

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

**BY EMAIL [fitandproper@centralbank.ie](mailto:fitandproper@centralbank.ie)**

20 May 2011

Dear Sirs

## **FIT AND PROPER REGIME – SUBMISSION REGARDING CONSULTATION PAPER CP51**

### **A. INTRODUCTION**

1. Thank you for the opportunity to make a submission in respect of Consultation Paper CP 51, *Fit and Proper Regime in Part 3 of the CBI Reform Act 2010* (the "**Consultation Paper**"). The Consultation Paper includes draft Regulations and draft Fitness and Probity Standards (the "**Requirements**").
2. We support the proposed regulatory framework for a fit and proper regime for financial services providers, and agree that enhanced fitness and probity requirements should contribute to ensuring that individuals at senior management level have the necessary expertise and knowledge to understand and manage the risks associated with their business and the potential impact on the economy, as well as ensuring that the risk of other factors impairing these individual's ability to manage the risks are minimised.
3. The submissions contained in this letter reflect our views on amendments which could be made to enhance the effectiveness of the fitness and probity requirements for regulated financial services providers ("**FSPs**") as proposed in the Consultation Paper. These submissions reflect our own opinions, based on our experience of the market and discussions with market participants, and should not be considered as representing views held by any of our clients.
4. If you would like to discuss any aspect of our submission, please contact Joe Beashel in the first instance. We would be happy to meet with you to discuss this submission further, or to take part in any working group which may be convened to assist with finalising the new requirements.

DUBLIN

LONDON

NEW YORK

PALO ALTO

**B. SCOPE**

**NARROW THE SCOPE OF CONTROLLED FUNCTION ROLES**

5. With regard to the scope of the Requirements, we are concerned that, in its existing form, the net may be cast too wide to enable practical application by the FSPs. In particular, paragraph 3(a) of Schedule 1 of the draft regulations states in relation to a Controlled Function ("CF") that it is likely to involve the *"giving of advice or assistance to a customer"*. This could include a very large group of individuals, particularly in a retail firm. We note that Chapter 3 of the Central Bank Reform Act 2010 the ("**2010 Act**"), on which the requirements are based, is permissive in its wording and not prescriptive. Specifically, section 20(1) provides that *"The Bank may make regulations prescribing functions..."* and section 20(2) states that *"The Bank may prescribe a function..."* (our emphasis). The CBI thus has a discretion in determining the functions to which the Requirements are to apply.
6. We recommend that the proposed regulations should make clear that it is only roles with line management responsibility that will be covered by the fit and proper regime. In addition, we believe that only those managers who have responsibility for a distinct business function or unit, for example a manager of a call centre or a branch manager of a regulated entity with a retail branch network, should have to comply with the fitness and probity requirements, but not supervisors or staff below branch manager level. This is recognised by the Consultation Paper in Section 1 Part 2 of the Introduction, which outlines that the focus for fitness and probity improvement is on *"individuals from senior positions in the financial services industry"*.
7. We further recommend that the draft regulations clarify that *"assistance to customers"* does not include back office processing staff but, to the extent that it is applicable, it only applies to those responsible for managing client facing staff.
8. At paragraph 13 on page 13 of the Consultation, it is stated that the giving of advice or assistance is related to consumer protection. We therefore submit that, in the context of advice and assistance, the proposed regulations should further narrow the scope of CFs to roles dealing with "consumers" as defined in eg the CBI's Consumer Protection Code.
9. Should the scope not be narrowed as suggested above, the Requirements are likely to create a significant administrative burden on the FSPs concerned and will significantly impact the FSPs ability to recertify by December this year resulting in extra time being needed, not least because system enhancements will be needed in order to efficiently process the numbers and build an auditable process.

**CLARIFY APPLICATION OF THE REQUIREMENTS TO OUTSOURCED FUNCTIONS**

10. The Requirements are sufficiently wide to include outsourced functions, specifically draft Regulation 9(1) states that *"A person shall be taken to perform a function where the regulated financial service provider or a person or persons in the regulated service provider are, with respect to that function, accustomed to act in accordance with the directions or instruction of the person in question"*. We have concerns that the Requirements may be difficult or contractually impossible to apply to outsourced functions as the outsourcing FSP does not have the same control over employees of the outsource entity as it would have over its own employees (for example to investigate, employ and ultimately dismiss).
11. We would request that the CBI clarify the extent to which it intends the Requirements to apply to outsourced functions and what it expects of FSPs in this regard.

**CLARIFY APPLICATION OF THE REQUIREMENTS WHERE A FSP IS A SUBSIDIARY FORMING PART OF A LARGER INTERNATIONAL GROUP**

12. Many FSP's established in Ireland are subsidiaries of international groups with matrix reporting structures. A Pre-approval Controlled Function ("**PCF**") and CF as defined in the Requirements (see draft regulation 9(1) quoted above in paragraph 10) could apply to functions in the Irish subsidiary as well as equivalent functions in the parent entity. Consider,

for example, the case of a Head of Sales in Ireland reporting to the European Head of Sales who in turn reports to the global Head of Sales. In any hierarchical structure all but board members themselves will report to a line manager of some sort and on the basis of the current draft Requirements it is arguable that non-Irish resident managers could be either a PCF or CF for the purposes of the Requirements.

13. We do not believe it was intended that the Requirements would apply to non-Irish based senior management of Irish FSPs but we would request that the final Requirements address this issue as clearly as possible. We feel we should point out that if it is indeed intended to apply the Requirements up the corporate ladder, so to speak, this will have a very significant negative impact on Ireland as place to do business for international investors.

#### **CLARITY REQUIRED ON APPLICATION OF 'MUTUAL RECOGNITION'**

14. The Requirements do not cater recognition of equivalent requirements in other jurisdictions ie a person taking up a PCF or CF in Ireland where that person has been approved under a similar regime elsewhere. Thus, in our example in paragraph 12 above, the Head of Sales may be approved as fit and proper in the UK, but would still need to comply with all the Requirements in Ireland. It is our view that the same process should not have to be undertaken twice or at the very least that some weight and credibility can be attached to the fact that a person has been approved elsewhere.
15. It is our recommendation that the CBI specifically addresses the extent to which equivalent fitness and probity regimes are recognised. The Consultation Paper states at Page 8 that the CBI "will adopt a proportionate and risk based approach" and it is our view that acceptance of an equivalent regime is reasonable on a risk basis. In addition, without this clarification it is likely that impacted FSP's will need to obtain legal advice on this matter which will have the effect of raising the cost of compliance in these firms.

#### **CLARIFY APPLICATION OF THE REQUIREMENTS TO PASSPORTED FIRMS**

16. It is our understanding that it is not intended to apply the Requirements to FSPs that have passported from another EU Member State but, in the interests of providing maximum clarification for international investors in Ireland, we suggest it would be helpful if the Regulations made this clear.

#### **CLARIFY APPLICATION OF REQUIREMENTS TO AGENTS OF A PAYMENT SERVICES INSTITUTION**

17. Under Regulation 28 of S.I. No. 383 of 2009 European Communities (Payment Services) Regulations 2009 (the "**PSD Regulations**") an authorised Payment Services Institution ("**PSI**") may appoint an agent. A separate authorisation for the agent is not required, although the PSI is required to apply to the Central Bank of Ireland ("**CBI**") for approval of the agent and a process is in place in this regard. In compliance with regulation 28 of the PSD Regulations evidence that the agent is "fit and proper" must be provided. The application to the CBI for approval for the appointment of an agent incorporates various questions and a form related to compliance with the CBI's fit and proper requirements.
18. We submit that it would be inappropriate to apply the Requirements to an agent of a PSI. A suitably adapted process is needed in order to meet the requirements of regulation 28 of the PSD Regulations and we would request that the CBI consider clarifying that this specific obligation under the PSD Regulations will be dealt with separately from the Requirements under the new/enhanced fit and proper regime. We think this will be helpful, not only for current PSIs, but also for potential future providers who may be considering establishing a business in Ireland.

#### **CONFIRMATION THAT FUNDS ARE OUT OF SCOPE**

19. We submit that Collective Investment Schemes ("**CIS**") do not fall within the definition of a "regulated financial service provider" and would thus fall outside the scope of the 2010 Act.

We would submit that a CIS is a financial product rather than a provider of a financial service, or financial service, and that the various applicable CIS legislation and regulations already deal with the approval of board members of a corporate type CIS. We would note that the CBI agreed with a submission made by Matheson Ormsby Prentice in the context of SI No 853 of 2004, the Distance Marketing Directive Regulations, which apply to "...contracts for the supply of a financial service". We outlined our view that a CIS was a product and not itself a financial service and therefore the disclosures provided for in those regulations, while applicable to distributors of CIS, did not apply to CIS themselves. We would submit that the same analysis applies and that consequently the provisions of the 2010 Act do not apply to CIS.

20. For clarity, it is our view that the 2010 Act does apply to management companies providing services to CIS. In this regard we would recommend as follows:
- (a) If the CB agrees with this view it would be helpful to have this clarified.
  - (a) If the CBI does not agree with this view it would also be helpful to expressly clarify how the Requirements might apply in the context of the delegation of key functions by CIS to service providers and delegates located in both Ireland and outside Ireland, and that the CBI confirm that the Requirements, in the context of funds, will only apply to PCF-38 to PCF-40 as set out in the Consultation Paper.

### **C. GUIDANCE FROM THE CBI**

#### **APPEALS PROCESS**

21. Considering that the impact of decisions to remove a person from a controlled function or refuse an appointment to a controlled function will impact individuals (and for the benefit of the FSPs) we believe that the applicable appeals mechanism be clearly and simply communicated in a non-statutory guidance note to accompany the final Requirements. At present one needs a legal knowledge to get to Part VIIA of the CBA 1942.
22. Although not directly related to the Consultation Paper we have concerns regarding the right of appeal against decisions to remove from, or refuse appointment to, controlled functions. This concern relates primarily to the legislation, but we believe the anomalies outlined below should be resolved as part of the process of developing and enhancing the fitness and probity regime. We believe that not resolving this issue could lead to decisions by the CBI, in terms of the sections specified below, being open to challenge, thus potentially undermining the new/enhanced fitness and probity regime.
23. Sections 23(5) and (6) of the 2010 Act state as follows:
- "(5) The Bank may refuse to approve the appointment of a person for the purposes of subsection (1) where—*
- (a) the Bank is of the opinion that the person is not of such fitness and probity as is appropriate to perform the function for which he or she is proposed to be appointed, or*
  - (b) the Bank is unable to decide, on the basis of the information available to it, whether the person is of such fitness and probity."*
- (6) Without prejudice to the generality of subsection (5), the Bank may refuse to approve the appointment of a person under subsection (1) if—*
- (a) the person, or an officer or employee of the regulated financial service provider concerned, has failed to comply with a request under subsection (2), or*
  - (b) any of the grounds set out in paragraphs (a) to (g) of section 25 (3) apply.*

According to section 23(7) of the 2010 Act, "A refusal pursuant to subsection (5) is an appealable decision..." but this right of appeal does not extend to a refusal on the basis of section 23(6).

24. Section 23(6) refers to the grounds in Section 25(3)(a) to (g) and these appear similar to Section 23(5), most notably (b) which states that "the person does not satisfy an applicable standard of fitness and probity in a code issued pursuant to section 50". This leaves open the possibility that a right to appeal can effectively be excluded by basing the refusal on section 23(6). This situation seems anomalous and we submit that this situation should be remedied by extending the right of appeal to all refusals, particularly given the potentially severe repercussions to the individual who is refused an appointment.
25. In addition, Chapter 3 of the 2010 Act providing for the suspension of persons performing controlled function for reasons of fitness and probity does not appear to include a right of appeal. Once again, we submit that the right of appeal should be extended to cover decisions made by the CBI in terms of this Chapter 3.
26. An appealable decision is defined in the CBA 1942 as "a decision of the Bank that is declared by a provision of this Act, or of a designated enactment or designated statutory instrument, to be an appealable decision for the purposes of this Part". We therefore recommend that the CBI remedy the above anomalies by means of the proposed regulations.

#### CLARIFICATION REQUIRED IN RELATION TO DUE DILIGENCE

27. Much greater clarity is required from the CBI regarding the level of due diligence which will be expected in relation to each of the criteria set out in the fitness and probity standards of the draft Code.
28. For example, Paragraph 5 of the Code, dealing with financial soundness, requires persons to demonstrate that their role in a CF is not adversely affected to a material degree by financial matters, credit issues or bankruptcy issues. Does this necessitate the regulated entity requiring each of its employees to produce a full statement of their financial affairs outlining all assets and liabilities, and would this statement of affairs need to be independently audited by a third party? Would the institution concerned have to conduct judgment or bankruptcy searches against every individual in a CF, both in Ireland and any jurisdiction in which the employee worked or lived previously? We submit that detailed guidance is necessary in order to answer these questions and clarify the due diligence required to establish financial soundness.
29. Likewise in relation to the requirement that the person is capable of performing the relevant CF on a continual basis having regard to his/her physical and mental health, we suggest that the CBI give regulated entities guidance as to the level of information sought from relevant persons as to their physical and mental health and in what circumstances this information should be sought.
30. Is a regulated entity required to request all Controlled Function holders to undertake a medical and psychiatric examination or can they take it at face value that the person is in full health? The CBI should clarify what happens when a person suffers ill health and is either absent from work on either an intermittent or continual basis. At what point does the CBI expect the regulated entity to remove that person from any responsibility for a Controlled Function? In considering these issues, we recommend that the CBI consider the impact with regard to potential disability discrimination under the Employment Equality Acts 1998 and 2007?
31. In Section 7 of the Consultation Paper (processing of applications), paragraph 39, there is a reference to "*appropriate Garda clearance (where deemed necessary)*". For the sake of clarity, we would recommend that the circumstances in which Garda clearance is deemed necessary be specified in the guidance.

**RELEVANCE OF INFORMATION IN RESPECT OF FINANCIAL SOUNDNESS**

32. Since the beginning of the downturn in Ireland, the recession has had a severe impact on the ability of people to repay their debts. The Government has encouraged institutions to enter into schemes of arrangement with debtors and various regulatory requirements have been introduced to facilitate this approach, such as the Mortgage Arrears Code. Terminology in the Consultation Paper such as "honoured all debts" in Paragraph 22 are an indication that a scheme of arrangement entered into by an individual would be a disclosable and relevant factor in determining financial soundness as, technically, an arrangement with a creditor often follows a situation where debts have not been honoured. Paragraph 5.2(b) of the draft code for fitness and probity standards at Appendix 2 of the Consultation Paper specifically refers to schemes of arrangement.
33. In this context, we would suggest that where individuals have entered into such a scheme of arrangement with creditors, that this in itself not be regarded as a relevant factor in determining financial soundness, unless the individual is not meeting the re-arranged repayments. In this regard, we would recommend that the Requirements exclude such arrangements where the individual is adhering to the terms of the arrangement.
34. Paragraph 23 of the Consultation Paper deals with individuals associated with entities that have failed to meet their financial obligations and in this regard states that "honesty and integrity may be in doubt". Once again, in the above context, with numerous businesses being declared insolvent, together with the fact that business ventures fail for a number of reasons that are not related to honesty or integrity, we propose that the Requirements clarify very explicitly that there is no automatic exclusion of the relevant individual, or automatic presumption that the individual is financially unsound. The term "may" is too vague to provide this assurance.
35. Paragraph 23 of the Consultation Paper states that the CBI should be made aware of "any such instances even where they are not likely to cause an adverse decision". We are concerned that individuals are being requested to provide information that is not likely to be relevant as it is difficult to draw a line and confirm that all necessary information has been provided. In keeping with the principles in the Data Protection Act 1988 that personal data should be "adequate, relevant and not excessive", we would suggest that the test for what information an individual is required to provide should be relevance based.
36. Paragraph 22 states that "it may not necessarily follow that one incident in a person's past (for instance, where a person did experience difficulty, but subsequently honoured all debts) would rule them out". This seems to imply that more than "one" would automatically rule the person out. Similarly, Paragraph 23 speaks of "an instance" not ruling the person out, the possible inference being that instances (plural) would rule the person out. We propose that it be made clear that there is no automatic exclusion, regardless of the number of instances.
37. We recommend that any guidance provided by the CBI to clarify the due diligence required in respect of financial soundness, as suggested at paragraph 28 above, include specific clarification regarding the points made in paragraphs 31 to 35 above.

**DUE DILIGENCE REQUIREMENTS – COMPLAINTS, INVESTIGATIONS, CHARGES, ALLEGATIONS ETC.**

38. In paragraph 4.1 of the draft code for fitness and probity standards at Appendix 2 of the Consultation Paper, various matters are detailed as relevant to determining whether a person's conduct is honest, ethical and with integrity. In paragraphs 4.1(a), (b), (c) and (g), we submit that where, following an investigation, a person is cleared of the complaint, investigation, charge, allegation etc that such complaint, investigation, charge, allegation etc not be regarded as relevant for the purposes of the fit and proper regime. To this end we recommend that paragraph 4.1 be amended to explicitly state that where a person is cleared of any complaint, investigation, charge, allegation etc, this does not need to be disclosed. We would suggest that it is unfair to effectively "retry" a person in matters where they have been

investigated and found to be innocent and that doing this could be regarded as calling into question the competence of the relevant body that found the person to be innocent.

39. In addition, specific clarity is required regarding paragraph 4.1(g) of the draft code. This requires notification of any proceedings of a disciplinary nature whereby the CBI will consider if the complaint adversely affects the person's ability to carry out a relevant function and, the CBI will take into consideration the outcome of concluded proceedings or investigations. In the case of disciplinary sanctions in the workplace, warnings on an employee's file lapse after period of time. This is common practice and Courts and employment tribunals do not look kindly to old and out-of-date disciplinary sanctions being reactivated in new or fresh cases. There is a point after which such matters may no longer be of relevance. Seeking to dredge up all disciplinary and investigatory matters should be reviewed for relevance and fairness after a certain time period. As mentioned above, this could also be particularly unfair in situations where the individual has already been exonerated of any wrongdoing.

#### **CLARIFICATION ON HANDLING THE CURRENT PRACTICE OF EMPLOYERS' REFERENCES AND GARDA CLEARANCE**

40. As mentioned at paragraph 44 below, most external candidates will be loath to request references from their current employers before they have a written binding job offer. Even where this is not a stumbling block for a candidate, getting a meaningful reference from many employers may be difficult.
41. The practice has increased among many employers not to give references which comment on the employee's competence, honesty and integrity for fear of giving rise to legal liability. The prospective employer can often only obtain a bland statement of position held, nature of duties and dates of employment. The candidate and prospective employer should not be penalised for this.
42. We recommend that the CBI clarify in any guidance what procedure it will follow in such circumstances. For example, will the CBI seek to obtain a full reference from the current employer directly? What if that employer does not know that the candidate is about to leave?
43. Likewise in relation to Pre-approval Controlled Functions which require Garda clearance, will the CBI obtain the clearance as it has done to date?

#### **ENSURE RECRUITMENT OF QUALITY EXTERNAL CANDIDATES IS NOT ADVERSELY IMPACTED**

44. We can foresee some practical difficulties in recruiting external candidates to key roles. Potentially suitable candidates may be extremely reluctant to apply for PCFs in another organisation if the approval process is likely to take a significant period of time to achieve. Suitable candidates from abroad who may have other job opportunities may not wish to wait a protracted period of time waiting for CBI approval.
45. One of the criteria that needs to be satisfied is obtaining a reference from the candidate's current employer. Many candidates will be reluctant to disclose to their current employer that they have applied for a new job prior to having a binding contractual commitment from the new employer to employ them. Section 23(1) of the 2010 Act, prohibits any contractual commitments being entered into without CBI approval of the candidate. This concern may be alleviated somewhat by the proposal in Regulation 11 that the CBI will agree in writing to a person taking up a role in a temporary capacity while approval is being sought. However, how that will work with the statutory prohibition against the regulated entity even making an offer of employment will need to be clarified by the CBI.

**CLARIFY APPLICATION OF THE REQUIREMENTS TO A FIRST-TIME PROMOTION OR LATERAL HIRE INTO A CONTROLLED FUNCTION**

46. The emphasis on experience in the same or similar roles categorised as CFs could seriously inhibit the movement of employees within the regulated entity, of talented individuals from outside of the financial services industry, or individuals from outside of the jurisdiction, thereby preventing fresh blood and new talent coming into the financial services sector. The effect of these requirements could be to significantly decrease the talent pool for regulated entities to recruit from.
47. Appendix 2 of the Draft Regulations outlines the Code for Fitness and Probity. Paragraph 3.2(d) requires the candidates to have *"a sound knowledge of the business of the regulated financial services provider as a whole, and the specific responsibilities that are to be undertaken"*. Paragraph 3.2(e) requires the holder of a Controlled Function to have a *"clear and comprehensive understanding of the regulatory and legal environment appropriate to the relevant function"*. For a candidate outside of the industry or jurisdiction to demonstrate this could be very difficult.
48. An example would best illustrate the difficulties which could be faced by a regulated entity and a candidate from outside the jurisdiction: Mr Kelly is currently working as Head of Risk in a top global bank in New York. Mr Kelly, who has been based in New York for over eight years, has an excellent track-record in this role. For family reasons, Mr Kelly wishes to return to Ireland. However, he has not divulged this to his current employer and does not wish to until he has a binding offer of employment. How does the pre-approval process work in Mr Kelly's case? Mr Kelly clearly has excellent credentials but how will the regulated entity and Mr Kelly demonstrate that he has knowledge of the regulatory and legal environment in Ireland? How does the regulated entity obtain current references for Mr Kelly? How will the CBI approve him on the basis of the current Requirements?
49. If these requirements are to remain, then we recommend that the CBI include specific provisions where such requirements can be met during a probation period such that persons appointed to PCFs are subject to a probation period, during which both the regulated entity and the CBI would have to be satisfied with the competence and capability of the new recruit. This would only apply to persons appointed from outside of the industry or jurisdiction who could not reasonably comply with specific requirements at appointment. Equally, this should apply to more junior staff otherwise suitable for internal promotion within the regulated entity.

**CLARIFICATION ON THE TEMPORARY APPOINTMENT TO A PRE-APPROVAL CONTROLLED FUNCTION**

50. Regulation 11 of the draft Regulations states that a regulated entity can temporarily appoint a person to a PCF by previous written consent of the CBI. We propose that the CBI should particularise the circumstances in which it will be prepared to allow a temporary appointment to a PCF role prior to final approval/authorisation.

**COMMITMENT TO PRE-APPROVAL TIMELINES BY THE CBI**

51. We recommend that the CBI should be in a position to commit to specific timelines for approval (or rejection) of an application once a fully completed application has been submitted.
52. It is also recommended that in the event that the CBI goes over this timeline in the pre-approval process, and there is no fault on the part of the regulated entity or the candidate, the CBI will issue a temporary approval until such time as it has completed the process.

**CLARIFY TO WHAT EXTENT THE REQUIREMENTS FOR INFORMATION ARE COMPATIBLE WITH THE DATA PROTECTION PRINCIPLES**

53. Some of the information required under the draft Code appears to conflict with the Data Protection principles and particularly in relation to ensuring that information obtained and



processed is “adequate, relevant and not excessive” and that data would only be used in ways compatible for the purpose for which it was given initially.

54. We would recommend that the CBI work with the Office of the Data Protection Commissioner in relation to issuing guidance on the gathering and processing of what is both “non-sensitive personal data” and “sensitive personal data” in attempting to comply with the fit and proper standards.

#### **CLARIFY HOW EMPLOYERS SHOULD ACT IN THE EVENT OF THE CBI'S SANCTION OF AN EMPLOYEE IN A CONTROLLED FUNCTION**

55. The CBI itself can sanction an employee in a regulated entity. This may involve a suspension notice or a prohibition notice. In the case of a suspension notice under Section 27(4) and a prohibition notice under Section 43(11) of the 2010 Act, it simply states that an employee’s contractual rights are not altered and the employer must continue to pay the employee’s remuneration. This is at odds with Section 6(4)(d) of the Unfair Dismissals Act 1977 which states that “ . . . the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal if it results wholly or mainly from . . . the employee being unable to work or continue to work in a position which he held without contravention (by him or by his employer) of a duty or restriction imposed by or under any statute or instrument made under statute”. It would appear from this that an employer can lawfully dismiss an employee who fails the fit and proper test. This will have serious implications for employees in Controlled Functions who have carried out their role without any difficulty, but who may not be able to meet the requirements of the fit and proper code.

#### **APPLICATION PROCESS**

56. Section 7 of the Consultation Paper outlines an automated applications process. We support automating the process as a means to improve efficiency and request that detailed practical guidelines be included in the proposed guidance to be produced by the CBI.

#### **D. FORMAT**

#### **MORE FREQUENT AND CLEAR LINKS REQUIRED TO LEGISLATION**

57. We would recommend including additional specific references to legislation in the draft code for fitness and probity standards at Appendix 2 of the Consultation Paper. As an example, in paragraph 1.2 (Legal basis) at (i) and (ii), it would be useful to refer to the sections in the 2010 Act on which these powers are based. The intention of this suggestion is so that the reader is more explicitly drawn to the 2010 Act as this is obviously the legislation upon which the Requirements have been based.
58. Similarly paragraph 29 at page 26 of the Consultation Paper (investigation may be conducted by the Head of Regulation) should refer to the section in the 2010 Act which deals with this process so that the reader will understand where to look for the details of this process. It would be helpful if non-statutory guidance notes also outlined this process for ease of reference of FSPs.

#### **CLARITY REQUIRED IN RESPECT OF TRANSITIONAL ARRANGEMENTS**

59. Section 6 of the Consultation Paper regarding transitional arrangements, at paragraph 34 provides that firms will be required to submit a list of individuals carrying out PCFs by 31 December 2011. The wording does not clearly state that firms will be required to actually check the fitness and probity of existing PCFs and CFs and obtain the signed declaration from these PCFs and CFs as required by the 2010 Act. Although we believe the intention of the CBI is reasonably clear, we recommend that this intention be clearly reflected in the wording.

## CONSISTENCY OF WORDING

60. In paragraph 4.1 of the draft code for fitness and probity standards at Appendix 2 of the Consultation Paper the term "*any jurisdiction*" is primarily used. However, in 4.1(j) the term "*in the State or elsewhere*" is used. We would recommend that these terms be aligned to ensure consistency and avoid any inference that a different meaning was intended. We further suggest that this is also applied to paragraph 4.1(e) and (f) as there does not appear to be any reason why these particular points should be confined to Ireland only.

## E. SPECIFIC QUESTIONS

### QUESTIONS RELATING TO PROPOSED PCFS AND CFS (PAGES 15 TO 16 OF THE CONSULTATION PAPER)

61. **Question:** "*Do you consider any PCFs or CFs should be removed from the list? If so, the reasons why?*"

**Answer:** No PCFs or CFs should be removed from the list.

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

**Answer:** No further positions should be added to the list.

63. **Question:** "*... submissions on the most appropriate guidance to firms in relation to the level of due diligence which firms should carry out prior to appointing individuals to CF positions. For example, should we formally exempt specific categories of staff from the definition of a CF; or 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)?*"

**Answer:** Please refer above, and in particular to paragraphs 5 to 9, 27 to 31 and 32 to 39.

### QUESTIONS RELATING TO THE PROPOSED STANDARDS OF FITNESS AND PROBITY (PAGE 31 OF THE CONSULTATION PAPER)

64. **Question:** "*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?*"

**Answer:** Standards are comprehensive.

65. **Question:** "*Do you consider that any of the Standards are superfluous? If so, the reasons why?*"

**Answer:** Our view is that some of the standards should be curtailed. Please refer above, and in particular to paragraphs 32 to 37 and 38 to 39.

66. **Question:** "*Do you consider that the Standards specified are sufficiently clear to be adopted by firms for their internal fit and proper process?*"

**Answer:** There will be significant challenges in adopting the Standards in the absence of detailed guidance on practical application.

67. **Question:** *"Comments ... 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?"*

**Answer:** We believe guidance is necessary. Please refer above to Section C regarding a number of aspects of the requirements that would benefit from guidance.

We hope that the above submissions are of assistance to the Financial Regulator in its review of the Requirements. We would be more than happy to discuss any aspect of our submission, or any matters arising from the Requirements which we have not addressed, with you at your convenience.

Yours faithfully

*Matheson Ormsby Prentice*

**MATHESON ORMSBY PRENTICE**