 and welcome the opportunity to participate in the public consultation process. This submission reflects our own opinions, based on our experience of the financial services market, and should not be considered as representing views held by any of our clients.

### **General**

With regard to the scope of the Draft Central Bank Reform Act 2010 (Sections 20 and 22) Regulations 2011 in Appendix 1 (Regulations") and the Draft Fitness And Probity Standards in Appendix 2 ("Standards") we would welcome the inclusion of the definition of a regulated financial service provider and whether or not this includes regulated investment funds structures.

We would also request that the Regulations explicitly state that branches in the State of a regulated financial service provider established in another EU country are not within the scope of the Regulations as has been indicated by the CBI.

We would request that the terms "customer" and "property" be clearly defined in the Regulations and that such definitions be aligned with other existing legislation, for example the Consumer Protection Code.

We would request that the Regulations clearly outline the appeals process for any decisions or actions taken by the CBI under the Regulations.

### **Proportionate Approach (Section 3)**

We note that the CBI will take a proportionate and risk based approach in the use of its power under the Regulations and would welcome further clarification regarding the approach the CBI will take in this regard. We would suggest that, in both the determination of any PCFs and Controlled Functions ("CF"), an approach similar to that adopted under the Corporate Governance Code for Credit Institutions and Insurance Undertakings, regarding major and non-major institutions and group subsidiaries, be incorporated into the Regulations.

The latter is particularly relevant where there are (a) group reporting lines outside the State or (b) certain functions centralised with other group entities. In both instances we would welcome the CBI's guidance as to how the Regulations are to be interpreted.

In relation to (a), a PCF or CF in an Irish subsidiary may have a reporting line to a group employee outside the State, notwithstanding that they are the person responsible for the identified controlled function in the financial service provider located in the State. We would request that the CBI clarify that it is not the intention that group employees outside the State be considered within the scope of the Regulations in these circumstances.

In relation to (b), within group structures it would not be unusual for certain control functions to be centralised with another group entity outside the State, for example internal audit, finance, and the inclusion of any such functions under the Regulations would be unwarranted. Again we would request that the CBI clarify that such centralised group functions are not within the scope of the Regulations.

#### Controlled Functions (Section 4 & Schedule 1 to the Regulations)

Schedule 1 of the Regulations details the criteria for determining what constitutes a CF. This includes the giving of advice and assistance to a customer and the dealing in or having control over property of a customer. This is very broad and, in some instances would include the majority of employees in a firm. We would suggest that it is more appropriate that the criteria for determining controlled functions be restricted to those exercising functions which have significant influence or have responsibility for a function.

#### Pre-Approval Controlled Functions (Section 4 & Schedule 2 to the Regulations)

We would be grateful if the CBI could advise of its proposed time frame for processing approvals for PCFs.

Section 23 of the Central Bank Reform Act 2010 requires financial service providers to obtain written approval from the CBI prior to the appointment of a person to a PCF. This may lead to difficulties in securing necessarily experienced and qualified personnel and we would suggest that the CBI consider an accelerated approval process for persons currently approved by them or other regulators for comparable positions.

Section 4 (Item 12, page 13) advises that the CBI will keep the positions designated as PCFs and CFs under review and may bring more functions within the scope of PCFs and revise the scope of functions falling within the definition of a CF. We would welcome clarity regarding the notification process for any changes in this regard and how much advance notification will be given. For example, will Schedules 1 and 2 of the Regulations be amended when and as any changes are made. It would also be beneficial if the CBI could advise if, when any additional PCFs are designated, whether or not the existing role holders will be required to undergo the CBI's approval process or if this will only apply to new persons appointed after the changes are made.

#### Money Laundering Reporting Officers (Section 4, Item 10, page 13)

In relation to PCFs in Section 4 there is a reference to Money Laundering Reporting Officers (MLRO). MLROs are not, however, included in the list of PCFs in Schedule 2 of the Regulations, except where this is carried out by the Head of Compliance (Head of Compliance with responsibility for Anti-Money Laundering and Counter Terrorist Financing Legislation (PCF-16)). We would welcome clarity regarding whether or not the MLRO function as a stand alone function is to be considered a PCF.

#### Standards of Fitness and Probity (Section 5 and Appendix 2)

Section 5 (Item 18, page 19) states that the competence necessary to perform a PCF or CF is normally tested with regard to the experience and qualifications of the individual. In

addition, Section 3.2(a) of the Standards (page 52) requires that a person must be able to demonstrate that they have relevant professional or other qualifications. The absence of formal qualifications would not necessarily prevent a person from carrying out a CF to the required standard if they have necessary experience and skills to carry out their role. While formal qualifications would be a consideration in determining their fitness, they should not be mandatory. We would suggest that it would be beneficial for the CBI to consult with the financial services industry bodies to determine the appropriate industry standards in terms of expertise and accreditation.

Section 5 (Item 20, page 19) states that the CBI will take the activities and size of an entity into consideration when considering the competence of a person proposed for appointment to a PCF or CF. Again, we would welcome clarity regarding the proportionate approach to be taken by the CBI.

#### Regulated financial services providers which have received State financial support (Section 5)

Section 5 (Item 27, page 26) states that the CBI intends to review the fitness and probity of persons in PCFs in financial services providers receiving or having received State financial support, who intend to continue performing those functions after 1 January 2012. We would request clarification that this only refers to institutions receiving or having received such support under the Credit Institutions (Financial Support) Act, 2008.

#### **Specific Questions raised by the CBI**

##### Section 4 Questions relating to PCFs and CFs

*"Do you consider any PCFs or CF should be removed from the list? If so, the reasons why?"*

- As referred to above we would suggest that the criteria for determining CFs be restricted to the head of the function.

*"Do you consider any other positions or functions should be added to the lists of CFs and PCFs? If so, the reasons why?"*

- No.

*"Should we formally exempt specific categories of staff from the definition of a CF?"*

- Yes. Currently the definition of CF is very broad, and could be deemed to cover all client facing staff or staff who have control of customer property. In a custodial services firm, for example, this could be a significant portion of the staff that are involved in cash and trade processing. We would suggest that the definition be limited to only include the manager or head of the appropriate function controlling that unit.

*"Should we provide non statutory guidance to firms on what we consider to be appropriate levels or types of due diligence which firms should carry out prior to appointing staff thereby allowing for firms to adopt varying levels of due diligence (for example providing reduced vetting for assistance roles with a lower risk profile, such as call centre staff)?"*

- Yes. Guidance should be provided. Also, if as per the above example, reduced vetting is appropriate for certain staff levels, the Regulations need to include recognition that firms have some discretion in applying the level or type of due diligence required for specific staff levels.
- In addition there is a reference to "appropriate due diligence" prior to the appointment of CFs (page 16). The Regulations should specify that firms are allowed to determine the appropriate level of due diligence to ensure that the proposed person is suitable for the position in their organisations.

- Also, clarity is required in terms of what due diligence is required to establish financial soundness (page 22). Is this obligation on the firm to establish or CBI or both? If it is the former would self-certification by the individual be acceptable?

## Section 8 Questions relating to the proposed Standards of Fitness and Probity

*“Do you consider that the Standards are comprehensive in setting the appropriate standards for fitness and probity of individuals working in the financial services industry in Ireland? If not, have you additional standards or considerations to add?”*

- Yes

*“Do you consider that any of the Standards are superfluous? If so, the reasons why?”*

- Section 1 (Item 2, page 2), specifies that the CBI may prohibit individuals from senior positions where there are "concerns" on their fitness and probity. While we expect that the CBI would require a higher standard of proof than just concerns, it would be useful if the Regulations specified how any decisions would be reached by the CBI. Section 1 also refers to the ability of the CBI to investigate, suspend, remove or prohibit individuals. We would also welcome clarification on the CBI's procedures in this regard and whether or not there would be any consultation with a firm prior to any action being taken.
- Section 3.2(a) of the Standards (page 52) requires that a person must be able to demonstrate that they have relevant professional or other qualifications. As outlined above, we would suggest that the requirement to have formal qualifications be amended.
- Under Section 4.1(b) (page 54) of the Standards, any complaint made against a person, made reasonably and in good faith, may be applicable in determining fitness to carry out a PCF of CF. We would suggest that this is only appropriate to an individual's fitness where the complaint has actually been upheld and that the Standards should be amended accordingly.
- Section 4.1(e) (page 55) of the Standards refers to directors of companies struck off the register of companies by the Registrar of Companies. We would suggest that this is only appropriate to an individual's fitness where a company is struck off involuntarily and that the Standards should be amended accordingly.
- Under Section 5.1(a) of the Standards, an inability to fulfil financial obligations may be applicable in determining fitness to carry out a PCF of CF. We would suggest that this is very broad and that more clarity regarding the nature of the financial obligations, including a threshold level and a relevant time period, say within the last five years, should be included in the Regulations.

*“Do you consider that the Standards specified are sufficiently clear to be adopted by firms for their internal fit and proper process?”*

- No. Clarity regarding proportionality and the level of due diligence is required.

*“We are considering the benefit of providing guidance on the statutory Standards. Such guidance would be provided on a non-statutory basis and would take into account responses received to this consultation. Comments are therefore also invited as to whether non-statutory guidance would be useful to firms. If so, what issues should the guidance cover to assist firms in carrying out their own fit and proper test for persons proposed or holding both PCFs and CFs?”*

- Yes. This would be useful. In addition to the comments above it would be beneficial to
  - provide clearer definition of CFs
  - indicate proportionality levels that can be applied
  - indicate the industry differences that can be applied

- in the event that a PCF or CF has been outsourced to another corporate entity (for example Company Secretary), how would due diligence for Fitness and Probity be carried out on that corporate entity
- advise to what degree self-certification by an individual can be relied on
- provide guidance regarding appropriate time limits for fitness and probity checks
- provide guidance regarding any reliance that can be placed on other regulatory approvals.

## Commencement Date

We note that the new Regulations and Standards will come into effect on 01 September 2011 and would be grateful if the CBI could advise if it intends to publish the final Regulations and Standards in advance of that date and if so, when, and also how soon they will be in a position to publish feedback on the consultation process and guidelines.

We would like to thank you for providing us the opportunity to comment on the proposals in CP 51 and we would be happy to expand on any of the foregoing comments should you wish to discuss any of them further.

Yours faithfully,



Stephen Young  
Chief Executive Officer  
HSBC Ireland