

SCOTIABANK (IRELAND) LIMITED (SIL) SUBMISSION TO THE CENTRAL BANK OF IRELAND ON CP51

I Power to Prescribe Controlled Functions

Sec 20 (1) of the Central Bank Reform Act, 2010 empowers the Bank to make regulations *prescribing* certain functions relating to the provision of a financial service as controlled functions. However, the power is granted on three conditions (set out in Sec 20 (2) (a) – (c):

(a) the function must be likely to enable the person responsible for its performance *to exercise a significant influence* on the conduct of the affairs of a regulated financial service provider (Significant Influence Roles);

(b) the function must be related to ensuring, controlling or monitoring compliance by a regulated financial service provider with its relevant obligations (Compliance Roles); or

(c) the function must be likely to involve the person responsible for its performance in the giving of advice or assistance to a customer, dealing in or having control over property of a customer, or dealing in or with property on behalf of the regulated financial service provider or providing instructions or directions in relation to such dealing (Customer Roles).

In our view the Bank has not sufficiently *prescribed* the roles which fall within Sec 20 (2) (a) to (c) of the Act. In addition, in CP51 the Bank has referred to functions which are *sufficiently important on an ongoing basis* whereas the Act refers to functions which carry *a significant influence*.

Prescription involves an authoritative statement of the functions which are to be controlled functions and paragraphs (a) to (c) of Sec 20 (2) require a demonstration of how any particular prescribed function constitutes a Significant Influence Role, Compliance Role or Customer Role. The Bank has instead construed these paragraphs of Sec 20 (2) as a definition of controlled functions. In our view the Act clearly intended these paragraphs to act as restrictions on the power to prescribe and not as a definition of the functions. By merely repeating the terms of these conditions in the draft Regulations the Bank is not making any authoritative statement on the functions which will be controlled functions and has not satisfied the conditions set out in paragraphs (a) to (c) of Sec 20 (2).

II Consequence of not Sufficiently Prescribing

By not sufficiently prescribing the controlled functions the Bank is leaving it to each firm to make their own interpretation of the conditions in paragraphs (a) to (c) of Sec 20 (2) and to determine which of their employees fall within these conditions. This creates:

- considerable uncertainty as to whether any particular firm's interpretation is correct;
- a very real likelihood that different firms will take different approaches;

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- the possibility that a more conservative firm will take on unnecessary due diligence for employees that the Bank may subsequently view as not being a controlled function;
- a very real risk for the Bank that any attempt to exercise its enforcement powers in respect of a particular employee based on a retrospective designation of that employee's role as a controlled function will be successfully challenged for want of certainty, natural justice and due process.

III SIL's Recommendations on Controlled Functions (for all Firms)

1) SIL recognises that some level of interpretation (on a risk based approach) at the level of the firms is appropriate but recommends that the Bank reduces the level of interpretation currently required under CP51 by more sufficiently prescribing the controlled functions. We propose that this should be achieved by designating roles that fall within paragraphs (a) to (c) of Sec 20 (2) and SIL recommends for each of the these three categories of Significant Influence Role, Compliance Role and Customer Role the functions set out in the Table below:

CATEGORY	CONTROLLED FUNCTION
Significant Influence Roles	Director
	Chair of the Board
	Chair of a Board Committee
	Company Secretary
	CEO
	CFO
	Senior Manager* responsible for Risk Management oversight and for reporting on such oversight to the Board or a Board Committee
	Senior Manager* responsible for Internal Audit oversight and for reporting on such oversight to the Board or a Board Committee
Compliance Roles	Senior Manager* responsible for Compliance oversight and for reporting on such oversight to the Board or a Board Committee
	Money Laundering Reporting Officer
Customer Roles	Any employee required to hold prescribed competencies under the Minimum Competency Requirements (MCR) regime in respect of advising customers or arranging transactions for customers on products covered by that

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	regime, other than introducers and call center staff (addressed in the “To whom will the Requirements apply?” Section of the MCR
	Any employee giving investment advice to customers, arranging investment transactions or managing investments of customers where the service is an investment service covered by the MiFID Regulations and relates to a product not covered by the Minimum Competency Requirements regime

2) In line with Sec 22 (4), we recommend that a *Senior Manager should be an employee (who is not a Director) who has been given delegated responsibility by the Board or a Director and who reports directly to a Director, or to the CEO or to the Company Secretary.

IV Power to Prescribe Pre-Approval Controlled Functions (PCF)

Sec 22 (1) of the Act empowers the Bank to prescribe a controlled function as a PCF. However, the power is granted subject to the conditions (set out in Sec 22 (2) and Sec 22 (3) of the Act) that:

(a) the controlled function is a Significant Influence Role. A Director, the CEO and the Company Secretary are deemed to be Significant Influence Roles for all firms; and

(b) the controlled function:

(i) is performed by a person who reports directly to a Significant Influence Role; and

(ii) (on a risk based assessment) should be prescribed for a particular firm on the grounds of size or complexity of that firm or its business and in order to verify compliance by that firm with its relevant obligations.

A controlled function of the Compliance Role or Customer Role categories cannot be prescribed as a PCF unless the function is performed by a Significant Influence Role, or in respect of a particular firm, it meets the conditions in IV (b) above to the satisfaction of the Bank.

Excepting the PCF Significant Influence Roles already prescribed by the Act (being Director, CEO and Company Secretary), Schedule 2 of the draft Regulations does not state which of the conditions IV (a) and IV (b) above is satisfied by the other functions set out in that Schedule. If any of these other functions has been included on any basis other than that of being another form of

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Significant Influence Role, they cannot be prescribed for *all* firms but can only be prescribed for a particular firm if they satisfy condition IV (b) above in respect of that firm.

V SIL's Recommendations on PCF's

1) PCF's for *all* firms should be limited to the Significant Influence Roles and Compliance Roles we have recommended in the Table in III above.

2) Condition IV (b) (ii) above should only be satisfied if the function is occupied by a Senior Manager with Significant Responsibility for a significant business unit in the relevant firm and for reporting on such business unit to the Board or a Board Committee of that firm.

3) The functions of cross-border Branch Manager, Head of Retail Sales, Head of Treasury, Head of Credit and Head of Asset & Liability Management should *not* be prescribed for all firms as PCF's but should only be prescribed for a particular firm if the function is occupied by a Senior Manager* with Significant Responsibility** and the business unit for which that person has such responsibility is a significant business unit.

4) In line with Sec 22 (4), we recommend that a *Senior Manager should be an employee (who is not a Director) who has been given delegated responsibility by the Board or a Director and who reports directly to a Director, or to the CEO or to the Company Secretary.

5) We recommend that in respect of a significant business unit, Significant Responsibility** should involve responsibility and authority for:

- setting the business strategy, the standards of business, and the risk profile, (including regulatory risk profile);
- making material business decisions for a firm on the commitment of resources, financial commitments, asset acquisitions or disposals, liability management and overall cash and capital planning; and
- ensuring effective systems and controls for that significant business unit.

VI Transitional Arrangements

In addition to the list of PCF within firms, SIL proposes that all firms are required to submit a list of controlled function (CF) employees who fall within each of the Significant Influence Roles, Compliance Roles and Customer Roles we have recommended in the Table in III above. We further request that the Bank then formally approves the employee CF and PCF designations for each firm.

VII Other SIL Feedback

Please see the Appendix to this submission for comments on other aspects of the CP and on the Standards.

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APPENDIX		
CP Provision	Central Bank Reform Act Provision	SIL Proposal
<p>Sec 2. 3 (e) Ensure that proposing firms take <i>all necessary steps</i> to ensure that they:</p> <p>i. only propose suitable individuals to be appointed to a PCF; and</p> <p>ii. monitor individuals carrying out CFs and, where necessary, discipline and/or remove such individuals from CFs where they are no longer fit and proper to carry out those functions.</p> <p>Sec 4.11 The Central Bank requires entities proposing to appoint PCFs and CFs to vet the fitness and probity of proposed appointees to ensure that they meet the standards</p>	<p>Sec 21(1) A regulated financial service provider shall not permit a person to perform a controlled function unless-</p> <p>(a) the regulated financial service provider is satisfied <i>on reasonable grounds</i> that the person complies with any standard of fitness and probity in a code issued under section 50, and</p> <p>(b) the person has agreed to abide by any such standard.</p>	<p>1) The Bank should clarify the level of due diligence required of firms, bearing in mind the timing issue for new appointments of PCF's and the limitations on independent verification of appointee information</p> <p>2) Replace "all necessary steps" with "on reasonable grounds" as set out in the Act.</p>
<p>Sec 4.14 The fitness and probity and the level of vetting for roles or functions outside the CFs and PCFs will remain a matter for firms, subject of course to complying with the required standards of fitness and probity</p>	N/A	<p>CBI to clarify which standards they are referring to in Sec 4.14 of the CP in respect of roles or functions outside the CFs and PCFs</p>
<p>Sec 4.16 (i) (c) (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</p>	N/A	<p>Guidance should be provided.</p> <p>In addition to tailoring the level of due diligence to the function being filled or maintained the required</p>

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APPENDIX		
CP Provision	Central Bank Reform Act Provision	SIL Proposal
allowing for firms to adopt varying levels of due diligence?		due diligence should also be tailored to the size/complexity of the firm where the role resides.
Sec 5.20 If the person performed a function in a regulated financial service provider which received State financial support, consideration shall be given to the competence and skills demonstrated by that person in that function and to the extent, if any, to which the performance of his or her function may have contributed to the necessity for such State financial support	N/A	CBI to provide guidance on how this assessment is to be carried out to determine that an appointee's performance for a firm that received state aid did not contribute to the necessity for such State financial support
Sec 5.26 (ii) Regulated financial services providers where the person performs the function must satisfy themselves on <i>reasonable grounds</i> that the person complies with the Standards of Fitness and Probity	N/A	CBI to define what is expected on the basis of "reasonable grounds".
Sec 6.32 firms are required to comply with Section 21 of the Act which prohibits them from permitting a person to carry out a CF unless the firm is "satisfied on reasonable grounds that the person complies with any standard of fitness and probity in a	Sec 21 of the Act	CBI to define what is expected on the basis of "reasonable grounds".

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code issued by the Central Bank Sec 6.35 The boards of such firms will be required to sign off when submitting the lists that they are satisfied the individuals are fit and proper according to the Fitness and Probity Standards		
Sec 7.39 appropriate Garda clearance	N/A	CBI to define the circumstances in which Garda clearance would be required. CBI to provide a copy of the proposed on-line IQ form before closing the CP process.
Sec 8.41 (i) Do you consider the Standards comprehensive?	N/A	See replies below in Schedule
Sec 9.43 We shall publish the final Regulations and Standards by 1 September 2011	N/A	CBI should publish the feedback received on the CP and a revised draft of the Regulations before the Regulations become effective. CBI should allow sufficient time for firms to receive and review the revised Regulations and the IQ form before the go live date of 1 Sep 2011.

SCHEDULE (STANDARDS)		
Standard	Agree/Disagree	Non-Statutory Guidance Appropriate

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SCHEDULE (STANDARDS)		
Standard	Agree/Disagree	Non-Statutory Guidance Appropriate
3.2 (a) Has professional or other qualifications and capability appropriate to the relevant function	Agree	Confirm that Minimum Competency Requirements (MCR) satisfy this Standard where the Customer Role is covered by the MCR regime.
3.2 (b) Has obtained the competence and skills appropriate to the relevant function, whether through training or experience gained in an employment context	Agree	Confirm that Minimum Competency Requirements (MCR) satisfy this Standard where the Customer Role is covered by the MCR regime.
3.2 (c) Has shown the competence and proficiency to undertake the relevant function through the performance of previous functions which if carried out at present would be subject to the Code, or current controlled functions, or performance by the person of any role similar or equivalent to the functions that are covered by the Code. If the person performed a function in a regulated financial service provider, which if performed at present would be subject to this Code, and that regulated financial service provider received State financial support, consideration shall be given to the competence and skills demonstrated by that person in that	<p>Disagree.</p> <p>What is 3.2 (c) covering that is not already sufficiently covered under 3.2 (b)?</p> <p>How can a firm assess the extent if any to which the appointee's or employee's performance for a state aided firm contributed to the necessity for such State financial support?</p> <p>Delete this standard.</p>	<p>If not deleted provide guidance on what additional matters are to be captured by 3.2 (c) and specify how firms are to assess the extent if any to which the appointee's or employee's performance for a state aided firm contributed to the necessity for such State financial support</p>

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SCHEDULE (STANDARDS)		
Standard	Agree/Disagree	Non-Statutory Guidance Appropriate
function and to the extent, if any, to which the performance of his or her function may have contributed to the necessity for such State financial support.		
3.2 (d) Has a sound knowledge of the business of the regulated financial service provider as a whole, and the specific responsibilities that are to be undertaken in the relevant function	Agree	Not required
3.2 (e) Has a clear and comprehensive understanding of the regulatory and legal environment appropriate to the relevant function	Agree	Not required
3.2 (f) Is capable of performing the relevant function on a continual basis having regard to his/her physical and mental health	Disagree. As with all roles (CF and non-CF) this should fall to be governed and managed under the firm's HR policies, sickness leave arrangements etc. It is not possible or appropriate to specify a minimum standard of physical and mental health for a particular role. Delete this standard. Consider instead a statutory requirement for a satisfactory pre-appointment medical for new CF/PCF roles	N/A

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SCHEDULE (STANDARDS)		
Standard	Agree/Disagree	Non-Statutory Guidance Appropriate
	(appointed after 1 Sep 2011).	
3.2 (g) Shall not allow the conduct of concurrent responsibilities to impair his or her ability to discharge the duties of the relevant function or otherwise allow personal conflicts of interest to arise in carrying out his or her pre-approval controlled functions or controlled functions	Agree.	Not required
Sec 3.2 (h) Is compliant with applicable Minimum Competency Requirements issued by the Bank	Agree	Not required
Sec 4.1 (a) The person has previously been refused, prohibited, restricted or suspended from the right to carry on any trade, business or profession for which a specific licence, registration or other authorisation is required by law, in any jurisdiction	Agree	Not required
Sec 4.1 (b) The person has been the subject of any complaint made reasonably and in good faith, relating to activities that are regulated by the Bank or an equivalent authority in another jurisdiction. In considering whether or not the complaint adversely affects the	Agree	Yes. Provide guidance on what level of materiality is required before a complaint should be considered as adversely affecting the person's ability to carry out a relevant function

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SCHEDULE (STANDARDS)		
Standard	Agree/Disagree	Non-Statutory Guidance Appropriate
person's ability to carry out a relevant function, particular consideration shall be given to the outcome of that complaint if it has been concluded		
Sec 4.1 (c) the person has been the subject of any existing or previous investigation or disciplinary proceedings, by the Bank, by other regulatory authorities (including a previous regulator), clearing houses and exchanges, professional bodies, or government bodies or agencies	Agree	Not required
Sec 4.1 (d) The person has been dismissed[, or asked to resign and resigned,] from any profession, vocation, office or employment or from a position of trust, fiduciary appointment or similar, whether or not remunerated	Agree subject to the wording being revised as follows: "The person has been dismissed on the grounds of dishonesty or fraud from any profession, vocation, office or employment or from a position of trust, fiduciary appointment or similar, whether or not remunerated".	Yes. Provide guidance on how this question can be "vetted" if necessary, particularly for PCF's, if a reference is not obtainable from the previous employer, Garda clearance is not available etc. Can the firm rely at face value on the appointee's/employee's reply?
Sec 4.1 (e) and (f) The person has been a director of a company that was struck off the register of companies by the Registrar of Companies. The person has been	Agree subject to the following amendment to (e): "The person has been a director of a company that was struck off the register of companies by the Registrar of	Not required

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SCHEDULE (STANDARDS)		
Standard	Agree/Disagree	Non-Statutory Guidance Appropriate
disqualified or restricted from acting as a director or disqualified from acting in any managerial capacity	Companies other than at the request of the Company, having no liabilities to discharge”.	
Sec 4.1 (g) The person has been the subject of any proceedings of a disciplinary or criminal nature or has been notified of any potential proceedings or of any investigation which might lead to those proceedings, under any law in any jurisdiction. In considering whether or not the complaint adversely affects the individual’s ability to carry out a relevant function, particular consideration shall be given to the outcome of such proceedings or investigation if it has been concluded	Disagree. Sufficiently captured by 4.1 (b), (h) – (l). Person entitled to presumption of innocence until successfully prosecuted and if successfully prosecuted this will be captured by ongoing monitoring of CF’s. Delete this standard.	N/A
Sec 4.1 (h) The person has been convicted of an offence of money laundering or terrorist financing or of an offence involving fraud, dishonesty or breach of a position of trust <i>or is subject to any pending and current proceedings which may lead to such a conviction</i> , under any law in any jurisdiction	Agree subject to deleting “or is subject to any pending and current proceedings which may lead to such a conviction”. Person entitled to presumption of innocence until successfully prosecuted and if successfully prosecuted this will be captured by ongoing monitoring of CF’s.	Not required
Sec 4.1 (i) The person	Agree subject to deleting	Not required

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SCHEDULE (STANDARDS)		
Standard	Agree/Disagree	Non-Statutory Guidance Appropriate
has been the subject of any judgment made by a court or competent authority in any jurisdiction that contains a finding of fraud, misrepresentation or dishonesty or breach of a position of trust entered against the person in any civil proceedings <i>or he or she is a party to any pending proceedings in respect of which there are reasonable grounds for considering that any such judgement may be made</i>	“or he or she is a party to any pending proceedings in respect of which there are reasonable grounds for considering that any such judgement may be made”. Too subjective. Person entitled to presumption of innocence until successfully prosecuted and if successfully prosecuted this will be captured by ongoing monitoring of CF’s.	
Sec 4.1 (j) The person has been <i>the subject of any investigation or disciplinary proceedings or been issued a warning or reprimand or any other administrative sanction by the Bank, any other regulatory authority, an operator of a market or clearing facility, any professional body or government agency, whether in the State or elsewhere</i>	Agree subject to deleting “the subject of any investigation or disciplinary proceedings or been”. Person entitled to presumption of innocence until successfully prosecuted and if successfully prosecuted this will be captured by ongoing monitoring of CF’s.	Not required
Sec 4.1 (k) The person has accepted, <i>acknowledged or consented to</i> civil liability for fraud or misrepresentation under any law in any jurisdiction	Agree subject to deleting “acknowledged or consented to”.	If the wording is not to be deleted provide guidance on the distinction between accepted, acknowledged and consented.
Sec 4.1 (l) The person has been the subject of	Comment reserved pending clarification.	What is a civil penalty enforcement action?

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SCHEDULE (STANDARDS)		
Standard	Agree/Disagree	Non-Statutory Guidance Appropriate
any civil penalty enforcement action taken against him or her by a regulatory authority under any law in any jurisdiction		
Sec 4.1 (m) The person has been untruthful or provided false or misleading information to the Bank or been uncooperative in any dealings with the Bank	Comment reserved pending clarification.	Yes. What is the benefit of this question? Depends on what level of due diligence required of firm to “vet” the reply. Provide guidance on what is expected of a firm to “vet” the appointee’s/employee’s reply to this question
Sec 4.1 (n) The person has been in a position of influence with a company, partnership, or other organisation that has been refused registration, authorisation, membership or a licence to carry out a trade, business, or profession or has had any such registration, authorisation, membership or licence revoked, withdrawn, terminated, or subjected to an onerous condition or has been expelled by a regulatory or government body	Agree subject to clarification on what is a position of influence.	Yes. Provide guidance on what is a position of influence or confirm it means a Significant Influence Role (as specified in Sec 20 (2) (a).
Sec 4.1 (o) The person has, <i>as a result of the removal of the relevant registration, authorisation, membership or licence</i>	Agree subject to deleting “as a result of the removal of the relevant registration, authorisation, membership or licence”.	Not required.

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SCHEDULE (STANDARDS)		
Standard	Agree/Disagree	Non-Statutory Guidance Appropriate
been refused the right to carry on a trade, business or profession requiring a registration, authorisation, membership or licence		
Sec 4.1 (p) The person or any business with which the person held a position of responsibility or influence has been investigated, disciplined, censured, suspended or criticised by a regulatory or professional body, a court or tribunal, whether publicly or privately	Agree subject to deleting “investigated” and “criticised”.	Yes. Provide guidance on what is a position of responsibility or influence or confirm it means a Significant Influence Role (as specified in Sec 20 (2) (a).
Sec 4.1 (q) The person has been found by the Bank or other regulatory authority to have perpetrated or participated in any negligent, deceitful or otherwise discreditable business or professional practice	Disagree. Sufficiently captured by other questions. Delete Standard	N/A
Sec 5.2 (a) The person is or has been unable to fulfil any of his or her financial obligations, whether in the State or elsewhere	Disagree. Sufficiently and more appropriately covered by the following questions Delete Standard	N/A
Sec 5.2 (b) The person has entered into a compromise or scheme of arrangement with his or her creditors or made an assignment for the benefit of his or her creditors, being a	Agree	Not required

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SCHEDULE (STANDARDS)		
Standard	Agree/Disagree	Non-Statutory Guidance Appropriate
compromise or scheme of arrangement or assignment that is still in operation, whether in the State or elsewhere		
Sec 5.2 (c) The person is subject to a judgment debt which is unsatisfied, either in whole or in part, whether in the State or elsewhere	Agree	Not required
Sec 5.2 (d) The person is or has been the subject of a bankruptcy petition, whether in State or elsewhere	Agree	Not required
Sec 5.2 (e) The person has been adjudicated a bankrupt and the bankruptcy is undischarged, whether in the State or elsewhere	Agree	Not required
Sec 5.2 (f) The person is or has been subject to any other process outside the State that is similar to those referred to in subparagraph (b), (c), (d) or (e);	Disagree. Already captured by reference to “state or elsewhere” in previous questions Delete standard	N/A
Sec 5.2 (g) The person is or was a person concerned in the management of an entity which has been the subject of the issues outlined at paragraphs (a) to (c).	Agree	Not required