



October 2016

Fitness and Probity - Ongoing obligations

Introduction

The Central Bank's Fitness and Probity Regime (the "**Fitness and Probity Regime**"), which was implemented in full on 1 December 2012, applies to regulated financial service providers ("**RFSPs**") which include banks, insurance companies, retail intermediaries, investment funds, MiFID investment firms and fund service providers.

The Fitness and Probity Regime comprises Part 3 of the Central Bank Reform Act 2010 (the "**Act**"); the Central Bank Reform Act 2010 (Section 20 and 22) Regulations 2011 (as amended) (the "**Principal Regulations**"); and the Fitness and Probity Standards (Code issued under Section 50 of the Central Bank Reform Act 2010) (the "**Standards**").

Fitness and Probity Requirements

Section 21 of the Act provides that a RFSP shall not permit a person to perform a Controlled Function ("**CF**") (including those prescribed as Pre-Approval Controlled Function ("**PCF**") unless it is satisfied on reasonable grounds that the person complies with the Standards and the person has agreed to abide by the Standards.

Under the Standards, persons performing CF roles in RFSPs are required to possess a level of fitness (i.e. competence and capability)

For further information on any of the issues discussed in this article please contact:



Michele Barker

DD: + 353 (0)1 673 1886

Michele.barker@dilloneustace.ie



Rose McKillen

DD: + 353 (0)1 673 1809

rose.mckillen@dilloneustace.ie

and probity (i.e. honesty, ethical judgment and integrity, together with financial soundness) befitting the relevant role.

In order to meet with the requirements of the Fitness and Probity Regime, RFSPs need to:

- ▣ Identify and maintain a record of all persons who are performing CF and PCF roles within the RFSP. Although identifying PCF positions may be relatively straightforward (see the list set out in the Principal Regulations), the same may not always be true of CF positions as the list of CFs is broader in scope than just head of organisational units and persons who effectively run the RFSP or those who hold key functions (see Appendix I for list of CFs);
- ▣ When hiring, determine clearly (and document) whether the new hire is to perform a CF and, if so, which one. Drafting terms of reference for the relevant positions outlining the role and responsibilities and the specific competencies and level of probity required to perform each role may be useful;
- ▣ Arrange to have the requisite due diligence searches carried out and maintain a record of due diligence undertaken in respect of all CFs and PCFs together with any documentation provided by the person including any responses given and signed by the person in relation to the Standards. A list of the due diligence required for each CF role is set out in Appendix II. Appointment to a PCF role must be pre-approved by the Central Bank and all due diligence in respect of a proposed appointment to a PCF must be undertaken prior to seeking approval from the Central Bank but appointment to a CF role does not require prior approval by the Central Bank; and
- ▣ Obtain written agreement of the CF and PCF to abide by the Standards (and the Minimum Competency Code 2011, where appropriate).

Ongoing obligations

RFSPs are reminded of their ongoing obligations under the Fitness and Probity Regime in respect of persons performing CF and PCF roles which involve:

- ▣ Requiring CFs and PCFs to certify on an annual basis that they are aware of the Standards and agree to continue to abide by these Standards;
- ▣ Asking persons performing CF and PCF roles to undertake to notify the RFSP of any material changes in respect of the initial due diligence carried out;
- ▣ Carrying out an annual audit of persons performing CF and PCF roles by asking those performing such roles to confirm whether they are aware of any material developments in relation to their compliance with the Standards of which the RFSP should be aware;

- ▣ Investigating any concerns regarding the fitness and probity of a person performing a CF or PCF, taking appropriate action without delay and notifying the Central Bank of such action; and
- ▣ Filing the Annual PCF Confirmation Return which is required from each RFSP in respect of each active PCF holder within the RFSP confirming that they are compliant with the Standards.

Central Bank Enforcement

RFSPs must ensure ongoing compliance with the Fitness and Probity Regime. In recent years, the Central Bank has included Fitness and Probity on its list of enforcement priorities. The Central Bank has statutory powers in respect of Fitness and Probity issues under the Act and can conduct reviews of a RFSP's compliance with the Fitness and Probity Regime. The Central Bank may require to see any fitness and probity records or due diligence within the context of an investigation of a RFSP's compliance with the Fitness and Probity Regime or of an investigation in relation to a person's fitness and probity to perform a CF or PCF role. In the event of non-compliance, Administrative Sanctions Procedure ("**ASP**") can be commenced against a RFSP by the Central Bank. The Central Bank also has the power to remove individuals from CF and PCF roles in certain circumstances.

How can Dillon Eustace help?

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

Dillon Eustace
October 2016

Appendix I**List of Controlled Functions as set out in Schedule 1 of the Central Bank Reform Act 2010 (Section 20 and 22) Regulations 2011 (as amended)**

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

Due Diligence Requirements – 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

Dublin

33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands

Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York

245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo

12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:

© 2016 Dillon Eustace. All rights reserved.