



October 2012

Fit and Proper Update

As you will be well aware, the Central Bank's Fitness and Probity Standards (the '**Standards**') have applied to all persons performing Pre-Approval Controlled Functions ('**PCFs**') since December 1, 2011 and to all persons newly appointed to Controlled Functions ('**CFs**') from March 1, 2012.

The implementation of the final phase of the Standards is fast approaching in that as of December 1, 2012 they will apply to all persons performing CFs prior to March 1, 2012.

Consequently, regulated entities (other than Credit Unions) will need to take measures to ensure that all persons performing CFs within their organisation are in compliance with the Standards.

The Fitness and Probity Standards

Under the Standards, persons performing CFs (and PCFs) in regulated entities are required to possess a level of fitness (i.e. competence and capability) and probity (i.e. honesty, ethical judgment and integrity, together with financial soundness) befitting the relevant role.

In determining whether an individual is performing a CF, regulated entities must assess the role and functions of each individual in line with the definitions prescribed by the Central Bank Reform Act 2010 (Sections 20 and 22) Regulations 2011 (as amended) (that is, the list of CFs as set out at Appendix I).

Where a CF is outsourced to a regulated entity, details of the outsourced entity's regulatory status will need to be ascertained. Where the function is outsourced to a non-regulated entity, a letter must be obtained from the outsourced entity confirming that the requisite Fitness and Probity checks have been carried out.

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For all other CF roles (i.e. those not outsourced), the regulated entity will need to consider the responsibilities of the CF and determine the specific competencies and the level of probity expected of a person performing that CF. This assessment should be documented.

Regulated entities must satisfy themselves 'on reasonable grounds' that persons performing the CF role in their organisation comply with the Standards. In order to do so, the regulated entity must conduct an appropriate level of due diligence on the individual concerned.

It should be noted that the roles of CF-1 and CF-2 will attract a greater level of due diligence than the roles of CF 3-11.

Assessing fitness

The fitness of an individual to hold a particular CF will be considered subjectively and will be dependent upon the function to be performed – its complexity, the risks attached to it etc.

In order to consider a person's 'fitness', a regulated entity must:

- ▣ obtain evidence of compliance with the Central Bank's Minimum Competency Code, where relevant (i.e. where the role is consumer-facing);
- ▣ obtain evidence of professional qualification(s), where relevant to the role;
- ▣ obtain evidence of compliance with continuous professional development ('CPD') requirements, where relevant;
- ▣ maintain a record of the individual's interview and job application;
- ▣ obtain satisfactory references from previous employers;
- ▣ obtain a record of the individual's previous work experience (both in and outside of the State); and
- ▣ obtain details of the individual's concurrent responsibilities (i.e. other posts held).

Assessing probity

In determining whether or not an individual has sufficient probity to hold a particular CF, the regulated entity will need to conduct due diligence on the individual's background. In the case of all CFs, this will involve the regulated entity obtaining a 'self-certification' letter from the individual stating that:

- ▣ they have read the Standards and the Central Bank's Guidance on same;
- ▣ they are in compliance with the Standards;

- ▣ they will continue to comply with the Standards;
- ▣ where relevant, they are in compliance with the Minimum Competency Code 2011; and
- ▣ whether or not any of the circumstances set out in Section 4.1(a)-(k) ('Honest, Ethical, Integrity') or Section 5.2(a)-(e) ('Financial Soundness') of the Standards apply to the individual.

Where the individual cannot give certification with regard to the final point above, the individual must be in a position to demonstrate that his or her ability to perform the CF is not adversely affected to a material degree.

A person performing a CF is required to notify their employer without delay if for any reason they no longer comply with the Standards, however, as part of ongoing performance monitoring, regulated entities should ask persons performing CFs to certify at least on an annual basis that they are aware of and continue to be bound by the Standards.

Additional due diligence must be carried out in respect of persons holding CF-1 and CF-2 roles. In such circumstances, the regulated entity will need to:

- ▣ check the website of the Central Bank (or other regulatory authorities, as appropriate) to determine whether or not the person has been the subject of sanction or other regulatory action;
- ▣ have appropriate searches carried out in order to determine whether the individual has been restricted or disqualified from acting as a company director;
- ▣ perform a judgment search to assess if a judgment debt has been registered against a person; and
- ▣ perform a bankruptcy search to determine whether or not the individual has been the subject of a bankruptcy petition.

With regard to the last two points above, where the person has lived outside the State for more than six months in the previous five years the regulated entity must request that the person provides a check from a publicly available source in relation to judgment debts / bankruptcy from that other jurisdiction(s).

For your convenience a table setting out the various due diligence requirements for the various CFs is set out at Appendix II.

Actions to be taken by regulated entities at this stage

In order to meet with the requirements, regulated entities will need to take the following steps prior to the December 1 deadline:

- ▣ identify and maintain a record of persons who are performing CFs within the organisation. The organisation is not required to submit this list to the Central Bank unless specifically requested

to do so. The roles of Company Secretary (CF-1) and MLRO (CF-2) will apply to most regulated entities. Depending on the number of employees, the type of services being provided by the regulated entity and the nature of the role (and whether or not it involves significant influence), then other CF roles may also be relevant;

- ▣ arrange to have the requisite due diligence searches carried out and maintain a record of due diligence undertaken in respect of those persons. It should be noted that the Central Bank recently corresponded with the Irish Funds Industry Association concerning the level of due diligence it expects to be conducted on those persons performing the role of company secretary. In this correspondence, the Central Bank states that in relation to corporate secretaries it may be inadequate for a regulated entity to only perform due diligence on directors or heads of function of such an entity. In addition the Central Bank states that all individuals in the role of company secretary must comply with the Standards;
- ▣ obtain written agreement of the CF to abide by the Standards (and the Minimum Competency Code, where appropriate);
- ▣ update employment contracts, where appropriate;
- ▣ draft terms of reference for the CF, outlining the role and responsibilities and the specific competencies and level of probity required to perform such a role; and
- ▣ update the Employee Handbook/Compliance Manual where relevant.

It should be noted that in relation to various judgment/bankruptcy searches delays may occur in obtaining search results at times of high demand, particularly in relation to foreign searches. We recommend that regulated entities address this issue as soon as possible so as to avoid missing the December 1 deadline.

If you should have any queries in respect of the above or require any assistance in complying with the Standards, please contact your usual Dillon Eustace contact or any member of the Regulatory and Compliance Team.

Appendix I**List of Controlled Functions**

CF-1	ability to exercise a significant influence on the conduct of the affairs of a regulated financial service provider
CF-2	ensuring, controlling or monitoring compliance by a regulated financial service provider with its relevant obligations
CF-3	giving of advice to a customer of the regulated financial service provider
CF-4	arranging a financial service for a customer of the regulated financial service provider
CF-5	assisting a customer in the making of a claim under a contract of insurance or reinsurance
CF-6	determining the outcome of a claim arising under a contract of insurance or reinsurance
CF-7	management or supervision of those persons undertaking CF3 to CF6 roles
CF-8	adjudicating on any complaint communicated to a regulated financial service provider by a customer
CF-9	insurance and reinsurance intermediaries who direct and manage the undertaking or are directly involved in insurance or reinsurance mediation
CF-10	dealing in or having control over property of a customer of the regulated financial service provider
CF-11	Dealing in or with property on behalf of the regulated financial service provider, or providing instructions or directions in relation to such dealing

Appendix II

Overview of due diligence requirements for Controlled Functions

Standard	Supporting documentation obtained from a third party	CF-1	CF-2	CF-3 – CF-11
Competent and Capable	Certificate/transcript/records evidencing the qualification	CF obliged to supply	CF obliged to supply	CF obliged to supply
Employer's References	References	Attempts must be made to obtain references	Attempts must be made to obtain references	Attempts must be made to obtain references
Minimum Competency Code 2011	Certificate/transcript/records evidencing the qualification or evidence of grandfathering arrangement as appropriate	Self-certification if applicable	Self-certification if applicable	Self-certification if applicable
Evidence of compliance with CPD requirement	N/A	CF to supply if necessary for maintenance of relevant qualification	CF to supply if necessary for maintenance of relevant qualification	CF to supply if necessary for maintenance of relevant qualification
Record of interview and application	N/A	Yes	Yes	Yes
Concurrent responsibilities	N/A	Self-certification	Self-certification	Self-certification
Conflicts of interest	N/A	Self-certification	Self-certification	Self-certification
Honest, ethical and with integrity	N/A	Self-certification	Self-certification	Self-certification
Restricted/disqualified director search	Extract from CRO website	Yes	Yes	N/A
Regulator check	Extract from Central Bank website	Yes	Yes	Self-certification
Bankruptcy search	Official searches	Yes	Yes	Self-certification
Judgment search	Official searches	Yes	Yes	Self-certification

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