

Matheson

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The Matheson Fitness & Probitry Handbook



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FITNESS AND PROBITY HANDBOOK

"The Central Bank's vision for the fitness and probity regime is that regulated firms and individuals who work in these firms are committed to high standards of competence, integrity and honesty, and are held to account when they fall below these standards. This is an ideal that should resonate with you all, and indeed with the wider public".

Seana Cunningham, Director of Enforcement and Anti-Money Laundering at the Central Bank of Ireland, 17 May 2019



1 Introduction to the Handbook

Since its introduction, the Central Bank of Ireland's (the "**Central Bank**") fitness and probity regime (the "**Regime**") has added significant layers of compliance obligations to human resource and compliance teams within Regulated Financial Service Providers ("**Firms**").

When the Regime was first introduced, Matheson published a hardcopy Fitness and Probity Handbook to assist clients in navigating the new requirements. 10 years have now passed and the Regime remains an area of high priority for the Central Bank. In the light of this, we have updated the original handbook to account for the intervening years and have moved it to an online platform for ease of reference and updating (the "**Handbook**").

This online Handbook is intended as a resource for those required to deal with the Regime by bringing together, in a simple, easy-to-use volume, links to all the relevant legal instruments and Central Bank documents (which together make up the Regime), along with Matheson's own commentary and guidance, where appropriate.

We will update the Handbook as and when the law develops in this area, particularly in relation to the forthcoming introduction of the SEAR regime, and we will ensure that the text is updated as the rules change. We hope it becomes your go to resource on all matters relating to the Regime.



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2

Resource Materials

We have included links to some of the key legislative and regulatory materials relevant to the Regime below. These materials are referred to throughout this document:

2.1 Part 3 of the 2010 Act:

In respect of Part 3 of the Central Bank Reform Act 2010 (the “**2010 Act**”), we have included two links.

- **Part 3 of the 2010 Act.** This link brings you to Part 3 of the 2010 Act on the Oireachtas website, as it was enacted in 2010.
- **Part 3 of the 2010 Act.** This link brings you to the revised version of Part 3 of the 2010 Act, published by the Law Reform Commission (the “**LRC**”). This consolidated version reflects all the amendments made to Part 3 of the 2010 Act since its enactment. At the time of writing, the latest version was dated as at July 2018.

To understand more about the LRC’s revised acts, please click [here](#).

Where we have linked other sections of the 2010 Act, we have used the LRC’s version (where possible) to show the most up to date picture.

2.2 Regulations:

- [Central Bank Reform Act 2010 \(Sections 20 and 22\) \(Amendment\) Regulations 2011](#)
- [Central Bank Reform Act 2010 \(Sections 20 and 22\) Regulations 2011](#)

2.3 Central Bank materials:

- [Lists of Controlled Functions and Pre-approval Controlled Functions prepared by the Central Bank - CFs and PCFs](#)
- [Fitness and Probity Standards](#) (Code issued under Section 50 of the 2010 Act)
- [Central Bank’s Guidance on Fitness and Probity Standards](#)
- [Central Bank’s Online Individual Questionnaire](#)
- [Central Bank “User Guide” on completing the Online Individual Questionnaire](#)
- [Central Bank Report on the Behaviour and Culture of the Irish Retail Banks July 2018](#)
- [Dear CEO Letter on Fitness and Probity dated 8 April 2019](#)
- [Central Bank Additions to the List of PCFs dated 9 October 2020](#)
- [Dear CEO Letter on Fitness & Probity dated 17 November 2020](#)



3

Background to fitness and probity and where it stands today

The decisions and actions of high-ranking individuals within Firms can have a far-reaching effect, not only on the business of that institution but also on the stability of the financial sector as a whole. It was for this reason that following his appointment as Deputy Governor at the Central Bank¹ in January 2010, Matthew Elderfield identified the absence of a statutory basis for the approval of key persons in the financial services industry as a significant weakness in Ireland's regulatory infrastructure.

The then Minister for Finance, the late Brian Lenihan, addressed this weakness in the introduction of the Central Bank Reform Bill 2010 (the "Bill"), noting that the new powers contained in the Bill would enable the Central Bank to ensure the fitness and probity of key office-holders within Firms.

The Bill became law on 17 July 2010 with the 2010 Act bringing the Regime into effect. The key provisions include:

- **Part 3 of the 2010 Act** which creates the system for the regulation of persons performing "*controlled functions*" ("CF") or "*pre-approval controlled functions*" ("PCF") within Firms (with the exception of credit unions);
- Sections **20** and **22** of the 2010 Act give the Central Bank the power to prescribe certain functions as CFs / PCFs, and set out certain conditions that must be satisfied in order for a function to be prescribed as such;
- Section **50** of the 2010 Act empowers the Central Bank to issue a code establishing the Regime; and
- several sections which give the Central Bank power, to ensure the efficacy of the new regime.

After the 2010 Act was introduced, the Central Bank issued the following documents to supplement the legislative framework already in place:

- a set of statutory instruments (**S.I. No. 437 of 2011**), (**S.I. No. 615 of 2011**), (**S.I. No. 394 of 2014**), (**S.I. No. 545 of 2015**) and (**S.I. No 410 of 2020**) which identify **CFs** and **PCFs** (the "**Regulations**");
- a **Code on Fitness and Probity Standards** (the "**Code**"). The Code specifies the Standards of Fitness and Probity (the "**Standards**"), with which all persons performing CFs and PCFs must, at a minimum, comply with (see **below**). The Code, like the 2010 Act and the Regulations, has the force of law; and
- a **set of non-statutory guidance** on the application of the Standards (the "**Guidance**").

The introduction of the Regime over a decade ago has required Firms to change how they appoint their key personnel, as well as to making changes to systems and procedures to ensure and monitor compliance. However, the current view of the Central Bank is that not enough has been done. This is evidenced in recent communications from the Central Bank such as the **Dear CEO Letter from April 2019** and **November 2020** (detailed **below**) and the recent enforcement action taken against **the former CFO of RSA Ireland Insurance DAC ("RSA")** (detailed **below**). With the proposed introduction of an enhanced Regime as part of the Individual Accountability Framework ("IAF"), Firms need to be more mindful than ever of compliance with fitness and probity requirements.

1 Pursuant to section 23 (2) of the Central Bank Act 1942, the Commission of the Central Bank decided to change the title of "Head of Financial Regulation" [and "Head of Central Banking"] to "Deputy Governor", as announced in Iris Oifigiúil 13 May 2011.

The layout of this Handbook follows the chronological development of the Regime, set out above, addressing each area in turn. However, we stress that when dealing with any aspect of the Regime, a Firm must have regard to the 2010 Act, the Regulations, the Standards and the Guidance and should not read any section in isolation of the others to ensure the full view is achieved².

3.1 PCFs and CFs – Part 3 of the 2010 Act and the Regulations

As outlined above, sections 20 and 22 of Part 3 of the 2010 Act allows the Central Bank to prescribe both CFs and PCFs through the introduction of regulations. Regulations to this effect were first introduced on 1 September 2011 by way of S.I. No. 437 of 2011, which were subsequently amended by S.I. No. 615 of 2011, S.I. No. 545 of 2015, S.I. No 394 of 2014 and S.I. No 410 of 2020.

3.2 Identification of CFs and PCFs

Schedule 1 and Schedule 2 of the Regulations identify certain staff and office holders within Firms as performing CFs and PCFs, respectively. In total, 54 senior positions have been identified as PCFs for which Central Bank approval is required prior to a candidate's appointment. 11 categories of staff have been identified as CFs and though CF appointments are not subject to pre-approval by the Central Bank, individuals in CFs who fail to meet the required standards of fitness and probity can be temporarily or permanently removed from such positions or can be prohibited from taking up such positions in future.³

Persons performing PCFs are approved by the Central Bank on an institution-specific basis. Therefore, a previous approval in respect of one Firm will not of itself enable a person to perform a PCF for another.⁴

The Regulations provide that it is the nature of a person's role within a Firm and whether others within the organisation are accustomed to act in accordance with that person's instruction, which should be the key considerations in determining whether a person performs a PCF. Whether or not any title, or any particular title, is used in relation to the person concerned will not be relevant if the person does in fact perform a PCF role. It should also be noted that any reference to "directors" in the Regulations includes shadow directors and alternate or substitute directors.⁵

The Regulations do not limit CFs to functions performed within Ireland. Accordingly, where someone performs a CF or PCF outside Ireland, but on behalf of a Firm that is authorised, licensed or registered in the State, they will be subject to the same rules (including prior approval of the Central Bank in the case of PCFs). However, the Regulations do provide that where the performance of a function is outsourced by written agreement, to an entity which is regulated either by the Central Bank or by a comparable regulatory authority in another jurisdiction, that function will not be taken to be a CF or a PCF.⁶

In the event of a temporary officer being appointed to a particular PCF, that person will not be taken as responsible for that PCF, provided he/she has been appointed on a temporary basis with the prior written agreement of the Central Bank.⁷

Temporary PCFs vacancies in the COVID-19 Crisis

The COVID-19 pandemic has created an unusual situation in which there is a real possibility of an individual performing a PCF role being temporarily unable to fulfil their role due to illness or required isolation. There is also a possibility that a Firm may not be able to fill a currently vacant PCF role due to the pandemic.

To address this issue, the Central Bank in its Covid-19 Regulated Firms FAQ, which forms part of the Central Bank's Covid-19 Hub, has added an additional question and answer to the existing FAQ list - "how should regulated Firms manage Pre-Approval Controlled Functions (PCFs) vacancies at this time?" noting that if a PCF role holder is unable to perform their role due to illness or if a Firm cannot fill a permanent PCF role vacancy due to COVID-19, the FIRM can seek the approval of the Central Bank to have another suitable individual perform that role for a limited period.

When appointing a temporary PCF a Firm should:

- 1 refer to its succession and contingency plan in the first instance and identify a suitable individual to perform the PCF role; and
- 2 contact the Central Bank stating that they wish to make a temporary appointment. When contacting the Central Bank Firms should:
 - outline the specifics of the circumstances that have given rise to the need for the temporary appointment;
 - provide confirmation that the Firm is satisfied on reasonable grounds that the person complies with and has agreed to abide by the Standards whilst performing the PCF role; and
 - outline the period of time for which the appointment is requested.

For further information on this please refer to Matheson's Insights article on same available [here](#)

2 For example, when deciding to appoint a PCF, a Firm should review the relevant sections in the Regulations in conjunction with the Standards and the Guidance to ensure the correct steps are followed and compliance achieved with the Central Bank's expectations.

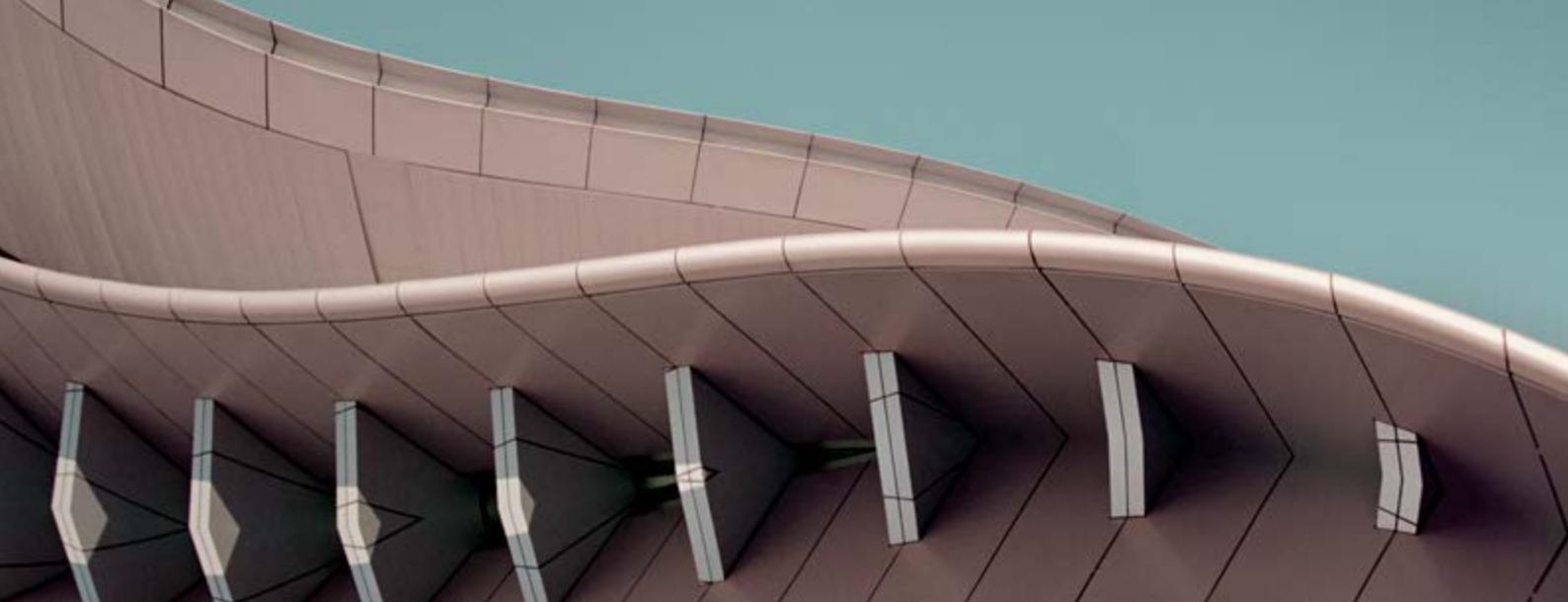
3 SI No 437 of 2011 (as amended), Schedules 1 and 2

4 Regulation 12, SI No 437 of 2011 (as amended)

5 Regulations 7,8 and 9., SI No 437 of 2011 (as amended)

6 Regulation 11A, SI No 437 of 2011 (as amended). It should be noted, however, that a person benefiting from this exclusion may still be subject to an investigation, suspension or prohibition notice under Part 3 of the 2010 Act

7 Regulations 11, SI No 437 of 2011 (as amended).



4 PCF Roles

4.1 What roles are PCF roles?

In general terms, in order to be designated as a PCF, a function must enable a person to exercise significant influence in terms of how the affairs of a Firm are conducted.⁸

The legislation also allows the Central Bank to designate functions as being PCFs by reference to factors such as whether the person performing the function is an officer of the company or the Chief Executive, or whether they report directly to an officer of the company or the Chief Executive.⁹ In such cases, the Central Bank must also be satisfied that the designation of the function as a PCF is: (i) warranted on the basis of the size or complexity of the Firm or its business; and (ii) necessary or prudent in order to verify the Firm's compliance with its obligations.

Where a Firm is a body corporate of a prescribed class, it will be taken that an officer of the company or the Chief Executive,¹⁰ persons who hold offices or positions in which they report directly to an officer of the company or the Chief Executive,¹¹ exercise significant influence in terms of how its affairs are conducted. Similarly, all members of a partnership which is a Firm of a prescribed class will be taken to exercise significant influence on the conduct of its affairs¹² and where a natural person is a Firm of a prescribed class, that person will be taken to exercise the level of influence necessary to designate their function as a PCF.¹³

Aside from designation by way of regulations, the Central Bank may also declare a function to be a PCF by way of written notice served on a Firm.¹⁴ In order to do so, the function must not already have been designated a PCF, the person performing the function must be concerned in the management of the Firm and there must be no other person who performs a PCF in the Firm.

4.2 Appointment of a PCF

Crucially, a Firm cannot appoint an individual to perform a PCF without the Central Bank having first approved that person for the role.¹⁵

This pre-approval requirement adds an extra and potentially onerous stage to the recruitment process, as potential candidates will need to be identified to the Central Bank so that their adherence to standards of fitness and probity can be assessed.

4.3 The Assessment Process for PCFs

As part of the process by which a candidate's fitness and probity is assessed, the Central Bank is entitled to request certain documents or information, or seek answers to specific questions¹⁶. On the strength of this section of the 2010 Act, the Central Bank has put in place specific steps in relation to approval of PCFs, see below – “*Approval Process for PCFs*”. Any such request will be made by way of notice in writing, which may

8 Section 22 (2)

9 Section 22 (3)

10 Section 22 (4) (a) (i) (ii) and (iii)

11 Section 22 (4) (iv) (l)

12 Section 22 (4) (b)

13 Section 22 (4) (c)

14 Section 22 (8)

15 Section 23 (1)

16 Section 23 (2)

be addressed to either the candidate directly or to an officer or employee of the Firm proposing to appoint the candidate. In addition, the Central Bank may request that either the candidate concerned, or an officer or employee of the Firm, present themselves for interview in connection with the matter.

4.4 Refusal and Withdrawal of PCFs

The Central Bank can refuse to approve a proposed appointment where it is of the view that the candidate does not meet the requisite standard of fitness and probity.¹⁷ Equally, the Central Bank may refuse to approve an appointment where it is unable to decide, on the basis of available information, whether a person is suitably fit and proper¹⁸, or in circumstances where a request for information, documents or an interview has not been complied with.¹⁹

If the Central Bank decides to refuse approval this will prohibit the candidate from being appointed to that PCF role. However, a refusal can be appealed using the appeal process set out in **Part VIIA of the Central Bank Act 1942** (the “1942 Act”).²⁰ To date, the Central Bank²¹ has “refused a number of applications”, according to Derville Rowland, Deputy Governor of the Central Bank. It is of note that a previous refusal must be disclosed in the Individual Questionnaire (“IQ”) when an individual is seeking approval in respect of another PCF role.

In its response to the LRC Issues Paper on “Regulatory Enforcement and Corporate Offences” the Central Bank suggested that it should be given the power to publish details of refusals to approve the appointment of an individual to a pre-approval controlled function, in order to further strengthen its gatekeeper role and increase transparency. This was raised again in the Central Bank’s IAF proposal.

The Central Bank in its 2019 Dear CEO letter, highlighted the marked increase in the number of PCF applications referred to fitness and probity specialists in its Enforcement Directorate due to concerns raised at the initial interview stage.

The number of PCF application withdrawals has also been increasing in recent years. In 2016, there were 5 withdrawals, increasing to 8 in 2017 and to 18 in 2018, (as of yet there are no available figures for 2019). To date, a total of 86 applications for senior positions have been withdrawn where the Central Bank has challenged the applicant. The Central Bank has remarked that the high level of withdrawals are relative to the number of refusals issued once a Firm or an applicant becomes aware that the Central Bank has concerns with the PCF application.

17 Section 23 (5) (a)

18 Section 23 (5) (b)

19 Section 23 (6) (a)

20 Section 23 (7)

21 Derville Rowland - The Role of Financial Conduct Regulation and 2020



5 CFs

A function can only be designated as a CF if it relates to the provision of a financial service. In addition, one of the following criteria must also be met²²:

1. the function must be likely to enable a person to exercise significant influence on how the affairs of a Firm are conducted;
2. the function must be related to either ensuring, controlling or monitoring the compliance of a Firm with its relevant obligations; or
3. the function must be likely to involve a person in the provision of a financial service by a Firm. This involvement can be in any of the following ways:
 - giving advice or assistance to customers of a Firm;
 - dealing in or having control over property of a customer of a Firm to whom a financial service is provided; or
 - dealing in or with property on behalf of the Firm or providing instructions or directions in this regard.

Though pre-approval in respect of appointment to CFs is not required, a Firm must not permit a person to perform a CF unless it is satisfied, on reasonable grounds, that the person meets the **Standards** and further, that the person has agreed to abide by the Standards.²³

It should be noted that the Standards still apply in circumstances where the CF is performed from a location outside the State (save for where Regulation 11A, S.I. No. 437 of 2011 (as amended) applies).²⁴ Equally, where the function is performed in Ireland but relates to the business of the Firm in another country, the Standards apply in respect of the person performing that function.²⁵

5.1 Where a CF is suspected of not being fit and proper.

As noted previously, individuals performing CF roles are not required to be preapproved by the Central Bank prior to their appointment. However, the Central Bank has a range of powers available to investigate, suspend, remove or prohibit individuals from performing a CF role in the financial services industry where it suspects that the individual's fitness and probity is not up to the required standards.

Additionally, as explained above, PCFs must be preapproved by the Central Bank prior to their appointment. Throughout this approval process, the Central Bank has the power to probe and investigate an individual's fitness and probity. If an individual fails to meet the required standards at this point, the application will be refused or an individual may withdraw their application prior to a refusal decision being given. Once a PCF has been appointed, the Central Bank has the same powers to investigate and sanction as it has with CFs.

22 Section 20 (2)

23 Section 21

24 Section 20 (4) (a)

25 Section 20 (4) (c)

5.1.1 CF Investigations

The Central Bank can investigate the fitness and probity of a person²⁶ in three circumstances:

- while a person is performing the role of a CF²⁷;
- the Central Bank has knowledge that a person is to be appointed to a CF role by a Firm²⁸; or
- the Central Bank has reason to believe that a person is to be appointed to a CF role by a Firm²⁹

if the Deputy Governor of the Central Bank considers there is reason to suspect whether the person is suitably fit and proper, or in any other circumstances warranting such an investigation.³⁰ Investigations are therefore initiated and conducted by the Deputy Governor.

The legislation provides that the reasons an individual's fitness and probity can be questioned, include (i) a suspicion that the person does not have the necessary experience, qualifications or skills,³¹ or (ii) that they fail to meet the particular standards prescribed by the Code.³² Previous participation in serious misconduct relating to the business of a Firm,³³ or failing to make a disclosure to the Central Bank or making a disclosure knowing it to be false or misleading in a material respect³⁴ or the provision of false or misleading information to the Central Bank (whether directly or through another person),³⁵ will also suffice.

In addition, causing or seeking to cause information requested by the Deputy Governor by way of evidentiary notice not to be provided,³⁶ or having been convicted of certain offences,³⁷ will constitute reasons to question an individual's fitness and probity.

5.1.1.1 Evidentiary Notices

As part of an investigation into an individual's fitness and probity, the Deputy Governor may serve an evidentiary notice on the individual or Firm concerned, or on any other person whom it is believed may be able to give evidence or produce documentation relating to the individual's fitness and probity.³⁸ Failure to comply with the terms of an evidentiary notice without reasonable excuse is an offence, with the maximum penalty on summary conviction being a fine of €5,000 and / or 12 months' imprisonment. Conviction on indictment can attract a fine and / or up to five years' imprisonment.³⁹ Where a person has been required to produce a document or to provide information, the legislation states that they will have a "reasonable excuse" for not doing so in circumstances where they do not have the document or information sought and they cannot by any reasonable effort obtain it.⁴⁰ Equally, they will have a "reasonable excuse" if they could not be compelled to produce the document or information sought in a court of law.⁴¹ It is stated however, that these examples do not serve to limit what will be taken to be a reasonable excuse and accordingly, there may be other circumstances which would justify non-compliance with a request to provide documents or information in accordance with an evidentiary notice.

Where a person appears before the Deputy Governor in compliance with an evidentiary notice, it will be an offence for that person to refuse or fail to give evidence,⁴² or to refuse or fail to answer a question put to them.⁴³ However, as above, having a "reasonable excuse" for not doing so will be a defence. An example given in the legislation is that a person may legitimately refuse or fail to answer a question posed where the answer to that question might tend to incriminate them.⁴⁴ Where it is sought to rely on the "reasonable excuse" defence in respect of a failure to either give evidence or to answer a question, it will be necessary for the person concerned

26 Section 25 (2)

27 This includes a PCF

28 This excludes PCFs.

29 This excludes PCFs.

30 Section 25

31 Section 25 (3) (a)

32 Section 25 (3) (b)

33 Section 25 (3) (c)

34 Section 43 (2)(ca), Central Bank Reform Act 2010 (No.23).

35 Section 25 (3) (e)

36 Section 25 (3) (f)

37 Section 25 (3) (h)

38 Section 32

39 Section 49

40 Section 36 (3) (a)

41 Section 36 (3) (b)

42 Section 37 (1) (a)

43 Section 37 (1) (b)

44 Section 37 (3)

to provide a written statement to the Deputy Governor which sets out the details of that excuse⁴⁵ In the event of proceedings related to the person's refusal or failure to give evidence or answer a question posed, this statement will not be admissible in evidence against them.⁴⁶

5.1.1.2 *Conduct of Investigations*

In terms of how investigations are conducted, **Part 3 of the 2010 Act** gives the Deputy Governor a certain level of procedural autonomy, subject to any regulations which the Central Bank may prescribe.⁴⁷

However, the legislation does specifically provide, that the Deputy Governor may hear oral evidence where this is deemed necessary and that persons giving oral evidence may be cross-examined.⁴⁸ As noted above, the Deputy Governor may issue evidentiary notices in relation to an investigation and such notices can require a person's attendance before the Deputy Governor for the purposes of giving evidence or producing documents.⁴⁹ It should be noted, however, that any evidence provided to the Deputy Governor in relation to an investigation, and any report prepared on the basis of this evidence, will be absolutely privileged.⁵⁰

The normal procedure is that investigations will be conducted in private.⁵¹ Despite this, a person appearing in accordance with an evidentiary notice can request that the matter, or any part of it, be dealt with in public.⁵² In this event, the Deputy Governor will adhere to this request unless the matter raises issues which, in his opinion, should be dealt with in private.⁵³ A decision not to deal with the matter in public may also be taken if the Deputy Governor considers it necessary or desirable to deal with the matter in private, so as to avoid the disclosure of confidential information relating to either the business of any person or body, or to avoid the disclosure of confidential information concerning the exercise by the Central Bank of its powers or the performance of its functions.⁵⁴ In the absence of a request that evidence be given or a document be produced in public, the Deputy Governor may still depart from normal procedure and direct that the matter be dealt with publicly, in circumstances where he is satisfied that it is desirable to do so in the public interest.⁵⁵

Where evidence is to be given or a document is to be produced privately, the Deputy Governor may give directions as to the persons who are entitled to be present⁵⁶ and may also give directions either restricting or preventing the publication of such evidence or documents.⁵⁷ A failure to comply with any such directions will constitute a criminal offence⁵⁸ and can attract, on summary conviction, a fine of up to €5,000 and / or 12 months' imprisonment, or where conviction is on indictment, a fine and / or up to five years' imprisonment.⁵⁹

Further, if during the course of an investigation, a person refuses or fails to provide information to the Deputy Governor, or if they refuse or fail to produce a document or present themselves as required by an evidentiary notice, it is open to the Deputy Governor to certify this matter to the High Court.⁶⁰ Following certification the High Court may, after hearing any witnesses which may be produced against or on behalf of the person concerned and any statement offered in defence, make an order or give directions as it sees fit.⁶¹ This could entail an order that the person attend or re-attend before the Deputy Governor, or that the person produce the document or information sought or answer the question posed. Conversely, the High Court could make an order that the person not be required to do any of the above.

45 Section 37 (5)

46 Section 37 (7)

47 Section 34 (3)

48 Section 34 (1) and (2)

49 Section 32 (1)

50 Section 38

51 Section 35 (1)

52 Section 35 (2)

53 Section 35 (2) (a)

54 Section 35 (2) (b)

55 Section 35 (3)

56 Section 35 (4) (a)

57 Section 35 (4) (b)

58 Section 35 (6)

59 Section 49

60 Section 40 (1)

61 Section 40 (2)

5.1.1.3 Preparation of a report following investigation

Following conclusion of an investigation into a person's fitness and probity, the Deputy Governor must prepare a report which will be considered by the Central Bank and the Governor of the Central Bank.⁶² A copy of this report will also be served on both the individual and the Firm concerned⁶³ and they must be notified of their right to make a written submission to the Deputy Governor in relation to the contents of the report.⁶⁴ Notice of the right to make a submission must also specify the period within which a submission may be made. This period will be prescribed by the Deputy Governor but the minimum period allowable is seven days.

5.1.2 Suspension Notices

Either during or following an investigation, the Central Bank may issue a suspension notice preventing the person under investigation from performing their CF.⁶⁵ In reaching a decision on whether to issue a notice of this kind, the 2010 Act states that the Central Bank will take into account the need to maintain the stability of the financial system and the need to protect those who avail of financial services.⁶⁶

If the Central Bank is considering an investigation in respect of a person yet to be appointed to a CF (see above), it will ask the Firm concerned to confirm whether or not it is actually considering to appoint the person, before it moves to issue a suspension notice.⁶⁷ Where confirmation is provided that the Firm is not considering making the appointment, the Central Bank will only issue a suspension notice where it believes that the appointment will be made regardless, or where it believes that it has already been made.⁶⁸

The terms of a suspension notice (which must be in writing) will set out the grounds upon which the investigation is deemed necessary and will specify whether the notice has the effect of suspending the person from the performance of a particular CF, an aspect of a particular CF or from the performance of all CFs.⁶⁹ The notice must be served not only on the individual concerned but also on each Firm for which, to the Central Bank's knowledge, the individual performs a CF. In addition, the notice must be served on any Firm which the Central Bank believes is considering appointing the individual to a function within the terms of the notice.⁷⁰

5.1.2.1 Effect of a Suspension Notice

Where a Firm receives a suspension notice, it must immediately provide a copy to the suspended person (unless it is impracticable to do so) and then certify that it has done so to the Central Bank.⁷¹ The Firm must also immediately remove the individual concerned from performance of the function which is the subject of the notice.⁷² If the individual has not yet been appointed, the Firm must not proceed to appoint them.⁷³ It should be noted however, that although a suspension notice requires an individual not to perform a particular function, it has no effect on any contractual arrangement between the individual and the Firm in respect of remuneration or benefits. Therefore, an individual's entitlement to remuneration or benefits will continue to be governed by the terms of the contractual arrangement in place.⁷⁴

A suspension notice also allows the suspended person, or the Firm concerned, to demonstrate, within five days of its service, why the notice should not be confirmed⁷⁵. Though submissions are not required in order for the Deputy Governor to make a decision, submissions made during the time allowed must be considered.⁷⁶ A submission made outside of the permitted five-day period may be considered, where the Deputy Governor is satisfied there was good reason why it could not have been made during the period allowed, or where its consideration is deemed necessary in the interests of justice.⁷⁷

62 Section 41 (1)

63 Section 41 (2)

64 Section 41 (5)

65 Section 26 (1)

66 Section 26 (2)

67 Section 26 (3)

68 Section 26 (3)

69 Section 26 (4)

70 Section 26 (5)

71 Section 26 (7)

72 Section 27 (a)

73 Section 27 (b)

74 Section 27 (4)

75 Section 26 (9)

76 Section 29 (1)

77 Section 29 (3)

A suspension notice is effective from the date of service but unless subsequently confirmed by the Central Bank, it will expire after a period of ten days.⁷⁸ It is, however, open to the Deputy Governor to revoke the notice at any stage before expiration. A person on whom a suspension notice has been served can request that the Deputy Governor make a decision on whether or not to confirm the notice before the expiration of ten days from service. If such a request is made and if that person provides material which the Deputy Governor is satisfied will allow a fair and proper decision to be made, the Deputy Governor is obliged to make all reasonable efforts to ensure the decision is made as soon as reasonably practicable.⁷⁹

5.1.2.2 Confirmation of a Suspension Notice

The Deputy Governor can confirm a suspension notice if, having considered any written submissions provided within the five day period permitted, it is considered that there is still reason to believe the individual concerned is not suitably fit and proper, or if it is considered that an investigation into the individual's fitness and probity is still warranted.⁸⁰ A suspension notice can also be confirmed where the Deputy Governor considers it necessary, in the interests of proper regulation, to prevent the individual from performing the CF at issue while the matter is under investigation.⁸¹

A confirmed suspension notice will remain in effect for a period of three months, which runs from the expiration of the ten-day period following service.⁸² The Deputy Governor can however apply to the High Court for an order extending the period of its application, up to a maximum of an additional three months.⁸³

5.1.2.3 Revocation of a Suspension Notice

The Deputy Governor can revoke a suspension notice at any time if it is considered that there is no longer any reason to suspect the fitness and probity of the individual concerned. Revocation may also take place if, during the course of the investigation, the Deputy Governor no longer considers it necessary in the interests of proper regulation that the individual concerned be prevented from performing the CF at issue.⁸⁴

5.1.2.4 Failure to comply with a Suspension Notice

Failure to comply with a suspension notice will allow the Deputy Governor to make an *ex parte* application to the High Court for an order directing the individual concerned or the Firm to comply with the terms of the notice.⁸⁵

5.1.3 Prohibition Notices

A person may be prohibited from carrying out a CF where the Central Bank or the Governor of the Central Bank has, on reasonable grounds, formed the opinion that they do not meet the appropriate standards of fitness and probity. A prohibition can be absolute in prohibiting the individual concerned from carrying out the CF in any circumstances, or it may simply attach conditions to their performance of the CF.

The notice in writing, which sets out the prohibition, will state whether the prohibition is to apply for a specified period or whether it will apply indefinitely. This notice will also state whether the prohibition will apply in respect of the performance of a particular CF, an aspect of a particular CF or CFs generally.⁸⁶

The grounds upon which the Central Bank, or the Governor of the Central Bank, may form the view that an individual does not meet the applicable standards of fitness and probity are broadly the same as the grounds upon which the Deputy Governor can suspect a person's fitness and probity for the purpose of initiating an investigation⁸⁷:

- the person does not have the experience, qualifications or skills necessary to properly and effectively perform the CF at issue, a part of that CF or CFs generally;
- the person does not meet specific standards prescribed by the Central Bank in respect of fitness and probity;

78 Section 28

79 Section 26 (10)

80 Section 29 (1) (a) and (b)

81 Section 29 (1) (c)

82 Section 29 (4)

83 Section 31

84 Section 29 (6)

85 Section 30

86 Section 43 (1)

87 Section 43 (2)

- the person has participated in serious misconduct in relation to the business of a Firm;
- the person has failed to make a disclosure to the bank or has made such a disclosure knowing it to be false or misleading in a material respect;
- the person has provided information to the Central Bank which they knew or ought to have known was false or misleading, whether the provision of this information was direct, indirect or through another person;
- the person has caused or sought to cause information requested by the Deputy Governor by way of an evidentiary notice not to be provided;
- the person has failed to comply with an evidentiary notice or a suspension notice; and
- the person has been convicted of an offence of money-laundering, terrorist financing or an offence involving fraud, dishonesty or breach of trust.

5.1.3.1 Issuing a Prohibition Notice

A prohibition notice can only be issued in certain circumstances and when certain requirements are met.

Firstly, a prohibition notice can only be issued where each of the following steps have been taken:

- the Deputy Governor has conducted an investigation into the person's fitness and probity and prepared a report of the findings, which was provided to those entitled to receive it; and
- the Central Bank, or the Governor of the Central Bank, considered this report and any submissions made to the Deputy Governor during the period allowed.⁸⁸

Secondly, a prohibition notice can be issued without an investigation into a person's fitness and probity, provided there are undisputed facts which, in the opinion of the Central Bank or the Governor of the Central Bank, renders an investigation unnecessary.⁸⁹ However, where a prohibition notice is being issued without an investigation into the individual's fitness and probity having been conducted, the individual concerned and the Firm must have been afforded a reasonable opportunity to make a submission in relation to the matter.⁹⁰

There are two further requirements which must be satisfied before a prohibition notice is issued, regardless of whether or not an investigation has taken place they include; (i) that individual and the Firm concerned must have been afforded a hearing in relation to the proposed issue of the notice.⁹¹ The nature of this hearing must be sufficient to do justice in the circumstances (ii) the Central Bank, or the Governor of the Central Bank, must be satisfied that the circumstances necessitate the issue of a prohibition notice.⁹²

5.1.3.2 Effect of a Prohibition Notice

A prohibition notice will take effect from the time it is first served on either the individual concerned or the Firm concerned.⁹³ If the Central Bank does not subsequently apply to have the notice confirmed, or in the absence of an agreement between the Central Bank and the individual or the Firm regarding the notice, it will cease to be effective two months from the day following first service.⁹⁴ If however, during the period of validity of the notice, the Central Bank makes an application to the High Court for its confirmation, the effect of this application will be to give the notice full effect until such time as the application is determined by the Court or withdrawn.⁹⁵

5.1.3.3 Agreement in relation to a Prohibition Notice

Once a prohibition notice has issued, it is open to the individual concerned to enter into a written agreement with the Central Bank in respect of the terms of the notice.⁹⁶ If the individual is, at the time of the notice, performing a CF on behalf of Firm, that Firm may also be party to such an agreement. The effect of the agreement is to confirm that the individual will comply with the terms of the notice for an agreed period and it removes the need for the Central Bank to make a High Court application seeking to have the notice confirmed.⁹⁷ Rather, the terms of the notice will be effective in the manner agreed by the parties and the two month expiration period will not apply.

88 Section 43 (3) (a) (i)

89 Section 43 (3) (a) (ii)

90 Section 43 (3) (a) (iii)

91 Section 43 (3) (b)

92 Section 43 (3) (c)

93 Section 43 (7) (a)

94 Section 43 (7)

95 Section 43 (7) (b)

96 Section 46 (1)

97 Section 46 (2)

The Central Bank may, during the agreed period, decide to terminate the agreement if it considers that there is no longer any need for the notice to continue in effect.⁹⁸ In order to terminate the agreement, written notice must be provided to the individual concerned and to the Firm, where applicable. If the terms of the agreement are breached during the agreement's lifetime, the Central Bank may apply to the High Court for an order to enforce the prohibition notice.⁹⁹

5.1.3.4 Confirmation of a Prohibition Notice

Where no agreement has been entered into with the parties concerned, the Central Bank may make an application to the High Court to confirm the prohibition notice.¹⁰⁰ If such an application is made with the consent of the individual concerned, the notice can be confirmed without the individual being present in court. If the individual has not consented to the application, a hearing will be necessary. Once confirmed, a prohibition notice has the full effect of a court order and can be enforced accordingly.¹⁰¹

The legislation provides that the High Court is under a duty, in so far as is practicable, to hear and determine an application to confirm a prohibition notice, within three months from the date the application is first made.¹⁰² It is open to the High Court to order that a hearing take place in private, in circumstances where this is deemed necessary for reasons of confidentiality or commercial sensitivity. An order of this kind can also be made so as to avoid the disclosure of confidential information relating to either the business of any person or body, or to avoid the disclosure of confidential information concerning the exercise by the Central Bank of its powers or the performance of its functions.¹⁰³

During the course of the hearing, the High Court may decide to consider evidence which was not previously adduced in relation to the matter or to hear arguments which were not previously advanced to the Central Bank or the Governor of the Central Bank.¹⁰⁴ In order to do so, the Court must be satisfied that there are cogent reasons justifying why the evidence was not previously presented or the arguments were not previously made. The Court must also be satisfied that it is just and equitable to consider the evidence or hear the arguments, as the case may be.

The High Court can confirm a prohibition notice where it is satisfied that there are reasonable grounds for the opinion of the Central Bank, or the Governor of the Central Bank, that the individual concerned does not meet the appropriate standards of fitness and probity.¹⁰⁵ An order may be made confirming the original prohibition notice or the Court may make an order varying the terms of the original prohibition notice such as, for example, by attaching conditions. Additional or ancillary orders may also be made as the Court sees fit. Any orders made by the Court will state whether they are to have indefinite effect, or whether they will remain in effect for a particular period of time only. An order may also be stated to be effective pending such time as a further order is made.

Where the High Court is not satisfied that there are reasonable grounds for the Central Bank or Governor of the Central Bank's opinion that the individual concerned does not meet the appropriate standards of fitness and probity, the Court may order that the prohibition notice be set aside and / or that the matter be remitted to the Central Bank or to the Governor of the Central Bank.¹⁰⁶

In the alternative, the Court may make any such order as it thinks fit. Where the Court makes an order remitting the matter to the Central Bank, the same procedure and criteria apply in respect of any reconsideration of the matter as apply to its consideration in the first instance.

5.2 SSM Requirements

Firms who are categorised as "Significant Institutions" and "Less Significant Institutions" by the European Central Bank ("ECB") are subject to the fitness and probity regime introduced by the Single Supervisory Mechanism ("SSM") Regulation and the SSM Framework Regulation.

98 Section 46 (3)

99 Section 46 (2) (c)

100 Section 45 (1)

101 Section 45 (9)

102 Section 45 (2)

103 Section 45 (3)

104 Section 45 (4)

105 Section 45 (5) (a)

106 Section 45 (5) (b)

With the introduction of the SSM, the ECB became the competent authority for the supervision of credit institutions in Ireland.

Significant Institutions are supervised directly by the ECB and are no longer supervised for prudential purposes through the Central Bank Framework for supervision called PRISM (Probability Risk and Impact System) but rather through the ECBs equivalent Framework.

In the case of Less-Significant Institutions, the Central Bank supervises them directly, while the ECB supervises them indirectly. In these cases, the ECB, which has ultimate responsibility for the functioning of the SSM, may issue guidelines to ensure consistent supervision or even take over the direct supervision of an institution if it considers it necessary.



6

The Standards

Part 3 of the 2010 Act provides that a person performing a CF must have a level of fitness and probity appropriate to the performance of that particular function. As noted above, the Code, issued under section 50 of the 2010 Act, sets out the Standards which all persons performing CFs or PCFs shall, at a minimum, comply with.

The Standards require a person to be:

- competent and capable;
- honest, ethical and to act with integrity; and
- financially sound.

6.1 Competent and capable¹⁰⁷

A person must have the qualifications, experience, competence and capacity appropriate to their function. This means that they should be able to demonstrate that they have relevant professional qualifications and capability and that they have obtained appropriate competence and skills through training or through experience gained during their employment. They should also be able to show competence and proficiency to undertake the function through their performance of previous or current similar functions.

Where a person performs (or has performed) similar functions in an institution that has received financial support from the State, an assessment of whether they meet the Standards must also involve consideration of their performance of those functions and the extent, if any, to which that performance may have contributed to the necessity for financial support from the State.

In addition, a person must have a sound knowledge of both their specific responsibilities and the business they are engaged in as a whole, together with a clear and comprehensive understanding of the relevant legal and regulatory environment. Any other responsibilities which they hold cannot impair their ability to discharge their duties and personal conflicts of interest should not arise in the performance of their functions.

Finally, where applicable, persons must also comply with the **Minimum Competency Code** issued by the Central Bank.

6.2 Honest, ethical and to act with integrity¹⁰⁸

A person must be able to demonstrate that their ability to perform the relevant function is not adversely affected to a material degree by factors such as whether they are or have been:

- prohibited from carrying on a trade in any jurisdiction, or had any authorisation or licence revoked on an involuntary basis;
- the subject of any complaint made to the Central Bank, the Ombudsman or any equivalent body relating

¹⁰⁷ Section 3 of the Standards

¹⁰⁸ Section 4 of the Standards

- to the performance of any regulated activity;
- subject to any disciplinary proceedings, or been issued with any warning or administrative sanction;
- dismissed or asked to resign and did resign;
- a director of any company in any jurisdiction that was struck off the register on an involuntary basis;
- disqualified or restricted from acting in any jurisdiction as a director or in a managerial capacity;
- convicted of an offence of money laundering, terrorist financing or any other offence which may be relevant to their ability to perform the relevant function;
- the subject of a finding, judgement or order made against them involving fraud, misrepresentation, dishonesty or breach of trust;
- the subject of current proceedings involving fraud, misrepresentation, dishonesty or breach of trust;
- the subject of any civil penalty or enforcement action taken by a regulatory authority in any jurisdiction;
- untruthful or provided false or misleading information to the Central Bank, or been uncooperative in any dealings with the Central Bank;
- investigated, disciplined, censured, suspended or criticised by a regulatory or professional body, a court or tribunal or any similar body, including circumstances where any business in which they held a position of responsibility or influence has been so investigated, disciplined, censured, suspended or criticised; or
- found by the Central Bank (or any regulatory authority in any jurisdiction) to have perpetrated or participated in any negligent, deceitful or otherwise discreditable business or professional practice.

6.3 Financial Soundness¹⁰⁹

A person must manage their affairs in a sound and prudent manner. In this regard, they should be able to demonstrate that their role in a relevant function is not adversely affected to a material degree by the fact that they defaulted upon any payments due arising from a compromise or scheme of arrangement with their creditors, or that they made an assignment for the benefit of their creditors. Similarly, factors such as whether they are subject to an unsatisfied judgment debt or have been the subject of a bankruptcy petition, or been adjudicated as bankrupt in Ireland or elsewhere, or whether they acted as director of an insolvent entity, will also be taken into consideration.

6.4 Exceptions

The Standards do not apply to any person whose function is solely concerned with acting in accordance with a written set of instructions in the form of a script which provides for that person to give a prescribed reply, or follow a prescribed course of action, where a particular routine matter is raised. This excludes the application of the Code to certain call centre staff.

¹⁰⁹ Section 5 of the Standards



7

The Guidance

The **Central Bank's non-statutory Guidance** restates some of the provisions set out in the 2010 Act and in the Regulations. It is not intended to be comprehensive however, and does not override any of the legal provisions discussed above. The Central Bank also reserves the right to update and amend the Guidance as it sees fit. Nonetheless, the Guidance does provide assistance on how Firms can comply with the Code.¹¹⁰

7.1 Application of the Code

The Guidance sets out those persons to whom the Code does not apply. Excluded are persons operating to a set of written instructions in the form of a script and any person performing a function in a separate legal entity within a group structure, who may exercise significant influence over a person performing a CF or PCF in an entity regulated by the Central Bank. This exemption typically excludes persons with functional responsibility at group level.

Despite these stated exclusions, it should be noted that any person exempt from the Code will remain bound by **Part 3 of the 2010 Act** and **the Central Bank's Minimum Competency Code**, if applicable.¹¹¹

7.2 Identifying CFs and PCFs

A Firm is not necessarily required to have all CFs or PCFs in existence.¹¹² In setting out how a Firm should identify a PCF or CF, the Guidance refers to **section 7 of the Regulations** which outlines that it is the nature of the function rather than its title which will identify a CF or PCF.

In addition to those set out in the Regulations, as outlined above, the Central Bank may declare in writing that a particular function is to be considered a PCF. The Guidance sets out the criteria which will be used for this purpose:

- the person who performs the function is concerned with the management of the firm;
- the function is not prescribed as a PCF in the Regulations; and
- no other person in the firm performs a PCF.¹¹³

7.3 Outsourcing¹¹⁴

The Guidance restates the legislative provisions regarding outsourcing to an entity regulated in another jurisdiction by an authority comparable to the Central Bank.

Where a Firm outsources the performance of a PCF, it will not be required to obtain Central Bank approval in respect of the person performing that function, provided there is a written agreement in place and the Firm to which the function is being outsourced is regulated by the Central Bank or an equivalent authority in another

¹¹⁰ Guidance, Section 2

¹¹¹ Guidance, Section 3

¹¹² Guidance, Section 4.4

¹¹³ Guidance, Section 4.3

¹¹⁴ Guidance, Section 5

jurisdiction. It should be noted however that although the pre-approval requirement of section 23 does not apply, a person benefitting from this exclusion may still be subject to an investigation, suspension or prohibition notice under Part 3 of the 2010 Act, this also applies those performing CF roles.

Where the performance of a PCF is outsourced to an unregulated entity, the Firm concerned must obtain the approval of the Central Bank before appointing the unregulated entity to perform the PCF on its behalf. The written outsourcing agreement must also name the person within the unregulated entity who will be responsible for performing the PCF and persons performing a PCF under such an outsourcing agreement must comply with the Standards.

If a CF is outsourced to an unregulated entity, the unregulated entity must be able to identify the individuals who will perform the CFs and assess whether those persons are compliant with the Standards. In such cases, the outsourced service provider should be able to provide written confirmation to the Firm that the individuals performing CFs are compliant with the Standards and have agreed to be bound by them.

7.4 Approval process for PCFs¹¹⁵

Before an individual can be appointed to a PCF, the Central Bank must have approved their appointment in writing. The Central Bank will expect a Firm to have conducted their own due diligence in relation to an appointee before proposing them for approval. The approval process involves the submission of an IQ to the Central Bank, which is now completed online.

In making a submission to the Central Bank to appoint a PCF, a Firm will be provided with a user account allowing it to log on to the Central Bank's online IQ system. Individual accounts can then be created by the Firm in respect of each PCF, enabling the proposed candidates to complete their IQ online.

For the most part, the Central Bank expects that the approval system will be based on the IQ. However, it may, in certain circumstances, request further information and if it considers it necessary, it may also seek to conduct an interview with the proposed candidate.¹¹⁶ The decision on whether or not to interview a PCF will be based on PRISM. This involves an analysis of the impact of the Firm on the Irish financial system and the risk probability that that entity will fail. However, the Central Bank reserves the right to call any PCF for interview, regardless of the Firm's impact rating.

The Central Bank anticipates that applicants for the roles of Chairman, CEO, Finance Director or Chief Risk Officer at any high-impact Firm will always be interviewed. The Central Bank will however expedite the application process for a PCF role where the applicant already performs the PCF role within another EEA Member State.

If an interview is to be conducted, the interview panel is likely to be comprised of members of the Central Bank's Regulatory Transaction and Supervisory Directorates and members of the Policy and Risk Directorate and / or the Enforcement Directorate, as appropriate.

Offers of appointment to PCFs should only be made subject to Central Bank approval. The performance of a PCF by a person on a temporary basis must be approved in advance by the Central Bank and any extension of the temporary period must also be approved.

7.5 Standard of fitness and probity appropriate for a CF

The standard of fitness and probity required of a particular CF needs to be judged by the Firm concerned on a subjective basis and the particular demands of each role must be considered. For this reason, the Guidance does not categorically set out the knowledge or expertise that is required in respect of a particular function.

*Fitness*¹¹⁷

In determining the fitness of an individual to perform a CF, the Firm should determine their qualifications, experience and knowledge, amongst other relevant factors. The Central Bank then expects the Firm to perform due diligence to assess a person's fitness to perform the CF. This due diligence should include:¹¹⁸

- evidence of compliance with the Minimum Competency Code;
- evidence of professional qualifications (where those qualifications are relevant to the exercise of the CF).¹¹⁹

¹¹⁵ Guidance, Section 8

¹¹⁶ Guidance, Section 9

¹¹⁷ Guidance, Section 14

¹¹⁸ Guidance, Section 15

¹¹⁹ Guidance, Section 15.2 (ii)

- evidence of having met continuing professional development requirements where relevant;
- record of interview and application;
- references;
- where the Firm is unable to obtain a reference it must record the attempts it has made to obtain the reference. It must then record how it was able to satisfy itself that the person was competent to perform the CF in the absence of a reference.¹²⁰
- record of previous experience;
- record of experience obtained outside the State; and
- details of concurrent responsibilities including directorships and any other employment.

"Probity"

The probity of an individual relates to his/her character. **The Guidance** states that it is only when evidence is available to suggest that a person might not comply with the required standard of probity that a Firm must investigate this thoroughly.

The Guidance sets out that the Central Bank expects the Firm to, *inter alia*, conduct the following due diligence:¹²¹

- obtain written confirmations from the person as to whether any of the circumstances set out in section 4.1 (a) – (k) and section 5.2 (a) – (e) of the Standards apply to that person (these provisions relate to past conduct and financial soundness). The Guidance suggests that Firms use the questions on these matters in the IQ (questions 5.1-5.23) as a template for their due diligence in this regard; and
- where a person confirms that one or more of the circumstances set out above apply that person must be able to demonstrate that his/her ability to perform the CF is not adversely affected to a material degree by that matter(s).

7.6 Additional due diligence for CF1, CF2 and PCFs¹²²

The Guidance sets out the standard of additional due diligence that must be conducted on a person being appointed to perform a CF1 (exercising significant influence), a CF2 (controlling or monitoring compliance) and PCFs. The Firm must investigate whether the person has been the subject of a sanction under the Central Bank's administrative sanctions regime or any other regulatory action. The Firm should check the Companies Registration Office records for any restrictions or disqualifications and should check publicly available sources to ascertain whether a judgment debt has been registered against that person. Due diligence should also be conducted to ascertain whether the person has any criminal conviction which could be relevant to his/her ability to perform the function, such as convictions for offences relating to dishonesty and financial crime.¹²³

For the purposes of conducting due diligence on proposed appointees, the Guidance sets out a sample due diligence grid at Appendix 1 and a pro-forma agreement for the employee to sign pursuant to **section 21(1)(b) of the 2010 Act**.¹²⁴

7.7 Failure to comply with the Code

Where there is a failure by a person to comply with the **Code**, the Central Bank may:

- in the case of a PCF, refuse to approve such a person to perform the relevant function;
- conduct an investigation into the fitness and probity of the person; or
- issue a prohibition notice under the 2010 Act which prohibits that person from acting in the relevant function.

¹²⁰ Guidance, Section 15.2 (v)

¹²¹ Guidance, Section 17.2

¹²² Guidance, Section 18

¹²³ Guidance, Section 19

¹²⁴ Guidance, pages 52 and 53

Firms may not permit any person to perform a CF unless they are satisfied on reasonable grounds that the person complies with the Code and that the person has agreed to abide by the Standards. A failure to comply with these requirements may expose the Firm and/or its management to financial penalties and other sanctions.

7.8 Continuing nature of the obligation

The obligation on Firms to ensure compliance with the Standards is an ongoing one. For this reason, this obligation is not simply discharged by undertaking due diligence upon commencement of the regime or when a person is first appointed to a CF or PCF role. To assist with ensuring compliance on an ongoing basis, persons in a CF or PCF should be required to notify the Firm of any material changes from when initial due diligence was carried out.

The Central Bank also recommends that Firms carry out an annual audit in respect of persons performing CFs. Such an audit should involve asking these persons to confirm whether they are aware of any material developments in relation to their compliance with the Standards. An investigation should be undertaken if the Firm has any concerns regarding the fitness and probity of relevant persons and the Central Bank should be notified without delay.

As part of a system of ongoing performance monitoring, the Firm should also, at least annually, ask persons performing CFs to certify that they are aware of the Standards and agree to continue to abide by them.

Ultimately, it is the Firm's responsibility to determine what is appropriate in order to satisfy itself, on reasonable grounds, that a particular person meets the Standards. In each case, how a Firm came to be satisfied that a person meets the Standards should be recorded and documented, to include documenting each step in the decision-making process and the reasoning behind decisions made.



8 Report on the Behaviour and Culture of the Irish Retail Banks (the “Report”)

One of the most recent proposals in respect of reform of the Regime arose from the Central Bank’s report on “Behaviour and Culture of the Irish Retail Banks”, (the “**Report**”), which was mandated by the Minister for Finance and Public Expenditure and Reform following the completion of the Central Bank’s Tracker Mortgage Examination.

The reviews and assessments carried out by the Central Bank in preparing for the Report focused primarily on the five retail banks’ executive leadership teams, owing to the importance of these teams *“in driving effective cultures in which customer interests are adequately identified, discussed and taken into account”*. In light of the findings of these reviews and assessments, and the Central Bank’s own supervisory and regulatory experiences, the Central Bank proposed reforms to its current *“legal and policy framework”* in the form of the IAF.

8.1 What we know about the IAF - Analysis of the Report

Although the Report stemmed from a review of the five retail banks, the Central Bank clarified in the Report that *“these reforms will apply more widely than to retail banks alone”*.

The Report sets out the four parts of the Central Bank’s IAF proposal:

- Conduct Standards which set out the behaviour the Central Bank expects of Firms and the individuals working within them;
- A Senior Executive Accountability Regime (the “**SEAR**”) which places obligations on certain Firms and senior individuals within them to set out where responsibility and decision-making lies for their business, to ensure clearer accountability. The Central Bank has proposed that, in the first instance, this will apply to credit institutions, insurance undertakings and certain investment firms;
- Enhancements to the current Regime, which will increase the focus on the responsibility of Firms by requiring Firms to proactively assess individuals in CFs on an ongoing basis; and
- A unified enforcement process, which would enable the Central Bank to pursue individuals directly for their own misconduct rather than having to link the misconduct to their participation in a regulatory breach by their Firm.

The interconnectivity between the IAF and the Regime is yet to be fully developed and articulated. However, it is important to have an understanding of what is likely to apply. This context we have set out below the likely impacts of the enhancements to the current Regime and the unified enforcement process.

8.1.1 *Enhancements to the Regime*

These enhancements are designed to complement the existing Regime. The enhancements proposed are:

- a certification regime which would require Firms to certify on annual basis that individuals performing CFs in the Firm are fit and proper to carry out their functions (currently firms are required to ask those performing the CFs to confirm their awareness of and compliance with the Regime on an annual basis);

- giving the Central Bank the power to publish details of where it has refused to approve an individual's appointment to a PCF role; and
- giving the Central Bank the power to investigate those who performed CFs in the past.

8.1.2 Unified Enforcement Process

As set out in the Report, the Central Bank is of the view that the current enforcement processes in place would not provide an effective enforcement framework for the IAF. The unified enforcement process, which will apply to all breaches by Firms or individuals of financial services legislation, recommends that the requirement of “*participation*” be removed as a hurdle to holding individuals accountable.

As it stands, under the current Administrative Sanctions Procedure (“**ASP**”), the Central Bank may only pursue a “*person concerned in the management*” of a Firm where (1) a case has first been proven against the Firm, and (2) the Central Bank can then prove that the individual participated in the breach.

Under the proposed IAF, the Central Bank has recommended the removal of the current participation requirement, enabling it to pursue individuals directly for their misconduct under the ASP, rather than only where they are proven to have participated in a Firm’s wrongdoing. The removal of the participation requirement is essential to enhancing the accountability of individuals for failing to maintain basic standards of conduct, thereby unifying the enforcement process.

8.2 The Implementation Timeline

The Central Bank explains in the Report that the IAF will have to be put on a legislative footing, it also acknowledges that “*the design, implementation and operationalisation of such a framework would be a multi-year project.*” As it stands, the Government is seeking to introduce the IAF by way of a bill which will amend the current Central Bank Acts to provide for the effective implementation of the IAF.

On 18 June 2019, the Minister of Finance and Public Expenditure and Reform secured the **approval of government** to begin the process of drafting heads of the Bill and explained that it was his “*intention to bring forward draft heads of Bill towards the end of the year.*” It was further communicated by the Central Bank that the Bill would go through a public consultation phase in 2020.

Unfortunately, no progress has been made since these intentions were voiced but given the delays in the formation of a new government and the management of all things COVID-19 related, this is not surprising. However, the **Programme for Government** released in September 2020, lists a Central Bank (Amendment) Bill to support the advancement of an improved culture in the Irish financial system through greater accountability in the regulated sector. This bill was also identified as undergoing pre-legislative scrutiny during the Autumn 2020 session. To date, there has been no further information provided beyond this.



9

Central Bank Dear CEO Letters

“Firms have the first line of responsibility under the Fitness and Probity Regime. Firms must ensure people subject to the regime are fit and proper. Further, this responsibility does not end following the hiring of staff; you must ensure that your staff are fit and proper on an on-going basis. Where Firms fall short, the Central Bank will take appropriate action.”

9.1 Dear CEO Letter dated April 2019

As mentioned in the [Background](#) above, one of the most recent pronouncements by the Central Bank on compliance with the Regime came in April 2019, when the Central Bank issued its ‘[Dear CEO’ letter on the Regime](#). In the Dear CEO Letter, the Central Bank stated that it continues to see significant shortcomings in Firms’ compliance with their fitness and probity obligations.

The Central Bank noted multiple failings. In particular, it noted:

- the failure to provide for the ongoing nature of the obligation including Firms’ failing to carry out effective due diligence to ensure persons holding a CF role remain ‘fit and proper’;
- the failure by Firms to report issues to the Central Bank including when Firms have identified fitness and probity concerns about an individual in a CF role;
- the appointing of persons to PCF roles without obtaining prior Central Bank approval; and
- the failure of applicants in disclosing material facts on their IQs which have been submitted to the Central Bank and subsequent failures of Firms to adequately review these questionnaires.

In light of this, the Central Bank set out its expectations of Firms, which include:

- the review of Firms’ fitness and probity policies, procedures and practices;
- ensuring that individuals appointed under the Regime are fit and proper both at the application stage and on an ongoing basis; and
- consideration of the issues raised in the Dear CEO Letter in conjunction with the guidance on the Standards issued by Central Bank, demonstrate the review process and explain and evidence what actions have been taken by the Firm to address any shortcomings.

As with many communications from the Central Bank in recent times, the contents of the Dear CEO Letter was to be brought to the board’s attention and any actions required to be taken to rectify shortcomings was to be carried out in conjunction with the board’s oversight. This Dear CEO Letter will continue to form part of the Central Bank’s supervision of the Regime and it would be prudent for Firms to treat same as an addition to the Guidance.

9.2 Dear CEO Letter dated 17 November 2020

Following on from the 2019 Dear CEO Letter, the Central Bank conducted a series of thematic onsite inspections across a sample of firms in the insurance and banking sectors, assessing the level of compliance with the Regime. On 17 November 2020, the Central Bank **issued a Dear CEO letter** (the **“2020 Dear CEO Letter”**) to Firms following the conclusion of the inspections, highlighting the key findings and observations together with its expectations of Firms.

The Central Bank’s inspections focused on the following areas:

- awareness and understanding within Firms of their compliance obligations;
- initial and ongoing due diligence processes;
- oversight and control where PCF or CF roles have been outsourced;
- processes and channels for effective engagement with the Central Bank; and
- role of the compliance function with regard to the Regime.

The Central Bank noted there was a wide divergence of standards in the implementation of the Regime across the Firms inspected. Some of the key findings of the inspections were in relation to:

- *Due Diligence:* The Central Bank noted that due diligence was the most consistent area of weakness across the Firms inspected. The initial due diligence undertaken by Firms was not sufficiently robust to evidence compliance with the requirements of the Standards. Issues identified included; a lack of evidence of qualifications, reference checks and suitability searches. Ongoing due diligence processes were highlighted as being particularly poor and often limited to an annual self-declaration with no ongoing due diligence screening of an individual’s fitness and probity.
- *The Role of the Board in the Fitness and Probity Process:* The Central Bank noted that the level of awareness by Board members of their fitness and probity obligations in many Firms was poor, particularly in relation to Board appointments. Issues included, lack of scrutiny of board, CEO involvement in candidate screening and inadequate succession plans. In a number of cases there was also no evidence of Board approval, discussion or challenge of proposed PCF appointments.
- *Outsourcing of Roles subject to the Regime:* In Firms where PCF or CF roles had been outsourced to unregulated Outsource Service Providers (“**OSPs**”), the majority of Firms had not, as part of their due diligence obtained the required documentation nor made appropriate inquiries as to the OSP’s process for assessing fitness and probity. In addition, Firms did not have a process whereby outsourcing arrangements were analysed to verify whether PCF or CF roles were being performed.
- *Engagement with the Central Bank:* The processes related to engagement with the Central Bank on fitness and probity issues in the majority of Firms were found to be inadequate. The Central Bank noted that this lack of engagement is a reflection of the passive approach taken by Firms to their ongoing due diligence requirements.
- *Role of the Compliance Function:* Many firms were found not to be undertaking the necessary robust compliance testing of their fitness and probity processes and procedures.

The Central Bank expects that all firms will take appropriate action to address the issues outlined in the 2020 Dear CEO Letter. Evidence of actions taken must be available to be provided to the Central Bank, if requested.

The Central Bank’s expectations include:

- *Board Appointments:* the same high standards be observed for board appointments as PCF appointments.
- */Qs:* IQs submitted to the Central Bank are required to declare that the Firm has carried out all necessary due diligence enquiries and contain full and frank disclosure of all relevant information including potentially adverse information. The Central Bank noted that non-disclosure, particularly, where there is an apparent attempt to mislead may call into question the individual’s suitability for appointment and the Firm’s decision to propose the individual in question.

- *Ongoing Due Diligence:* Annual self-declarations by PCF and CF role holders is the minimum expected. The Central Bank expects any concerns regarding the ongoing fitness and probity of a person performing a CF role to be investigated and appropriate action taken without delay.
- *Outsourcing of PCF/CF Roles:* Firms are reminded that fitness and probity obligations apply irrespective of whether the PCF or CF role is performed within the firm or outsourced to an unregulated OSP and firms are required to have appropriate processes and procedures to ensure compliance.
- *Engagement with the Central Bank:* The Central Bank expects firms to be proactive in identifying fitness and probity issues as part of its ongoing due diligence and in reporting as appropriate to the Central Bank without delay.
- *Role of the Compliance Function:* Firm's fitness and probity process should be subject to comprehensive oversight by the compliance function and periodic independent testing by the internal audit function to ensure it is fit for purpose.

The Central Bank noted it will continue to engage with firms in assessing their compliance with the Regime and will initiate necessary supervisory action where weaknesses are identified. Given that this is the second communication in quick succession on the topic, it is a clear indication of the priority which the Central Bank is placing on fitness and probity and by extension, culture within Firms. Firms have now been reminded twice of their obligations and failure to ensure compliance with such obligation will likely lead to supervisory action.



10

Additional PCF Roles

On 25 February 2020, the Central Bank issued a **Notice of Intention** proposing the creation of three new PCF roles PCF-49 Chief Information Officer (“**CIO**”), PCF-50 Head of Material Business Line and PCF-51 Head of Market Risk and the splitting of PCF-39 Designated Person into six new roles aligned to the specific managerial functions.

On 9 October 2020, the Central Bank published an **update** on its website to its February 2020 Notice of Intention noting the enactment of a new statutory instrument **S.I. 410 of 2020** (the “**Amending Regulations**”) amending the Regulations introducing three new PCFs roles:

- PCF-49 CIO (under the ‘General’ category);
- PCF-50 Head of Material Business Line (under the ‘Banking’ category); and
- PCF-51 Head of Market Risk (under the ‘Banking’ category);

and splitting PCF-39 Designated Person into six PCF roles aligned to the specific managerial functions highlighted in the Central Bank’s UCITS Regulations, AIF Rulebook and the Fund Management Companies Guidance as follows:

- PCF-39A Designated Person with responsibility for Capital and Financial Management;
- PCF-39B Designated Person with responsibility for Operational Risk Management;
- PCF-39C Designated Person with responsibility for Fund Risk Management;
- PCF-39D Designated Person with responsibility for Investment Management;
- PCF-39E Designated Person with responsibility for Distribution; and
- PCF-39F Designated Person with responsibility for Regulatory Compliance .

The Central Bank has introduced these new PCF roles due to the (i) increasing importance of and reliance on IT within firms; and (ii) the changing landscape of the banking sector in Ireland due to Brexit, including the entry/ expansion of investment banks/broker-dealer firms with significant capital markets activity.

On the creation of the new PCF roles outlined above, the Central Bank stated that it is its aim to capture a greater number of individuals responsible for the performance of key function’s so as to ensure they fall under the remit of the Central Bank’s Regime. In doing so, the Central Bank ensures that a greater number of individuals will be required to uphold fit and proper standards in relation to the relevant PCF role which they carry out within their Firm.

10.1 Chief Information Officer

The creation of the role of CIO is intended to provide a response to the growing importance of IT in the financial services industry. The high level of reliance on IT in modern business strategies provides greater exposure to certain risks and a pressing need for security risk management. The Central Bank acknowledges and seeks to counteract these risks by proposing the new PCF role of CIO who shall be responsible for all IT matters. The Central Bank expects that the CIO, also possibly referred to as ‘Chief Technology Officer’ will be likely to apply, but is not limited to, situations where:

- the Firm has a PRISM impact rating of High or Medium High.
- or
- IT is a key enabler or core element of the Firm’s business model.

10.2 Head of Material Business Line

The new PCF role of Head of Material Business Line is relevant to credit institutions only and would typically be held by an individual tasked with reporting directly to the CEO. A Material Business Line is described by the Central Bank as being one which satisfies either of the following:

- has gross total assets equal to or in excess of €10 billion;
- or
- accounts for 10% or more of the credit institutions gross revenue.

10.3 Head of Market Risk

The PCF role of Head of Market Risk is only relevant to certain credit institutions. The role will only apply where a credit institution is linked to a certain level of material risk. Whether a material risk exists is dependent on whether the credit institution satisfies the following criteria:

- €500 million of market risk (including Credit Valuation Adjustment) risk weighted assets;
- or
- €100 billion of notional derivatives traded.

10.4 Split of PCF-39 Designated Person

The proposal to split the PCF-39 function of Designated Person will allow for the creation of six new roles. These six individuals roles are intended to cover separate key management functions highlighted in the Central Bank’s UCITS Regulations, AIF Rulebook and the Fund Management Companies Guidance. These functions are as follows:

- Capital and Financial Management;
- Operational Risk Management;
- Fund Risk Management;
- Investment Management;
- Distribution; and
- Regulatory Compliance.

10.5 Next Steps

The Amending Regulations became effective on 5 October 2020. In addition to the Amending Regulations, the Central Bank published an accompanying FAQ document detailing next steps and clarifications on the Amending Regulations.

The Central Bank has clarified that firms that do not currently have an individual performing one of the new PCF roles are not required to create one in order to comply with its obligations under the Regime. Firms are, however, required to review their functions and determine whether any would meet the PCF roles as listed in the Amending Regulations.

The Central Bank has also clarified that individuals who occupy two PCF roles must be approved by the Central Bank in respect of the performance of each PCF role separately.

Individuals in situ on 5 October in the roles of PCF-49, PCF-50 and PCF-51 were not required to seek the approval of the Central Bank to continue to perform one of the new PCF roles, however, Firms had to review their assessment under Section 21 of the 2010 Act in respect of those individuals and submit confirmation of such an assessment to the Central Bank by 16 November 2020. Similarly, individuals in situ on 5 October in one of the newly split PCF-39 roles were not be required to seek the approval of the Central Bank to continue to perform one of the new PCF roles, however, firms had to submit a list of the individuals performing each of the roles to the Central Bank by 16 November 2020.

If an individual holding any of the newly created PCF roles changes after 5 October 2020, the new individual will be required to seek the Central Bank's prior approval as a PCF in the normal way.



11

Recent Enforcement Cases

The following is a brief account of some of the most recent enforcement cases and notices taken by the Central Bank against both Firms and individuals in respect of breaches of the Regime and general misconduct. The details of the notices are always recommended reading as they speak to the view of the Central Bank and gives insights to its areas of priority and concern.

11.1 Appian Asset Management

From 2014 - 2015 Appian Asset Management (“**Appian**”) breached section 21 (a) of the 2010 Act by permitting an employee to perform two CFs without satisfying itself that the employee complied with the Standards.

According to the Central Bank’s settlement agreement with Appian, on 13 June 2018, the Central Bank fined Appian €443,000 and reprimanded it for significant breaches across three regulatory regimes: client asset, anti-money laundering, and fitness and probity. Appian admitted to the breaches.

Appian’s historic regulatory failures left it exposed to a cyber-fraud by a third party where, acting on the instructions of a fraudster impersonating a client, it facilitated a series of transactions resulting in the loss of €650,000 of a client’s funds. The client was fully reimbursed.

The Central Bank had regard to section 33AS(1) of the Central Bank Act 1942, and had it not been for the financial position of Appian, the Central Bank would have imposed a financial penalty of €825,000.

The Central Bank’s enforcement investigation identified that the loss of client funds was caused by Appian’s failures in the following areas:

- (i) it had defective controls to protect client assets against fraud;
- (ii) it had inadequate policies and procedures to monitor transactions, detect and report money laundering and provide its staff with appropriate training; and
- (iii) it failed to ensure that an employee, performing a role that might expose Appian to financial, consumer or regulatory risk, was fit for that role.

11.2 Merrion Stockbrokers Limited

The Central Bank's settlement agreement with Merrion Stockbrokers Limited ("Merrion") states that on 12 December 2017, the Central Bank fined €200,000 and reprimanded it for a breach of section 21 of the 2010 Act. Merrion admitted this breach, which was identified during a Central Bank inspection of Merrion in 2016.

Under the Fitness and Probity regime, individuals performing certain influential and customer facing roles in regulated entities are considered to be performing controlled functions ('CFs'). The most significant of these roles are pre-approval controlled functions ('PCFs') in respect of which Central Bank approval is required prior to appointment.

The Central Bank's enforcement investigation identified that Merrion failed to introduce adequate systems or controls to ensure that individuals holding CFs and PCFs complied with the Standards.

The breach occurred from the introduction of the Fitness and Probity Regime on 1 December 2011, and persisted for over 4 years. During this period, Merrion failed to:

- (i) Introduce adequate systems or procedures to ensure compliance with its obligations under section 21 of the 2010 Act; and
- (ii) Take reasonable steps to satisfy itself that its CFs and PCFs complied with the Standards.

A programme of compliance improvements began following a management buy-out and the appointment of a new Board in late 2014. Following the Central Bank's inspection in 2016, the current Board took appropriate steps to ensure that the inadequacies in Merrion's Fitness and Probity policies and procedures were addressed.

11.3 Mr. Michael Kearns

On 27 September 2019, the Central Bank issued a prohibition notice prohibiting Mr. Michael Kearns from performing any CFs in any Firm for a period of 2 years. Mr Kearns acted as an Executive Director of "Home Credit Ireland Limited" which is authorised as a Moneylender.

According to the Central Bank's Prohibition Notice, Mr. Kearns had failed to properly disclose to the Central Bank the circumstances under which his former employment had ceased when he made an application for a PCF position in Home Credit Ireland Limited.

11.4 Mr. Rory O' Connor

On 9 June 2020, following on from the Central Bank's investigation of RSA Ireland DAC ("RSA") in 2018, the Central Bank reprimanded Mr. Rory O'Connor, former Executive Director and CFO of RSA and disqualified him from being a person concerned in the management of a firm for a period of 8 years 4 months and imposed a fine of €70,000 for his admitted participation in RSA's failure to maintain sufficient technical reserves from February 2010 to September 2013.

The Central Bank's investigation in respect of Mr. O'Connor found that:

- he knowingly and actively participated in RSA's failure to maintain sufficient technical reserves through his involvement in the under-reserving of large loss claim reserve estimates;
- participated, along with certain other individuals, in undocumented meetings during which certain large loss claim reserve estimates were deliberately and wrongfully under-reserved;
- gave instructions and transmitted information relating to those claims within RSA knowing them to be under reserved; and
- concealed the under-reserving by knowingly providing inaccurate and misleading financial information to the Central Bank in his role as CFO.

11.5 Mr. Juerg von Geitz

On 16 July 2020, the Central Bank published a Prohibition Notice prohibiting Mr. Juerg von Geitz, an Executive Director of The Mortgage Department Limited, an authorised mortgage intermediary from performing any CF in any firm for a period of ten years from 5 July 2019.

Mr. von Geitz's prohibition arose from:

- the provision of several misleading answers in his IQ to the Central Bank in application for a PCF position in The Mortgage Department Limited; and
- his failure to cooperate with the Central Bank's subsequent investigation.

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