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NEW CENTRAL BANK FITNESS AND PROBITY REGIME FOR PERSONS PERFORMING CONTROLLED FUNCTIONS AND PRE-APPROVAL CONTROLLED FUNCTIONS AT REGULATED FINANCIAL SERVICE PROVIDERS.

Regulated financial service providers, (for ease of reference called firms) would include Banks, insurance companies, financial advisers, MiFID firms etc with the exception of credit unions.

The Central Bank Reform Act 2010 and related regulations (Act) has together with a **Fitness and Probity Code** issued under s50 of the Act and a **Guidance** document¹, created a harmonised statutory regime for the regulation of persons performing Controlled Functions (CFs) and Pre-Approval Controlled Functions (PCFs) at firms. In complying with the new regime, the new **Minimum Competency Code 2011** must also be complied with.

Persons occupying positions where CFs² (including PCFs³) are performed will be subject to the Central Bank's powers of investigation, suspension and prohibition. Firms need to act with urgency to ensure compliance with the new regime as the first deadline is the **31st of December 2011**.

What firms must not do

- permit a person to perform a CF unless satisfied on reasonable grounds that the person complies with the Standards (s21 and the Code issued under s50 of the Act)
- appoint a person to perform a PCF unless the Central Bank has approved in writing the appointment (s23)

What firms must do by 31st of December 2011

- examine the definition of PCFs in Schedule of the Regulations
- create a record of persons performing PCFs in the firm
- if unsure whether an employee is performing a PCF, contact a member of the firm's supervisory team in the Central Bank

- document and record all due diligence and retain relevant documentation
- submit to the Central Bank by 31st of December 2011 a list of persons in PCFs as of 1st December 2011. CEOs of firms must confirm in writing, when submitting the list, that they are satisfied that the persons on that list are compliant with these Standards and they have obtained each person's written agreement to abide by the Standards

Fitness and Probity

A person to whom the Code applies must comply with the Standards set out in the Code. In order to comply with the Standards, the person must be:

- Competent and capable (s3 of the Code)
- Honest, ethical and act with integrity (s4 of the Code); and
- Financially sound (s5 of the Code).

Relevant Dates for commencement of the new regime

From 1st December 2011 the new regime applies to new and existing PCFs

From 1st March 2012 the new regime applies to new CFs

From 1st of December 2012, the new regime applies to existing CFs

¹ in the process of finalisation

² this is a significant influence function (CF1) or a compliance function (CF2), or customer facing function (CF3-9) or dealing in property function (CF10-11).

³ this would be a member of a board, the CEO or company secretary (PCF1-9), member of a partnership/sole trader (PCF10-11), senior management position (core) (PCF12-18), senior management positions (Industry specific -FSP)(PCF19-41) and non-EEA firm branches in the state (PCF42)

General Obligations of Firms

Firms must:

- carry out certain levels of Due Diligence appropriate to the CF or PCF concerned and in the case of a PCF, the Directors questionnaire (IQ) has to be completed and filed on line with the Central Bank as part of the pre approval process
- be satisfied on reasonable grounds that persons performing PCFs and CFs comply with the Standards on appointment. This includes obtaining certain undertakings from them
- require staff to comply with the Standards throughout their employment
- establish systems and controls to comply with their obligations and retain supporting documentation

Standards of Fitness and Probity appropriate to the particular CF - levels of due diligence

The firm must satisfy itself on reasonable grounds that a person complies with the Standards. This would include considering the responsibilities linked to the specific function in the firm and determining the specific competencies and level of probity that should be expected of a person performing that specific CF in the firm.

The **level of due diligence** required from a firm in fulfilling its obligations may differ depending on the categorisation of the CF (e.g. CF1 and CF2 will attract higher diligence than CF3-11).

Guidance on determining the **standard of fitness and level of due diligence** appropriate to a particular CF are set out in s13 and s14 of the Guidance

Guidance on determining the standard of probity and level of due diligence appropriate to a particular CF are set out in s 15 and 16 of the Guidance.

Additional due diligence is required to be undertaken by a firm in the case of **CF1, CF2 and PCF functions**. The Guidance at s17 sets out what should be done.

The continuing obligations imposed on firms by the Act

- Firms should require person performing CFs to undertake to notify the firm of any material changes in respect of initial due diligence carried out
- Firms should carry out an audit of persons performing CFs on an annual basis by asking persons in CFs to confirm whether they are aware of any material developments in relation to their compliance with the Standards of which the firm ought to be aware
- Where a firm becomes aware that there may be concerns regarding the fitness and probity of a person performing a CF, the Central Bank expects the firm to investigate such concerns and take action as appropriate without delay and this would include notifying the Bank
- Firms must bring the Standards to the attention of every person performing a CF on its behalf and obtain a signed copy of an undertaking in a certain form
- As part of ongoing performance monitoring, at least on an annual basis, the firm should ask persons performing CFs to certify that they are aware of the Standards and that they agree to continue to abide by those Standards.

How McKeever Rowan can help

- Advice on practical steps to be implemented by firms to comply with new regime
- Advice on ongoing compliance with the regime
- Advice on submissions to Central Bank
- Advice on offer letters to potential employees and directors
- Restructuring employment contracts and director services contracts
- Advice on employment termination arising from new regime (including giving of references).

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