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20 May 2011

Dear Sir / Madam

UBG welcomes the opportunity to respond to your Consultation Paper 51 on the Fit and Proper Regime ("CP51").

In reviewing the proposals, we note many similarities with the existing Financial Services Authority regime in the UK with which we are familiar, and we hope that our experience of this will help in our submission.

Our response covers in the first part general issues / concerns which we would like to raise in respect of your proposals, and in the second part specific answers are provided to the questions you have raised.

We trust that this submission will help you in formalising your final requirements, and we are available to meet and discuss any aspects of our submission that you may find unclear or wish to further deliberate.

At a high level, our principle concerns are as follows:

- we believe the scope as currently drafted is too wide (in respect of Controlled Functions generally, rather than Pre-Approved Controlled Functions), and could capture an unnecessarily vast population of front-line customer facing processors. A more selected approach would be preferred, focusing on roles which are sufficiently senior to influence policy, rules and decisions, and which have responsibility for the leadership of teams and functions
- the timeline proposed will be very challenging if the scope remains as drafted, and it may not be possible to meet the deadlines proposed.

If you have any queries in respect of our submission, we would be keen to facilitate discussions of such queries in detail. Please contact Barry Rojack in this regard on 608 4055 if you so wish.

Kind regards

Maureen Stanley
Head of Regulatory and Operational Risk
Ulster Bank Group

Ulster Bank Group

Submission to the Central Bank of Ireland

on consultation paper 51 (CP51):

The Fit and Proper Regime

in Part 3 of the

Central Bank Reform Act 2010

PART 1 GENERAL COMMENTS

(a) high level outline of work involved in implementation, and consequential concerns regarding the timelines proposed

At a high level, it would appear that your expectations of financial services providers under the current draft are to establish a register on which all existing persons performing controlled functions ("CFs") and performing pre-approved controlled functions ("PCFs") prior to 1 September 2011 will be identified, and on / with which evidence of compliance with fitness and probity standards will be recorded. There also appears to be an expectation that each individual CF (including PCFs) will need to provide specific agreement to the firm they work for that they agree to abide by the new standards of fitness and probity.

A semi-transitional period for written verification by the Board of satisfaction of PCFs up to 31 December 2011 has been provided, however no transitional period for internally evaluating and verifying CFs (including procuring individual agreements from CFs / PCFs to abide by the relevant standards) appears to be provided. Through interim discussions through the Irish Banking Federation, it appears that this transitional period is also intended to extend to the 31 December 2011. If correct, this extension of time is welcome, however we still believe 3 months from publication of final standards may prove too challenging a timeline for completion of all this work, particularly if the currently proposed scope remains unchanged.

In addition, it is noted that there is a possibility non-statutory guidance on fitness and probity standards will also be issued. In order to avoid unnecessary duplication of work, and also to avoid a situation where assessments need to repeated, it would be logical and proper for institutions to have regard to such guidance when making any assessment of fitness and probity.

We understand that any new CFs or PCFs (including internal transfer from one CF / PCF to another) immediately after the commencement date should follow the new process and be subject to the new standards. However, as this non-statutory guidance has not yet been issued, and as far as we can ascertain will not be issued prior to the commencement date, it is not practical to immediately commence complete fit and proper assessments for our legacy staff and officers.

Consequently, we would ask that you confirm as a matter of urgency whether you intend to proceed with non-statutory guidance. If you plan to issue non-statutory guidance, the transitional period for assessing legacy CFs and PCFs will be reconsidered, as a complete assessment cannot take place without sight of the guidance.

In any event, whether you intend to issue guidance or not, we believe it makes practical sense for an appropriate transitional period to be provided for assessment of legacy CFs (as well as PCFs) once there is full and final clarity on the nature and scope of functions captured by the new requirements, and the relevant standards of fitness and probity which apply. At present we only have draft proposals on scope and standards, and as such it is premature to conduct significant assessment work on a large body of staff who may or may not ultimately be covered, and against whom assessments may or may not ultimately be satisfactory.

The length of any transitional period required for assessing existing CFs will be particularly dependent on the breath of scope which is finally decided on. As currently drafted, several thousand staff members may fall under the scope of CF.

If the scope remains as currently drafted, our experience on the Minimum Competency Requirements, and subsequent reviews and discussion with your offices, would suggest a period of 9 to 12 months may be appropriate.

(b) Overlap with existing fitness and probity regime (and mapping to PCFs / CFs)

It is not stated in the CP what interim process will apply to approvals for appointments under the existing regime which are still outstanding on 1 September 2011, nor whether the current regime will terminate on commencement of the new regime.

In addition, it is not clear whether any mapping exercise will be conducted to match existing approved persons against new CFs / PCFs; whether any such exercise should be conducted purely 'in house' by a regulated entity or with the co-operation of, and in consultation with, the firm's relevant supervisory team in the CBI; and what the status is of persons who are already approved under the current regime but do not appear to map into a PCF under the new regime (i.e. will the regulator formally notify these persons that they are no longer "approved", or will their approval lapse under the new regime as a matter of course?).

We seek clarity as to what approach regulated entities should take in respect of appointments which are proposed between now and the commencement of the new requirements, and also what approach is expect in respect of mapping existing approved persons to CFs and PCFs, and how, if at all, you intend to communicate with persons who no longer would be approved under the new regime.

(c) verification / assessment of legacy CFs and PCFs

(i) appropriate standards for retrospective review of commercial judgment (particularly for PCFs)

We are conscious that you are keen to ensure reviews of legacy PCFs in particular by financial institutions should include consideration of the competence and skills demonstrated by such persons where they conducted their functions in the lead up to the financial crisis. In this regard, we note that you will review the fitness and probity of PCFs in regulated financial services providers which have received financial support from the State (we are excluded from this category), and in doing so you will "*have particular regard to the competence and skills demonstrated by those persons and to the extent, if any, to which the performance of those functions may have contributed to the necessity for such State financial support*".

In addition, in his speech[1] to the Galway Chamber, GMIT on the 5th of May, the Head of Financial Regulation stated "*In his report Nyberg pointed out that as controls at covered banks gradually weakened to allow increased growth, there was a collegiate and consensual style at board level with very little serious challenge or debate. Further, he concluded that non-executive directors did not appear to have the banking knowledge and expertise necessary to assess the lending and funding risks inherent in their bank business models, and, though formally independent, were in practice highly reliant on the knowledge, openness and ability of bank*

[1] http://www.financialregulator.ie/press-area/speeches/Pages/AddressbyMatthewElderfieldtoGalwayChamberGMIT05May2011.aspx

management. We are addressing that by reforms to corporate governance standards designed to broaden the gene pool of Irish corporate life and with tough new fitness and probity standards and a review of incumbent bank directors."

In order for banks such as ourselves (who fall outside of the CBI-specific review) to ensure we are adopting a commensurate approach to the retrospective review of the competence and skills demonstrated by legacy PCFs (and also to help ensure we are adopting an approach which is likely to meets your expectations on subsequent review), it would be useful if the CBI provided some indication (possibly by way of non-statutory guidance, if appropriate) specifically on the expected standards / approach you intend to adopt on reviewing commercial judgment exercised in the lead up to the financial crisis.

In the absence of clear guidance thusfar being issued in this regard, we believe each individual PCF should be considered on an individual basis. In establishing whether any ongoing fitness and probity concerns arise in respect of this legacy PCF population, the reasoning behind any commercial judgments to which that PCF is connected (either significant individual cases or broad policy decisions) should be considered in the context of generally understood assumptions in respect of the market at that time.

(ii) appropriate approach to assessment of legacy customer-facing CFs

Please see comments in (e) (iii) below proposing a possible risk-based approach to which CFs may not require assessment against the new standards.

(iii) reliance on 3rd party data for verification / assessment of CFs/PCFs

For the large number of existing CFs and PCFs as at 1 September 2011, it is not clear what extent of assessment is expected of regulated entities, in particular in respect of any necessary (if at all) 3rd party verification of information provided by the CF or PCF.

For example, while it clear that a level of Garda vetting is expected for some (if not all) new CF and PCF appointments, it is not clear whether you expect, as part of the verification exercise for existing CFs and PCFs, regulated entities to conduct Garda vetting of all existing staff.

If such vetting were required, this would raise a number of issues:

1. the Gardaí may be unwilling / unprepared to co-operate in such a massive cross-industry exercise covering thousands of people within a very short defined period;
2. the timescale for obtaining responses to such vetting is outside the control of regulated entities, and as such may be impossible to comply with by 1 September, or, if applicable, by the end of any relevant transitional period;

Similar issues could arise if regulated entities were expected to conduct 3rd party checks to verify other matters arising under the standards (such as financial soundness or prior involvement in companies).

It would seem that these issues would be significantly less onerous and more practical to comply with if, for legacy CFs and PCFs, self-certification of factual information by the CF or PCF concerned were acceptable.

We would therefore ask you to either confirm that self-certification by legacy PCFs and CFs at 1 September 2011 is appropriate, and secondary 3rd party verification is not required, or we would ask you to bear in mind the issues outlined above in determining an appropriate transitional period (in this case we would also ask you to provide for a contingency process which will apply in the event of non-co-operation or lack of response from the 3rd party concerned).

(d) regulatory concerns regarding CFs

While an element of control is built into the proposed process in stopping PCFs from being approved where the regulator has knowledge of prior concerns at other regulated entities, this control is not in place for CFs.

As a result, if a CF leaves an entity on the instruction of the CBI, and / or if a CF has been issued with a prohibition order from the CBI, future prospective employers will not necessarily be on notice of these concerns unless the employee self-declares their prior record.

As no pre-approval process is proposed for CFs, we would ask, in order to avoid this happening, that you publish personal details of persons conducting CFs who have failed to comply with any aspect of your fitness and probity regime, and what enforcement action (if any) you have taken against that person.

(e) CBI power to determine scope of controlled functions; and appropriate scope for the fit and proper regime

(i) General discretion to choose relevant controlled functions

We note that sections 20 and 22 of the Central Bank Reform Act, 2010 ("the Act") give complete autonomy to the CBI to prescribe what functions shall be controlled functions and pre-approved control functions, save that any such prescription will only be permissible if the functions concerned are covered by one or more of the various functions listed in section 20(2), and that the functions outlined in section 22(4) are deemed PCFs in the circumstances described therein.

We believe that the discretion on selection of CFs and PCFs is such that you are not automatically required to deem all functions listed in section 20(2) as CFs or PCFs. Indeed, it could be argued that the Act envisages specific roles to be recognised which are sufficiently senior, and / or carry significant risk of fitness or probity concerns, rather than just applying the blanket circumstances in section 20(2).

In identifying such roles, you may wish to identify persons who have authority to bind the company or have discretion over a certain monetary amount. In this way processors and persons who are constrained by policy and procedure would not be captured by the regime, given the relative low risks associated with such persons.

(ii) Exclusion of customer-facing staff from scope given existing MCR regime

Given your discretion in the matter, we request that you reconsider the scope of CFs and PCFs specifically to limit the regime to senior management and controlling personnel in financial services providers.

A detailed and exacting fitness regime is already in place (under your Minimum Competency Requirements ("MCR") regime) for the vast majority of customer-facing staff, which requires extensive tracking and monitoring on a continuous basis.

Rather than creating a 'top up' regime for fitness and probity purposes for such staff, we believe an amendment to the MCR regime to provide for extra basic probity requirements (particularly around clear record and financial soundness) would be more straightforward and create less ambiguity and overlap of administrative work, leaving the new fitness and probity regime only applying to currently listed PCFs and possibly a number of clearly delimited roles in institutions which you believe do not need pre-approval, but should be specifically captured as they are not otherwise covered by MCR.

Naturally this may also necessitate replicating certain enforcement processes inherent in the proposed fit and proper regime into the MCR regime (i.e. where a need arises, you would be in a position to investigate, remove, suspend, or permanently prohibit and individual from conducting MCR activities or CFs/PCFs in the future).

In recent years, financial services providers have progressively built stronger controls around probity concerns in assessing prospective new staff, including in many cases Garda (and foreign police) vetting and financial checks. However, for similar reasons of scale that underlined the grandfathering exclusion for competence purposes, and also as the passage of time should in many cases have brought any probity concerns to the surface already, we believe existing staff already covered by MCR should not be subject specifically to a retrospective reassessment of probity, particularly given the tight timeframes envisaged under CP51 (as discussed earlier).

Alternatively, if the wide scope of CFs are to remain, then a risk based approach to retrospective assessment against the new standards may be more appropriate more some CFs rather than others – e.g. only applying to customer-facing staff who deal with particular products which carry an element of high risk of susceptibility to fraud, or who provide certain services where conflicts of interest may arise (see (e)(iii) below), or only applying to PCFs and / or other senior staff who have the ability to bind the company or have discretion to make decisions over a certain monetary amount (as per (e)(i) above).

(iii) Possible alternative approach of only applying to certain products and / or the specific service of advice involving recommending one product over another

If you disagree with our proposal to exclude customer facing staff from the fit and proper regime, we would ask you to strongly reconsider extending the scope to the full extent allowed under the Act.

In particular, we would suggest that the provision of services to customers could be limited solely to persons giving advice, rather than also "assistance" (a very

generic term which would conceivably touch on any person talking to customers in a financial services provider).

In addition, we believe it may be appropriate to limit the relevant product range to those products where a genuine risk of probity concerns manifesting in customer detriment may arise (i.e investment products).

In respect of advice, we note that "advice" is not defined for the purpose of the fit and proper regime. If you were to choose to limit the application of the fit and proper regime solely to the provision of advice, to the exclusion of assistance, it is important that this term is properly defined and understood.

"Advice" as a generic term means different things to different people (as we pointed out in our response[2] to CBI Consultation Paper 45 on revising the MCR), and not all such meanings should raise probity concerns, particularly where the advice is more in the guise of confirming suitability but not recommending one product over another (confirmation of suitability is referred to as 'type 2 advice' in our response to CBI CP45).

Recommendations of one product over another ('type 1 advice' in our response to CBI CP45) raise possible probity concerns regarding conflicts of interest and commission-led advice. An assessment of suitability is principally a fitness matter which should already be captured by the MCR requirements where a staff member is selling a product to a customer.

In light of our reasoning above, if you decide to apply the fit and proper test to advisors, or to extend probity assessment requirements to advisors under the existing MCR regime, we would request that the relevant definition of advice would be limited to 'type 1 advice', to the exclusion of 'type 2 advice'.

(iv) Extent of "ensuring, controlling or monitoring compliance"

The proposed CF2 appears problematic, in that it is firstly not clear what compliance is in this respect (potentially compliance with all legal and regulatory requirements, whether under the CBI's rules or not), and secondly the practicality of identifying specific staff is questionable.

All staff and management have their own responsibility to ensure they act within the rules and requirements applicable to their job, in working for and as the regulated financial services provider. In addition, as the financial services industry has become increasingly process driven, usually there are several operational risk / assurance frameworks in place to ensure staff and management are adhering to process, procedures and governance frameworks.

Any failure to adhere to these may or may not (depending on the circumstances of each case) ultimately amount to a failure to comply with regulatory or legal

[2] See page 5 of the UBG response to CP45; http://www.financialregulator.ie/consultation-papers/Documents/CP45%20Review%20of%20Minimum%20Competency%20Requirements/CP45%20Submission%20from%20Ulster%20Bank%20Group.pdf

requirements. However, for reasons of scale it seems inappropriate for all such persons to be captured under this controlled function.

We would therefore suggest defining this controlled function in such a way that it applies specifically to compliance / regulatory risk personnel who report to PCF13 and also possibly PCF14 and 16 (and also possibly staff in the internal legal department, depending on the scope of "compliance" for the purpose of this function).

(v) Meaning of "dealing in or with" and "property" for the purpose of proposed CF3(b) and (c)

The absence of a definition of property (both in the context of "property of a customer" or "property on behalf of a regulated financial services provider") and "dealing in or with"/ "dealing in having control over", means it is very difficult to draw a line between who should and should not be covered by the proposed CFs 3(a) and (b).

For example, this could include a bank teller who has temporary physical control of customer's property in the context of safe deposit boxes, or arguably even to the handling of cash deposits; however it seems excessive for all tellers to be captured by the full rigour of the fitness and probity regime. Similarly, persons involved in the physical transport of cash or customer property from central locations such as cash centres to branches or other locations (and persons responsible for handling such cash and other property in those locations), and vice versa, could be considered as either or both dealing with and having control over the property of the customer / bank. This would create an inappropriately wide remit for this CF, and full application of the fit and proper regime to all such persons (including persons to whom such work is outsourced) would not appear to be merited.

In respect of dealing in or with the property of the bank, or giving instructions in respect to such dealing, this could, for example, capture a significant number of persons working in treasury / finance departments who manage the bank's own funds and are influential in respect of deposit / lending strategy, or people in credit departments who make a decision on whether bank funds should be lent out on an individual application basis or in respect of overall lending policy.

Consequently, we request that this CF is clarified in respect of the provision of specific identified services (such as relevant listed investment services under the Markets in Financial Instruments Regulations), or other specific roles you deem appropriate, so that the scope of the requirement is clearly limited.

(vi) Potential cross-over of CFs / PCFs with staff within the scope of the Capital Requirement Directive ("CRD") Remuneration Requirements

Given the potential overlap of issues concerning conflicts of interest and probity, it would be helpful if it was clear to what extent, if any, persons captured under the CRD Remuneration Requirements as '*staff whose professional activities have a material impact on the risk profile of the bank*' would not automatically come within the scope of any of the listed CFs / PCFs. It may also be worth

considering, for reasons of administrative simplicity, introducing a CF or PCF specifically tied in with the scope of the remuneration requirements.

(f) Position of persons on whose instructions PCFs / CFs are accustomed to act

The effect of Regulation 9(1) (a) would seem to be such that every line manager (at least, and possibly further managers given the matrix management approach of large financial entities / groups) of every CF and PCF could be captured by the requirements. If the scope of CF remains as wide as it currently is, for large financial services providers such as banks and insurance companies this would be an extremely large. This will create problems in the short term in respect of the practical likelihood of meeting the current proposed 1 September 2011 to verify and evidence satisfaction of all CFs and PCFs.

In addition to our prior stated belief that the scope of CFs should be greatly restricted, we also believe that in any event the appropriate persons to be captured under Regulation 9(1)(a) should only be those persons who have a direct managing influence over senior management (i.e. PCFs) in a regulated entity.

(g) Possible restriction on the use of certain titles in the financial services industry

Given the lack of a number of definitions in the Act and proposed standards relating to specific titular PCFs, it may be appropriate (in order to avoid confusion and unnecessary regulatory concern) to limit the use of such titles for persons who are not *prima facie* sufficiently senior to merit being captured under PCFs (if not CFs). For example, particularly within the corporate banking and operations areas of large financial services entities, it is often commonplace for terms such as "vice-president" and "director" to be bestowed on staff who do not in fact have authority to bind the company as an executive, and do not otherwise have executive powers under company law.

An alternative approach which may be more practical would be specifically define these terms in respect of executive authority / power. This should ensure persons with sufficient seniority are properly captured whilst excluding other persons who could ostensibly be deemed or presumed within scope.

(h) Process for evaluation of staff who potentially could be PCFs if the CBI so determines

While it is clear from the Act that the CBI reserves the right to designate certain individuals as PCFs notwithstanding the fact that they do not appear to fall under any of the specific listed PCFs (e.g. under section 22(3)(b), it is not clear whether, in providing for specific additional PCFs in the CP, the intention of the CBI is to solely use this power purely in respect of those additional PCFs outlined in CP51, or will there also be specific individuals identified in firms (we note that you state in the CP that "while [the CF and PCF tables] are extensive, they are not exhaustive", which suggests that you do intend to identify further CFs and PCFs, either on individual institution, or cross industry basis).

If it is the intention of the CBI to use these powers to identify specific PCFs within institutions in addition to those outlined in CP51, we seek clarity as to what process will be followed to identify such individuals, and when you would anticipate using it (in particular whether you anticipate any additional work being required before 1 September 2011).

(i) Assessment of prior record as regards complaints made against the individual

In the absence of any definition of complaint, it is hard to draw a line as to the extent of any or all incidences of statements of unhappiness or informal grievance is captured under the proposed regime. Insofar as any customer-facing staff member, there may be multiple complaints logged against an individual which are down to process issues or a misunderstanding on the part of the customer. In addition, complaints about the conduct of a financial services provider may be personally directed by an unhappy customer at senior level (in particular, to the figurehead of that provider; e.g. typically the chief executive in the case of bank).

We do not believe all such complaints are relevant, and as such should not be captured by your requirements in such a way that each one must be considered and then ruled out on a case-by-case basis for every appointment of a CF or PCF. We also do not believe such complaints should be considered at all where the complaint was not upheld, and we would request that a clearer definition and scope of complaint should be provided for in light of these issues.

(j) Assessment of prior record as regards dismissal or resignation from any role, whether remunerated or not

One aspect of the proposed standards which appears to be excessive is the extent to which a regulated entity is expected to delve into the circumstances of all prior dismissals or "forced resignations", particularly insofar as such dismissals or resignations may relate to unremunerated roles, or general changes in management.

Most persons applying for roles in financial services providers, particularly at a senior level, will have a long and often varied history of roles and responsibilities. It is often the case in unremunerated roles in particular (as well as remunerated roles) that differences of opinion and / or personality clashes may lead to a dismissal or a person being requested to resign. In addition, following a takeover or merger, or other change in leadership of an entity, it is common practice for management to significantly change.

A detailed examination of all such circumstances therefore does not appear to be appropriate, and we would request that this element of a potential appointee should only be considered insofar as the reasons for the dismissal or forced resignation is due in whole or in part to an allegation of malfeasance or quasi-criminal conduct.

(k) The extent to which any prior record of misconduct allegations / complaints should be considered where a person has been fully vindicated, cleared of

any wrongdoing, or where the charges were dropped (for reason other than settlement)

In mandating a full review of a potential appointee's history in circumstances irrespective of whether they were vindicated or cleared of any wrongdoing, or where the charges were dropped (for reasons other than settlement), a number of constitutional concerns arises in respect of that appointee's enumerated and unenumerated rights. We would suggest that where an appointee's record is clear in that no finding of wrongdoing was made, or where the charges were dropped, no settlement was reached, this should not be a matter for consideration or query under the fit and proper regime.

(l) The extent to which physical and mental health can (and should) be tested

We are unsure to what extent, and how, a regulated entity is expected to continuously assess a CF / PCF's mental and / or physical health on a continuous basis. In addition, it is unclear what your expectations are in respect of how such fitness must be tested on application for a CF / PCF role; do you anticipate all staff potentially engaged in controlled functions to go through a full physical and psychiatric assessment? It also appears inappropriate to enquire into a prospective appointee's prior medical history when any former physical or mental ailment is no longer an issue.

Given these sensitivities concerned in this issue, and in light of the very wide scope of CFs and PCFs as currently drafted, we would strongly suggest that you discuss this issue with the Equality Authority, the Data Protection Commissioner and the Department of Health before proceeding to include these in the minimum pre-application/post-appointment standards which a financial services provider must be satisfied the staff member meets on an initial and ongoing basis.

(m) The extent to which a financial services provider can (and should) substitute their view for the forthcoming judgment of others

In addition to our concerns raised earlier regarding reconsidering the merits of decisions around complaints and accusations of misconduct where the person concerned was cleared or the charges were dropped with no settlement, we are concerned with proposed conduct standard 4(d) in Appendix 2 of CP51 appears to place an onus on a regulated financial services provider to pre-determine a judgement of a third party.

This raises constitutional concerns on the part of a prospective appointee and further could open the provider and / or the CBI to legal action in the event that the judgment ultimately favours the potential appointee but the appointment was not made on the assumption that the finding would be against the appointee.

We understand that matters of potential misconduct which have not yet been found on may be of relevance in considering the probity of an appointee, however we do not believe that the standard concerned should require the provider to pre-determine the

outcome of a judgment which has not been made. We would therefore ask you to reconsider and reword this proposed standard.

(n) Process for temporary appointees

We note that the draft Regulation 11 allows for a process whereby the CBI can temporarily exempt someone from the requirement to be full pre-approved, where the CBI has approved this temporary arrangement in writing. In order to allow for very exceptional circumstances where someone would need to perform the person's role at such short notice that pre-approval by the regulator would not be practical, we would request an exemption should also be capable of be retrospectively provided in appropriate emergency circumstances (leaving the CBI free to enforce where an entity permits someone to perform such a PCF without prior approval in inappropriate circumstances).

This could potentially arise on the sudden death or serious illness of a PCF, or the sudden resignation of a PCF (e.g. due to confirmation that the PCF has agreed to a management / non-executive role in a competitor, or if some significant issue affecting the person's fitness or competency arose).

We would also ask for clarity to be provided in respect of the process to be followed to seek temporary exemption (either prospective exemption as currently proposed, and also retrospective exemption if you agree with our suggestion).

(o) Necessity and propriety of Garda clearance

We note that when submitting IQs, "appropriate Garda clearance" must be attached, "where deemed necessary". It is not clear how appropriateness or necessity should be determined.

Part 2 Answers to specific questions raised in CP45

Many of the areas outlined in detailed in Part 1 are touched on in our answers below, however please note a number of important issues raised earlier did not clearly fall under the questions you raised and as such are not touched on below.

Questions relating to proposed PCFs and CFs

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

As outlined in Part 1 in greater detail, we believe the following changes should be made to the scope of CFs and PCFs (and we believe this is within your power given the wide discretionary wording of the Act):

- customer facing staff should be excluded from the fit and proper regime as they are already significantly covered by the extensive registration and tracking rules under the MCR regime (an amendment to the MCR regime to allow for appropriate limited probity testing, and to extend CBI enforcement powers under that regime if required, may complement this), and also because the focus of the fit and proper regime should really be on senior personnel in an institution who lead from the top;

- if customer facing staff are not to be excluded, then greater restriction should be put on the scope applicable in light of where the biggest risks around probity arise (fitness is already mostly covered by MCR); we believe these are around 'type 1 advice' where an advisor chooses to recommend one product over another (raising the possibility of conflict of interest and potential incentives to push one product inappropriately over another), and around investments, where customers potentially stand to be defrauded of funds)

- the "accustomed to act" extension to all CFs and PCFs brings a huge number of staff into scope in a large institution, particularly if the CF population remains as wide as currently proposed. We believe this should be exclusively aimed at anyone on whose instructions persons who perform PCFs are accustomed to act in respect of that function, in order to prevent the entire administrative process being unnecessarily unwieldy and impractical.

- the meaning and extent of "ensuring, controlling or monitoring compliance" should be strictly limited. A possible approach may be to limit it to persons who directly report into, or are managed by, whoever performs PCF13. It may be appropriate to extend this to PCF14, PCF16 and, also possibly PCF15 and the internal legal function, depending on the extent of the definition of compliance.

- The meaning and extent of "dealing in or having control over property of a customer", and "dealing in or with property on behalf of [a] regulated financial institution, or providing instructions or directions in relation to such dealing" in connection with the provision of financial services, is unclear and should be strictly define. We suggest a list of specific financial services (such as some or all of those outlined in the Markets in Financial Instruments Regulations) may be appropriate.

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

As outlined in Part 1, we believe you should consider the possible overlap with the scope of the remuneration requirements. You also may wish to consider the extent to which internal legal advisors and Head of Legal / Chief Counsel should be captured as a PCF.

c. ... In order to strike a balance, we therefore invite 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:
(1) Should we formally exempt specific categories of staff from the definition of a CF; or
(2) 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)?
In respect of possible exemptions / scope, please see our answer to a. above.

In respect of guidance on appropriate levels of due diligence required, as outlined in Part 1 we believe clarity or guidance on the following areas would be beneficial:

- extent of retrospective due diligence required for legacy personnel already conducting CFs and PCFs on the commencement date of the new requirements, particularly with regard to:
    - what standards the CBI expects to apply in its review of commercial judgment made in the lead up to the financial crisis
    - any Garda vetting required;
    - any other 3rd party verification checks required (e.g. in respect of financial soundness, or prior involvement in other companies);
    - whether self-certification by all or some in-scope personnel is acceptable; and
    - what contingency process is expected in the event of non-co-operation or non-response from a 3rd party
    - whether a risk based approach to assessment may be possible where "low risk" personnel (or all existing non-PCF CFs) would not need to be assessed.

Questions relating to the proposed Standards of Fitness and Probity
i. 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?
We do not believe there are any additional standards which need to be added to the current standards.

ii. Do you consider that any of the Standards are superfluous? If so, the reasons why?
As outline in Part 1, we believe a number of the proposed standards are either superfluous, inappropriate or potentially legally problematic, including:

- the extent to which any or all complaints against an individual should be considered;
- the extent to which forced resignation or dismissal from all roles should be reviewed, particularly unremunerated positions, or changes resulting from changes in senior management following a merger or takeover;
- the extent to which any review of misconduct allegations or complaints should be reviewed where no settlement has occurred and where the complaint or allegation was withdrawn or the person concerned was cleared of any wrongdoing or vindicated;
- the extent to which physical and mental health can be tested;
- the extent to which a firm can substitute their view for the forthcoming judgment of others

iii. Do you consider that the Standards specified are sufficiently clear to be adopted by firms for their internal fit and proper process?
As outlined in Part 1, there are a number of areas which are unclear (this may be resolved by way either amending the standards, or by issuing revised guidance), including;

- the areas identified above as legally problematic or superfluous (if kept in whole or in part)
- in what circumstances is Garda clearance necessary or appropriate.

Issuance of non-statutory guidance
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?
As outlined in Part 1 of this response, the critical issue for us regarding the issuing of non-statutory guidance is that we will either have to delay our work on implementing the new requirements until we have visibility of the finalised guidance, or we will have to repeat the task of implementing, first in the absence of guidance, and then in light of the guidance. Which approach we adopt will be largely determined by when the guidance is expected to issue (no indicative timeline has been provided).

While the issuance of such guidance may be helpful in driving clarity around a number of issues raised earlier, its efficacy will be largely determined by whether you provide for a full, workable transitional period, or whether you push out the timeline for implementation to allow for timely integration of the guidance into implementation plans.