Fit & Proper
Ireland’s Fitness & Probity Regime

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The Central Bank of Ireland’s new Standards of Fitness and Probity came into effect on 1 December 2011. The following article examines the Standards which now apply to all regulated financial service providers other than credit unions. The regime was established under the Central Bank Reform Act 2010.

In essence, the Central Bank’s new Fitness and Probity regime provides that any person performing a controlled function (CF) in a regulated financial service provider must have a level of Fitness and Probity appropriate to the performance of that function. It also makes provision for a sub-set of CFs for which the prior approval of the Central Bank is required before a person can be appointed to that function. These are known as Pre-Approval Controlled Functions (PCFs).

The Standards

In order to comply with the new Standards of Fitness and Probity, individuals must be:

(i) competent and capable;

(ii) honest, ethical and must act with integrity; and

(iii) financially sound.

How Do We Establish if People Meet the Standards?

Regulated financial service providers are required to carry out due diligence to satisfy themselves that individuals occupying CF and PCF roles meet the Standards. For any person occupying a PCF role on 1 December 2011, the Central Bank has imposed a deadline of 31 March 2012 for the submission by the regulated financial service provider of:

• confirmation that due diligence in respect of each relevant person (PCF) has been carried out;

• written confirmation from the Chief Executive Officer that they are satisfied that such an individual is in full compliance with the Standards; and

• confirmation that the regulated financial service provider has obtained each PCF’s written agreement to abide by the Standards.
The due diligence, which needs to be performed on a person currently in a PCF role, includes the following:

- a review of the websites of the Central Bank, any other regulatory authorities and the Companies Registration Office to determine if any regulatory action has been taken against that individual, or if they have been restricted or disqualified from acting as a director. A search should also be performed to determine if a judgement debt has been registered against them. If the person has lived outside Ireland for more than six months in the previous five years, a search of records in the relevant foreign jurisdictions will also be necessary;

- where a professional qualification is required for a particular PCF role, a copy of the documents confirming this qualification will need to be provided. Where relevant, confirmation that the person fulfils the requirements of the Minimum Competency Code 2011 will also be required; and

- obtaining confirmation from the person that they meet the conditions of probity laid down in the Standards. To satisfy this requirement, the person will be required to certify a number of things, including, for example, that they have not been the subject of a civil penalty enforcement action taken by a regulatory authority and that they have not been involved in any negligent, deceitful or discreditable business or professional practice.

For individuals who are in CF roles before 1 March 2012, regulated financial service providers will also need to have completed a similar due diligence exercise by 1 December 2012.

What if People Do Not Meet the Standards?

If, following the relevant due diligence, it transpires that an employee fails to meet the Standards, this may present a justification to an employer for the dismissal of the employee.

This justification alone, however, may not fulfil an employer’s obligation to adhere to an employee’s constitutional, common law and statutory rights to natural justice and fair procedures.

In order to ensure that these rights are protected, it is our view that employees should be afforded the right to participate in the process. This would give them an opportunity to explain any apparent failures or shortcomings and to appeal any decision adverse to their interests.

Ongoing Procedures

Since 1 December 2011, prospective holders of PCFs have been required to submit a new online individual questionnaire to the Central Bank. Company procedures, policies and contractual arrangements with candidates for new and existing CFs and PCFs need to take account of the new regime. Indeed, in circumstances where the requirements of the Standards encompass continuous obligations, regulated financial service providers need to develop procedures for the annual assessment and monitoring of all staff and other individuals carrying out CF and PCF roles.

Conclusion

The introduction of these new enhanced Standards raises many complex issues for employers in the financial services industry. Consideration will have to be given to the levels and types of due diligence required in order to ensure that the Standards are being met and continue to be met. Moreover, employers will need to reflect on what they can do in circumstances where some of their employees or executive directors who currently occupy CF and PCF roles do not meet the Standards.

It is widely anticipated that implementation of the regime will lead to a number of different types of legal challenge, particularly in circumstances where a finding that an individual does not meet the required Standards would impact significantly on their ability to earn a livelihood.