irish funds

The Central Bank of Ireland’s Consultation Paper 153

of

The Individual Accountability Framework – Enhanced Governance, Performance and Accountability in Financial Services

IRISH FUNDS

CONSULTATION RESPONSE

Introduction:

The Irish Funds Industry Association (Irish Funds) is the representative body for the international investment funds industry in Ireland. Our members include fund managers, fund administrators, transfer agents, depositaries, professional advisory firms, and other specialist firms involved in the international fund services industry in Ireland. By enabling global investment managers to deploy capital around the world for the benefit of internationally based investors, we support saving and investing across economies. Ireland is a leading location in Europe and globally for the domiciling and administration of investment funds. The funds industry employs over 17,000 professionals across Ireland, providing services to 8,701 Irish regulated investment funds with assets of EUR 3.7 trillion. As a part of our remit to represent the financial services sector in Ireland, our organisation conducted an in-depth exercise to draw out points of concern with respect to the implementation of the Individual Accountability Framework (IAF) for firms in our industry. Irish Funds' members welcome the CBI's focus on enhanced governance and are broadly supportive of the IAF. Strengthening corporate culture and increasing individual accountability to mitigate risks is essential to strong governance and enhanced consumer protection.

However, our members have presented concerns which we will explain in further detail throughout our response. Key themes include:

- **Timing**: The implementation of the Common Conduct Standards and Additional Conduct Standards (Conduct Standards) and the enhancements to the Fitness and Probity (F & P) regime are scheduled to be live from 31 December 2023 onwards. We believe the timelines do not allow firms to prepare adequately to meet their obligations by year end. We also note that the publication of the Consultation on the enhancements to the CBI enforcement powers is yet to be released. Therefore, we suggest that the Conduct Standards, enhancements to the F & P regime and the Senior Executive Accountability Regime (SEAR) be rolled out at the same time, in July 2024. We believe that this approach ensures that the industry will have adequate time to prepare for and successfully implement the IAF.

- **Uncertainty** regarding timing of required adoption by firms who are not yet in scope: In addition to our concerns on the misalignment of implementation timelines between SEAR and the other requirements of the IAF, the CBI is encouraging firms that are not in scope in Phase One of SEAR to work towards the adoption of the Regulation as early adopters. This messaging is confusing for our members, as it raises a question if the CBI will measure firms by reference to the SEAR standards. We are supportive of the standards of good practice issued in the guidance; however, firms should not be expected to meet regulatory obligations if they are not in scope of such regulations yet.

- **Proportional approach**: In Section 2.4 of the draft guidance under point 2.4.6 we acknowledge there is a proportionality approach applied to firms who fall under the Low PRISM Impact in-scope investment firms heading. In this case there is a reduced number of Prescribed Responsibilities that are applicable to such firms, and this is based on the firm's nature, scale, and complexity. Irish Funds is supportive of the proportionality approach similar to that applied by the SMCR in the UK. We encourage the CBI to continue to consider proportionality when extending the regime to other types of entities in the financial services sector.

- **Further clarity and guidance**: As mentioned previously, the Consultation on the enhancements to the CBI's enforcement powers is yet to be published. We would like to encourage the CBI to provide basic principles and clear guidance, in good time, for individuals who fall in scope of IAF/ SEAR to better align themselves with the rules. We believe that the CBI should offer workshops for individuals in scope of IAF/SEAR as well

as positive written guidance. We believe this is the best approach to prepare Directors, PCFs and CFs to meet the Banks expectations under IAF/ SEAR.

In this document, our members are referred to as "Firms" or as "Regulated Financial Services Providers" (RFSPs)

1 THE CP 153 QUESTIONS:

1.1 What are your overall views and comments on the draft SEAR Regulations and related draft guidance?

Overall, the SEAR Regulations are well-structured and differentiated, and they sit well with the existing F & P regime. Our view is as follows:

(a) The Conduct Standards are due to come into force on 31 December 2023 however the enactment of the SEAR elements for Firms in scope does not take place until 1 July 2024.

(b) We feel the application of the Conduct Standards and SEAR are intrinsically linked and the deadline of the 1 July 2024 should be applied for both elements. We recommend pushing out the implementation date of the Conduct Standards because it would allow firms a reasonable opportunity to prepare responsibility mapping post issuance of finalised guidance. In addition, the issuance of the Business Standards as part of the consultation on the Consumer Protection Code is not expected until Q4 2023. It is reasonable that Firms should have clarity on the new Business Standards and to have adequate time to properly consider the Business Standards before implementation of both the Conduct Standards and SEAR.

(c) There is widespread concern that the CBI has indicated that Firms which are not in scope for SEAR will be held to the standards imposed by SEAR by reason of the CBI's reference to an obligation to comply with the "spirit of SEAR". This has created some confusion and uncertainty as to the precise obligations imposed on Firms and the precise consequences of breaches of those obligations. In particular, the CBI has stated '… *there is much in the spirit of the SEAR that firms not initially falling within scope should consider as aligned with good quality governance and which will support firms and senior management in implementing an effective governance framework* ….' This creates a potential expectation for Firms not initially in scope for SEAR, that SEAR will be the de facto standard applied by the CBI to assess how such businesses and their risks are managed, who is responsible, and gaps which may arise. It creates an incoherent expectation that such firms should meet the standards set out in the SEAR framework regardless of whether they are in scope. We feel that this is a confused message, and we would welcome a clearer statement from the CBI that there is no obligation on RFSPs who are not initially in scope for SEAR to apply it.

(d) Could the CBI confirm whether the new Conduct Standards and SEAR will apply to externally managed funds as a regulated product? While we know that the F&P regime applies to "regulated financial services providers" and the CBI has brought externally managed funds within the scope of that framework, an externally managed fund would not appear to fit neatly within the definition of "regulated financial service provider" under the CBI Act 1942 as amended given that it is in effect a regulated product as opposed to an entity which "provides" a financial service. As a result, it would be helpful if the CBI could confirm whether it intends both sets of standards to apply to externally managed funds in order to eliminate any doubt on this matter.

(e) In the UK there is a proportionality approach to the equivalent SMCR– i.e., limited scope, core firms, enhanced firms and dual regulated firms which impacts the

responsibilities allocated to the legal entity dependent on the material risk of the business. An example of this proportionality would be that Management Responsibilities Maps are only required for enhanced/dual firms. Another example of proportionality is that there are 26 Prescribed Responsibilities for dual regulated firms and only 6-9 for Core Firms under the SMCR. A similar proportionate approach to the SEAR responsibilities which aligns to the PRISM rating would be welcomed.

(f) There are a number of areas where specific comment is warranted:

(i) Inclusion of NED / INED under SEAR – the CBI has been very clear that it is their intention that NEDs and INEDs be included under SEAR. We would note that with respect to multinational firms headquartered overseas, many look to appoint overseas directors as NEDs to local subsidiaries to help ensure effective parent/ subsidiary operations and communication. You will be aware that many multinational banks, insurance firms and financial services firms have already adopted this approach. Based on initial soundings, some of our multinational firms have noted that it appears that (foreign) NEDs are possibly being subjected to a standard higher than the SMCR, which we understand was used as a basis for the current framework the subject of this consultation. If it is the case, particularly for foreign NEDs, that the current proposed regime is indeed more extensive than the SMCR, it would be viewed as the CBI gold-plating the UK regime and could directly impact the international competitiveness of Ireland as an international financial services centre. We acknowledge that the CBI have no mandate for Ireland's competitiveness however, this would potentially be a matter relevant to the Department of Finance and the Industrial Development Authority, who participate in international trade missions to specifically encourage multinationals to operate in Ireland. We have no other comments on this matter.

(ii) Reasonable Steps – we value the principle of reasonable steps – as it eliminates the concept of absolute accountability. However, we believe that training will be necessary to elevate the volume and quality of record keeping necessary to evidence the Reasonable Steps. While current business practice will often be aligned with Reasonable Steps, the evidence of such steps may be currently lacking.

(iii) Temporary Roles – we believe that the need for temporary PCF roles does not arise exclusively in exceptional circumstances. Sick leave, maternity leave, parental leave and other statutory family leaves, bereavement leave, and sabbaticals are all daily occurrences in our businesses and are not "exceptional". In the interest of diversity and inclusion and driving operational certainty and practicality, greater clarity in respect of events that qualify for Temporary assignments is required.

(iv) Shared roles and responsibilities – further clarity and guidance on the circumstances where shared roles and responsibilities is permissible.

(v) Outsourced PCF roles and Exemptions – we require clarity on the expectations of the CBI for Firms in relation to meeting their obligations with respect to the Conduct Standards for outsourced providers particularly where they are third parties. Could the CBI please provide some further explanation or examples for which PCF roles can be outsourced?

1.2 **Do you agree with our proposed approach to the Inherent Responsibilities?**

(a) We have no objection to the proposed to the Inherent Responsibilities however clarity and certainty of responsibilities apportioned to identified roles will be helpful in the development, embedding and operation of governance frameworks within Firms. Clarification from the CBI of the overlay of these responsibilities on collective responsibility of directors would be useful, as is the role of proportionality in the identification and allocation of inherent, prescribed, and other responsibilities.

(b) Given the CBI's expectation that firms not yet falling within scope of the initial phase of SEAR should consider alignment in the spirit of SEAR as well as the expectation that individuals are taking responsible steps to discharge their responsibility under the Conduct Standards, we require the CBI to provide clarity that there is no requirement with respect to the SEAR responsibilities for firms not in scope of the initial phase of SEAR; roles such as PCF-34 Head of Accounting (Valuations), PCF-35 Head of Trustee Services etc.

(c) For the Inherent Responsibilities, the draft regulations do not state that PCF-52 (Head of AML & CFT) should report to the Board like PCF-12 (Head of Compliance). This is not consistent. Both should report to the Board, or in the case of Branches, to the Branch Manager.

(d) Further clarification is required regarding:

(i) PCF-52 reporting to the Board as currently it could imply that the PCF-12 may need to report to the Board on AML matters.

(ii) PCF-12 Head of Compliance: Overall responsibility for managing the operation of the compliance function and reporting directly to the Board on compliance matters.

(iii) PCF-52 Head of Anti- Money Laundering and Counter Terrorist Financing: Overall responsibility for managing the operation of the firm's anti-money laundering/counter financing of terrorism functions.

1.3 **Do you agree with our proposed approach to the Prescribed and Other Responsibilities?**

(a) We have no objection to the proposed approach to Prescribed and Other Responsibilities as set out in SEAR. Clarity and certainty of responsibilities apportioned to identified roles will be helpful in the development, embedding and operation of governance frameworks within asset management firms.

(b) From an INED's perspective, the CBI's clarification of the overlay of these responsibilities on collective responsibility is also useful, as is the role of proportionality in the identification and allocation of inherent, prescribed, and other responsibilities.

(c) Under 2.4.10 of the Guidance states "In addition, the firm should satisfy itself on reasonable grounds that the individual, to which the prescribed responsibility is allocated, is fit and proper to perform in line with Section 21(1) of the 2010 Act." For existing PCFs that will be allocated a prescribed responsibility is there an expectation that the Firm would need to do fresh Due Diligence, or can they rely on the initial due diligence originally completed and the annual due diligence that takes place?

(d) In section 2.4.10 of the Guidance reference is made to "Appropriate level of seniority: A Prescribed Responsibility should be allocated to the most senior individual, with the appropriate authority, responsible for that area taking into

account the governance structures of the firm." Will the CBI provide further guidance as to the application of this element?

(e) Is it possible for Firms to delegate a responsibility to an appropriate delegate? For example, PR1 relates to “Responsibility for the firm’s performance of its obligations under the Senior Executive Accountability Regime” which must be assigned to the CEO for Firms not in scope of SEAR. However, can responsibility be delegated across areas such as HR, compliance etc?

(f) "A number of the General Prescribed Responsibilities require more definition and specificity to understand the intended regulatory scope. As an example:

(i) PR28 (climate related and environment risks) requires one individual to be allocated ‘responsibility for managing the firm’s approach to identifying, assessing and managing climate related and environmental risks across the firm’. This is extremely broad and in practice, this responsibility is allocated across multiple senior managers in the organisation, not all of whom will be PCFs.

(ii) It is recognised that the ESG landscape and agenda is evolving quickly and therefore it is important that the scope of PCF accountability is defined to ensure the reasonable steps expected of PCFs can be defined and monitored. By way of comparison in the UK the equivalent responsibility is limited to “managing financial risks from climate change” which enables clear allocation of Senior Manager responsibility and reasonable steps to be defined and monitored.

(iii) Similarly, PR29 (responsibility for overseeing the adoption of the firm’s policy on diversity and inclusion) is broad and hard to allocate to one PCF. As an example, aspects will touch on HR, the line of business recruitment lead, and the Boards or Branch Manager who are responsible for setting the culture from the top. The CP confirms that these allocations should not materially change the operating model of the firm but there are some instances where this would have to be the case. In the UK SMCR there is no Senior Manager accountability for Diversity & Inclusion and therefore further guidance on accountability for Diversity & Inclusion will be critical.

(iv) PR5 “Responsibility for adopting the firm’s culture in the day-to-day operation of the firm”. The UK wording of this responsibility (PR I) feels more appropriate that the responsibility is for “overseeing” the adoption of the firm’s culture in the day to day “management” of the firm.

(v) PR6 “Responsibility for overseeing the development of, and embedding positive culture … and conduct risk into, the firm’s remuneration policies and practices” This is another example of where additional clarity is necessary in terms of what precisely constitutes a positive ethical culture.

(vi) PR21 “Responsibility for developing structures and mechanisms to oversee, monitor, and assess the appropriateness and performance of the firm’s outsourcing framework including outsourcing arrangements and associated outsourcing risks”. There is currently no designated PCF for the magnitude of this role.

(vii) PR22 – “Responsibility for managing the anti-money laundering/ countering the financing of terrorism (‘AML/CFT’) function in order to address the firm’s money laundering and terrorist financing risks including the development, implementation, and oversight of a robust AML/CFT framework including effective systems and control”. Presently this sits with

the second line of defence, but it is not a second line role to implement the control framework.

(g) Significant Influence – the CF1 role comprises the ability to exercise a significant influence on the conduct of the affairs of a regulated financial service provider. The CP states that "Firms will need to set out clearly the responsibilities of each individual in a PCF role in their Statement of Responsibilities" and it is proposed that as PCFs, all NEDS and INEDS are included within the scope of SEAR. Our understanding is that CF1s are required to comply with the Additional Conduct Standards, but it is not possible under current guidelines to allocate any inherent or prescribed responsibilities to their CF1 role as they are not mentioned in Annex 2- 2.2.3 as being part of the in-scope population.

(h) If an individual is designated as a CF1 but the areas for which they exercise significant influence become the responsibility of a PCF, then this appears to create a conflict or an unforeseen change in the operating model to accommodate the new requirements.

(i) In the UK there is a SMF18 position - Other Overall Responsibility function (which seems similar to a CF1) which enables firms to allocate responsibility to a Senior Manager across all of an entity's activities (excluding Prescribed Responsibilities). Could a PCF position be created to support a similar approach for CF1 role holders?

(j) Other responsibilities – the purpose of this is to ensure there is clarity around the allocation of responsibilities in relation to any material functions/business areas/projects and to ensure key risks are identified and appropriately allocated to PCF role holders so that no key responsibilities remain unallocated. The CBI indicates that consideration should be given to the importance of the relevant item. Further guidance is required as to who determines whether an item, such as a project is deemed to be material. Please clarify whether the requirement for allocating responsibility applies to one PCF for the overall project where the assessment has been carried out but is different (in terms of materiality) across different legal entities?

1.4 **Do you agree with our proposed approach to the sharing of roles and responsibilities including job sharing?**

(a) Further clarity and guidance would be welcome in understanding the parameters for when sharing of roles and responsibilities is permissible, does it for example go beyond job-sharing and include for PCFs that work a reduced working week?

(b) 2.3.1 of Annex 2 - indicated that sharing or splitting of PCF roles amongst individuals is not permitted under the SEAR, other than in the case of job sharing. This seems to contradict to Annex 1 page 9 - Where the firm has allocated an allocated responsibility to more than one PCF holder, the firm shall explain its rationale for doing so, together with the arrangements for the effective operation of that joint allocation of responsibility.

(c) In the UK there are certain prescribed responsibilities which are shared – e.g., within the UK financial crime includes Cyber Crime and MLRO role. Therefore, responsibility is split between Chief Technology and Chief Compliance respectively with clear descriptions of how this is done in the Management Responsibilities Maps (MRM) and their Statement of Responsibilities (SORs).

(d) Please note the comments above at 1.1 (g) about the further flexibility and clarity that is required in relation to PCF temporary roles.

1.5 **Do you agree with our proposed approach to the inclusion of INEDs/NEDs within scope of SEAR?**

(a) Overall, our members are supportive of the inclusion of INEDs/NEDs within the scope of SEAR. The Non-Executive Prescribed Responsibilities set out in Table 1 of Annex 2 to the Consultation Paper appear to be complete. Given the duties of a Non-Executive Director implicit under Company Law and the F&P Regime, it is a natural extension to include non-executive directors in SEAR. To maintain international competitiveness though we believe that the obligations and requirements of SEAR should not exceed those of the SMCR.

(b) While the Guidance recognises that NEDs and INEDs do not manage a Firm's business in an executive capacity, the Prescribed Responsibilities outlined in the guidance extend beyond the responsibilities expected of NED's and INED's by prescribing responsibilities to them that one would typically allocate to the CEO of the Firm. For example, PR6 notes that "Responsibility for overseeing the development of, and embedding positive ethical culture, consumer protection and conduct risk into, the firm's remuneration policies and practices" should be allocated to a NED/INED. Although the Firm acknowledges that NEDs and INEDs play an important role with respect to challenge, governance, and oversight of the activities of the Firm we feel that allocating responsibilities such as this to an INED/NED is stepping into executive management territory.

(c) Including the responsibilities of NEDs/INEDs in SEAR seems reasonable if applied proportionally, as in the UK, with collective decision making and separation of exec/non-exec powers (including limiting the application of senior manager conduct rules to exec PCFs) and this needs to be explicit in the guidance.

(d) A clearer differentiation between the expectations of Executive Directors, NEDs and INEDs would be valuable as currently NEDs and INEDS are described the same. A NED is generally somebody that is from outside the legal entity day to day activities and executive oversight whereas the INED is independent to the firm and would not have the same knowledge of ongoing operations in the firm as a NED.

(i) PCF-1 Executive director: Directing the business of the firm.

(ii) PCF-2A Non-executive director: Overseeing and monitoring the strategy and management of the firm.

(iii) PCF-2B Independent Non-executive director: Overseeing and monitoring the strategy and management of the firm.

(e) We found the guidance in 2.4.11 -2.4.16 to be useful in understanding the distinction between the expectations for different roles- further examples and clarity would be useful to support the prescribed responsibilities to be allocated. The UK has provided clarity on board versus executive governance and also expectation of reasonable steps in respect of each of the prescribed responsibilities for the NEDs. We recommend that this approach is followed in the guidance.

1.6 **Do you agree with our proposed approach to the Statements of Responsibilities?**

(a) We would request that the CBI provide clarity around updating the SORs. In the draft guidance, there is language discussing how Firms should treat the SORs as live documents. We believe that further guidance on this is needed to understand if the SORs should be updated and approved for each iteration or only when a notable change takes place.

(b) The guidance sets out the expectation that Firms must retain a record of MRM's and SOR's for each PCF holder for a period of 10 years. In addition, it notes that

Firms must retain SOR's for former PCF holders for a period of 10 years after that person has ceased to be a PCF holder within the Firm. We welcome clarification on the latter expectation as to whether the CBI expects firms to maintain a record of all SOR's for former PCF role holders for a period of 10 years or if that record is limited to the last SOR in place for that former PCF holder.

(c) The SOR template shows that the PCF role holder must sign the document and then there is an extra section for the approver's signature. We welcome clarity as to what is the regulatory expectation in terms of the who the approver is and would this need to be an evidenced by a wet-ink signature or a digital signature.

1.7 **Do you agree with our proposed approach to the Management Responsibilities Map?**

(a) The Guidance with respect to the preparation of the MRM notes that a description of responsibilities consistent with how they are described in the SORs should be included in the MRM and not the entire SOR. To ensure the information is as accurate and up to date as possible our members believe that it would be more practical for Firms to include the full SORs in the MRM for ease of update and to ensure pertinent information is captured in the MRM.

(b) We would appreciate additional clarity on the approval process for the MRM. Our members need to know who exactly approves the document and is the document to be updated as part of an annual review. Furthermore, our members seek clarity on what information is required in the MRM for individuals who fall under the CF1 category.

1.8 **Do you agree with our proposed approach to submission of documents?**

(a) We understand that Firms in scope of SEAR will have to submit a SOR to the CBI along with the Individual Questionnaire when approval for a PCF role is being sought. Additional clarity is needed around whether Firms will be obliged to provide a SOR for other PCFs and/or an MRM at this time to demonstrate how the applicant's roles and responsibilities fit within the Firm's structure. Our members support the requirement to submit an MRM as part of ongoing supervision for in scope Firms and the requirement to submit data in relation to the Annual PCF Confirmation or Certification process.

1.9 **Do you agree with our proposed approach to outsourcing in the context of SEAR?**

(a) In terms of the F&P Outsourcing Exemption, Table 2 in the Guidance notes that SEAR is not applicable in cases where Firms have outsourced a PCF role to a regulated entity but notes that the Conduct Standards will apply to that individual. Given the CBI's expectation that individuals are taking responsible steps to discharge their responsibility under the Conduct Standards, we would ask the CBI to provide guidance now for how this would work in practice.

(b) Where a Firm avails of an Outsourcing Exemption, should the Firm classify the individual in the outsourced role as holding a Controlled Function irrespective of the overall responsibility for that role being documented on the SOR of the individual who is ultimately responsible for it within the firm?

(c) Further guidance, case studies and training sessions would be helpful.

1.10 **Do you agree with our proposed approach to reasonable steps in respect of SEAR and the Conduct Standards?**

(a) Further guidance and training sessions in advance of the implementation deadline would be beneficial for how reasonable steps can be demonstrated for CFs who have a responsibility to abide by the Conduct Standards.

(b) Further guidance is requested on the reasonable steps for the prescribed responsibilities - especially for Firms which may have a group structure outside of Ireland.

(c) From the CBI's perspective, the reasonable steps approach (in respect of the Conduct Standards) is designed to promote greater individual accountability and integrity within RFSPs. Furthermore, by placing a greater emphasis on the conduct of employees the approach aims to create enhanced transparency and responsibility for CF role holders (including PCFs) to evidence they have taken all reasonable steps in discharging their respective responsibilities. However, given the approach places a greater emphasis on individual accountability, this may also discourage firms from innovative behaviour (e.g., trying out new ideas and/or adopting new internal processes), which may, in turn, lead to overly cautious decision making which could slow down or impede the development of new products or services that could benefit customers. There is also the potential for a CF/PCF role holder to make decisions, perhaps primarily through the lens of seeking to reduce his/her personal liability, as opposed to considering the needs of the RFSP holistically. As such there is a fine line between promoting individual accountability and encouraging innovation, and so we welcome the CBI's views on this, whether that be in the form of further guidance, or clarification on the expectations of the CBI in this regard.

(d) The CBI has acknowledged in the CP that the 'concept of reasonable steps should be already embedded in an individual's day-to-day actions in managing their areas of responsibility.' However, the concept of 'evidencing that reasonable steps were taken' is new to Firms, as such it will be necessary to establish an enhanced governance framework including new processes and controls that will need to be rolled out across the Firm. Whilst we accept the good governance benefits arising from this concept, the timeline for completion of this work will be challenging. The Firm will also need to consider what type of assistance is needed to support CFs/PCFs in the provision and retention of documentary evidence to demonstrate that they have taken reasonable steps to meet their obligations under the new Conduct Standards. This may include for example implementing enhanced delegation procedures, enhancing meeting minutes for collective decision making, revising the Firm's record retention policy for emails in order to seek to adhere to new CBI regulatory requirements/expectations, and providing both initial and ongoing training, education, and awareness of the new requirements applicable to the relevant CF/PCF role. Please note that this is linked to our comments that the Conduct Standards should not be implemented before July 2024 in order to give Firms adequate time to prepare for implementation.

(e) CP153 notes that the review of the Business Standards is being conducted as part of the review of the CBI's consumer protection code. Please clarify the expected timing of the review of the Business Standards. As noted above, Firms will require adequate advance notice of and time to prepare for the implementation of the Business Standards and the timing of implementation should be aligned with the implementation of the new Conduct Standards and SEAR for in scope Firms.

1.11 **Does the guidance assist you in understanding the Duty of Responsibility and the non-exhaustive list of factors to be considered with regard to reasonable steps?**

(a) The principle that the exercise of an individual's Duty of Responsibility should be evidenced by Reasonable Steps is helpful and eliminates the concern of an absolute individual liability. It is helpful that the CBI has acknowledged that human

error can occur, and that perfection is not the required standard. It is also helpful that the CBI will, when assessing the steps that an individual took, consider what steps an individual, in that position, could reasonably have been expected to take at that point in time. The detail set-out in Chapter 3 of Annex 2 does facilitate an understanding of what might be expected in terms of Reasonable Steps. Our members would welcome clear written guidance and training workshops to further facilitate Industry implementation and adoption.

1.12 **What are your views and comments regarding the guidance on the Common Conduct Standards and Additional Conduct Standards?**

(a) We welcome the guidance on the Common Conduct Standards and Additional Conduct Standards. As referred to in section 53F of the IAF Act 2023, the guidance sets out the standards in the case of a person who performs a controlled function in relation to an RFSP, which are:

(i) that the business of the RFSP is controlled effectively,

(ii) that the business of the RFSP is conducted in accordance with its obligations under financial services legislation,

(iii) that any delegated tasks are assigned to an appropriate person with effective oversight, and

(iv) that any information of which the Bank would reasonably expect notice in respect of the business of the RFSP is disclosed promptly and appropriately to the Bank, including information relevant to, or giving rise to a suspicion or expectation of, any of the following: (i) to (ix)…

(b) The wording could be interpreted as requiring all PCFs and CF1s to be in compliance with (i) to (iv) above in respect of all control functions as set out in the Act. We do not believe that this is the intention and suggest that the wording is clarified to specify that the Additional Conduct Standards apply to all PCFs and CF1s but only in respect of the control functions that they are responsible for.

(c) Currently, the role of Company Secretary is regarded by the CBI as being captured by the CF1 category ("a function in relation to the provision of a financial service which is likely to enable the person responsible for its performance to exercise a significant influence on the conduct of the affairs of a RFSP") and will therefore be subject the changes arising from the IAF.

(d) We are of the view that it is inappropriate to include the Company Secretary amongst the category of functions involved in senior executive/management roles where the persons exercising such functions exercise a "significant influence" on the conduct of the company's affairs (CF1) for the following reasons:

(i) A secretary is an "officer" of an Irish company or ICAV under the Companies Act 2014 (C.A.). The powers of management of a company are exercised by its Directors pursuant to Section 158 of the C.A., (save to the extent that the company's constitution provides otherwise). The listed duties of the Company Secretary under the C.A. are limited and relate principally to the signing and filing of returns with the Companies Registration Office (CRO). The Company Secretary has no powers of management whatsoever under the C.A, and apart from its limited statutory duties (and a common law duty to act with skill, care, and diligence) its responsibilities are such as may be delegated to them by the board of Directors (Board) under Section 226 of the C.A. The Company Secretary has no voting (or speaking rights) at Board or shareholder meetings.

(ii) In the role delegated to them by the Board , the Company Secretary typically provides administrative services to the board of Directors such as agreeing board meeting dates with the Directors, convening Board/committee/general meetings, arranging meeting location facilities, drafting agendas for scheduled meetings (to be approved by the Directors), circulating Board packs which would include the reports of the various officers and services providers to the company, attending Board/committee/ general meetings in order to prepare draft minutes (for review and approval by the Directors), generation and maintenance of certain statutory registers and filing forms necessary to be filed in the Companies Registration Office.

(iii) The C.A., which became effective in 2016 brought several changes in relation to the Company Secretary role which were not in place in 2011/2012 (when the CBI moved the Company Secretary from being a PCF role to a CF1 role), namely:

(A) The C.A. introduced a requirement that the Directors of a company must ensure that the Company Secretary has the skills or resources necessary to carry out their statutory and other duties and, when making the appointment, ensure that the secretary has the skills necessary to enable them to maintain (or procure the maintenance of) the records (other than the accounting records) required to be kept under the C.A (Section 129(4) and 226). Prior to this, no statutory qualification requirements for a Company Secretary of a private company existed.

(B) Between October 2001 and the introduction of the C.A., there had been a statutory duty imposed on Company Secretaries (together with the Directors) to ensure that companies complied with the requirements of the Companies Acts. This duty was removed on the introduction of the C.A. (by the recommendation of the Company Law Review Group) on the basis that it is illogical and unreasonable to hold a Company Secretary to account for matters which lie beyond their control (this duty now rests solely with the Directors).

(iv) As previously indicated, the Company Secretary has no powers in that capacity under the C.A., The duties delegated to it are of an administrative support nature to the Board and the limited responsibilities and influence of the Company Secretary has been reflected in amendments to the obligations imposed on Company Secretaries under company law.

(v) We also note that the office of company secretary is not a controlled function under the FCA's SMCR.

(e) For these reasons, we are therefore of the view that it is inappropriate to include the Company Secretary amongst the category of functions involved in senior executive/management roles where the persons exercising such functions exercise a “significant influence” on the conduct of the company's affairs (CF1).

1.13 **What are your views and comments on the guidance in relation to obligations on the firm in respect of Conduct Standards?**

(a) There are no material objections to the Conduct Standards and applicability as proposed. That said, the following issues arise and would benefit from additional guidance or clarification from the CBI:

(i) Concerning the obligation to report to the CBI suspected breaches of Conduct Standards, additional consideration is recommended as to the timing requirements here. Our recommendation is that the timing of any report on Conduct Standards should be post conclusion of all stages of the internal disciplinary process including an appeal in relation to whether there was an actual breach of a Conduct Standard. Reports of suspected breaches are potentially subject to abuse, could drain CBI resources and time, damage the individual's reputation and standing in connection with regulatory approvals going forward and create employment law issues and exposure for the firm.

(ii) The proposed implementation deadline (December 2023) in respect of the obligations to (A) develop appropriate polices for integrating the Common Conduct Standards into a firm's culture, and (B) notify CFs of the Common Conduct Standards and individuals in PCF / CF1 roles of the applicable Additional Conduct Standards, and to provide suitable training to ensure compliance with the new standards, creates significant concern. This deadline will present a significant challenge to firms to design and obtain appropriate approval for training programmes, which are regularly, particularly in large institutions, subject to centralised mandatory training processes and timelines and often scheduled for Q4 for Q1/Q2 roll out. These challenges are compounded by the fact that the final Administrative Sanction Procedures rules are currently in development and not finalised – which presents challenges in terms of finalising a robust and comprehensive training programme, including in terms of CBI reporting of conduct rule breaches. Accordingly, we request that implementation be delayed until 1 July 2024 and that further information be received on the following: (1) CBI's expectations for conduct training to be provided by firms to all relevant employees before the implementation date (2) CBI's expectations for the timing of the firm's assessment of conduct rule breaches against the new Standards (e.g. should kick off occur pre or post implementation date, and what is expected completion date).

(iii) SEAR introduces a 'Duty of Responsibility' for individuals performing PCF and CF1 roles at in-scope firms to take reasonable steps to ensure that the areas of the firm for which they are responsible conform to legislative and regulatory requirements. The Conduct Standards also require persons in these roles to take reasonable steps to discharge their responsibilities and duties. However, there is no guidance provided as to what the responsibilities are for each PCF/CF from a Conduct Standards perspective. Best practice examples and specific case studies as guidance would be helpful for our members.

1.14 **Do you agree with our proposed approach to temporary appointments within scope of SEAR and the Conduct Standards?**

(a) The Central Bank of Ireland states that they expect that temporary appointments will only be used in "exceptional circumstances." We believe that further consideration and dialogue in this area is required as the industry believes that temporary appointments will be required in any circumstances where the designated PCF holder is on leave that is not short-term. There are many distinct types of leave such as maternity, parental leave, sick leave, other forms of statutory leave and sabbaticals and they cannot all be considered as exceptional. Accordingly, we are asking the CBI to revisit its approach regarding temporary appointments and specifically considering the following points:

(i) Consider a 'fast-track' approval process for candidates seeking a temporary PCF appointment. This would relate to circumstances where the temporary leave is unplanned (for whatever reason).

(ii) The definition of what considers “Temporary” should be carefully considered. As noted above, Temporary Leave cover should apply for all periods of statutory leave as set out in the relevant employment legislation. Furthermore, any limits to the duration of the temporary leave should correspond to the duration of the statutory leave.

(iii) We noted some inconsistency in the documentation whereby Note 9 of the Guidance states that “Under Regulation 11 of the PCF Regulations, Temporary Officers will not be subject to SEAR”. However, in the body of the text at 2.9.12 it states that “During the temporary occupancy of a PCF role whereby an individual has been pre-approved under Section 23 of the 2010 Act, while the SEAR and the Duty of Responsibility will apply, the consideration of reasonable steps will reflect the particular circumstances of the individual”. These statements seem to contradict one another, and we believe that clarity regarding the CBI’s intended approach to the applicability of SEAR to Temporary Officers is required.

(iv) Will those from other legal entities within a group, travelling to Ireland temporarily for work reasons, be required to comply with the Conduct Standards if they are performing an activity which falls under a Control Function requirement while they are working in Ireland or acting on behalf of an Irish entity?

1.15 **What are your views and comments on the draft Certification Regulations and related guidance?**

(a) The industry welcomes the detail provided regarding the draft Certification Regulations but has identified some points below that require further consideration and/ or clarification:

(i) Firms will be required to maintain all information collected in compliance with its obligations under the Certification Regulations for a minimum of 6 years however data relating to SORs, and MRMs must be retained for 10 years. It would be helpful if the retention requirements were consistent.

(ii) Can the CBI confirm that no expectation is required in relation to notification when a conduct breach/disciplinary matter is under investigation during the certification process but where due process has not concluded.

(b) RFSPs or holding companies are not allowed to appoint someone to a CF or PCF role unless they have received a certificate of compliance indicating they meet the required fitness and probity standards. A certificate of compliance is issued only when the RFSP or holding company is satisfied that the individual in question meets those standards and has provided written confirmation that they will comply with them. The draft regulations indicate that the F&P Certificate must be issued within 2 months of the regulations going live. It would be helpful to receive more information on the following.

(i) does the CBI expect the F&P certificate to be issued by the implementation date or after the implementation date?

(ii) does the CBI expect the F&P certificate that is issued to have included an assessment of any breaches in Conduct Standards for the CF/PCF role holder, and if so, what is the expected timeline for completion of this assessment (noting the effective date of Conduct Standards is also 31 December)?

(c) The CBI has authority to investigate individuals who previously held CF or PCF roles up to six years before the start of the investigation. This is regardless of whether they currently hold such roles or any other roles within the F&P Regime.

(d) Under 7.2.21 there is a requirement to hold information collected in compliance with Section 21 of the 2010 Act and the Certification Regulations for a minimum of 6 years after an individual has ceased to perform the CF role which would include someone having left the firm. Is there the same obligation on a Firm to hold records with respect to SORs for 10 years after an individual has left the firm?

(e) Further guidance is sought in circumstances where a PCF delegates responsibilities to an individual who is not a CF and does not fall within the current category of CF's. Further clarity would be helpful to determine whether they meet the definition of significant influence. If the delegate does not fall within any of the PCF categories, this means they will not be subject to the Common Conduct Standards or the F&P requirements.

1.16 **Do you agree with our proposed approach to roles prescribed as PCF roles for holding companies in the draft Holding Companies Regulations?**

a) Individuals proposed for PCF roles in holding companies will now be assessed by the CBI under the existing F&P Regime in the same way as individuals proposed for PCF roles in regulated firms are assessed. Can the CBI provide clarification how this process will operate in practice as it is not clear in the guidance. Can you also clarify how you propose approving existing directors of holding companies (i.e., submission of IQ or grandfathering process).

1.17 **Do you agree with our proposed approach to reporting of disciplinary actions?**

a) Under the Certification Regulations the CBI imposes a legal obligation on firms to report disciplinary actions arising from breaches of the Conduct Standards to the CBI. The legal obligation on firms should apply to the Firm at the conclusion of in the internal disciplinary procedure which means after, and not before, any internal Firm appeal process has concluded.

(i) An employee has a fundamental right to appeal any disciplinary sanction and to have a fair and impartial hearing of their appeal.

(ii) A possible outcome on appeal is that a disciplinary sanction previously imposed is revoked and purged from the record where the appeal is successful.

(iii) An employee could argue that such a report to the CBI before the appeal process has concluded could prejudice or damage their reputation before the CBI where a report is made regarding a disciplinary sanction which is subsequently revoked.

(b) Taking the above a) into consideration, we recommend that the obligation to report disciplinary action is triggered within ten working days from when the final internal appeal process has concluded or the deadline by which the right to exercise the appeal has expired, whichever is the earlier and assuming that a disciplinary sanction has in fact been imposed.

(c) We would also like clarification that Firms are not required to advise the CBI of the details of any formal disciplinary review that has not yet concluded, in the event of PRISM reviews, engagement meetings and/or regulatory inspections overlapping with the disciplinary process. Please confirm the level of detail required when the internal disciplinary process is still incomplete.

(d) Further items where it would be helpful to have additional guidance or clarity from the CBI would be in relation to:

(i) The mechanisms and process/timelines for deregistering outgoing PCFs and registering new PCFs and/or reallocating responsibilities among existing PCFS or from an outgoing PCF to an existing PCF.

(ii) Since there is no reporting requirement for updates to PCF Statements of responsibilities further clarity is requested in relation to when the nature of accountability/starts and ends and the same clarity is requested for temporary appointments as detailed in Annex 2 – 4.21.

(iii) Whether a handover requirement will be introduced, as in the UK, as a means of demonstrating the passing of responsibilities from a regulatory accountability perspective."

1.18 **Do you agree with our proposed approach to introducing the Head of Material Business Line role for insurance undertakings and investment firms?**

(a) Our members have no concerns or comments in relation to this question.

2 FEEDBACK

2.1 **Do you have any other Feedback or further questions regarding implementation that you would like Irish Funds to communicate to the CBI as part of CP 153?**

(a) From a HR perspective, is it possible for the Guidance or Regulations to acknowledge that employers in Ireland are not in a position to conduct criminal background checks and to clarify the expectations in this regard of the CBI when assessing fitness and probity? If the CBI expects employers to conduct criminal background checks in relation to PCF or CF roles either as part of the initial appointment or as part of the ongoing F&P Certification exercises, then it should be expressly stated in the Regulations that this is a requirement.

(b) Under 2.4.18 of the Guidance "2.4.18. The purpose of 'Other Responsibilities' is to (i) ensure that there is clarity surrounding the allocation of responsibilities in relation to any material functions/business areas/projects (ii) to ensure that same are captured under the relevant Statements of Responsibilities to be put in place by firms in scope of SEAR; and (iii) to ensure that the key risks at a firm are identified and appropriately allocated to a PCF role holder." It seems to suggest that Other Local Responsibilities and Other Responsibilities are the same under SEAR, - e.g., project outside normal course of business is 'Other Responsibility, under the SMCR, whereas if caught by PR or inherent responsibilities are classified as Other Local Responsibilities in the SMCR. In terms of the SMCR the following elements of this regime have been considered beneficial in how Firms operate:

(i) The documentary components of the SMCR, particularly the SOR and accompanying MRM ensure that accountability is clearly allocated, and that there are no gaps or overlaps. The requirements to keep both documents up to date also ensures that these are regularly reviewed and updated as part of BAU exercises, and on trigger events such as a change in a Senior Manager Function (SMF), or a re-allocation of accountability. These requirements have had a knock-on effect on internal documentation, such as job descriptions also being regularly reviewed and updated, collectively improving the clarity of roles and responsibilities, and therefore ensuring individuals can be held to account based on the scope of their documented accountability.

(ii) The requirements for firms to identify overall responsibilities activities which are not inherent in the SMF or listed as prescribed responsibilities has also encouraged firms to review, list and define key activities which may have been implied in traditional role descriptions, and clearly allocate these to individuals, again ensuring clear allocation, and formal adoption of ownership. The SMCR has therefore encouraged the clear allocation of accountability, in a more granular level than under the APER regime.

(iii) Additionally, the duty of responsibility has encouraged SMFs to formalize and document meetings and decision-making processes which may take place outside of formal committee governance as well as improve other record keeping practices. The clarity, of regulatory expectations, and increased rigor around record keeping has helped to focus minds at the top level and have acted to increase and codify management best practices, which in turn has had an impact on individual accountability.

(iv) The Certification Regime has encouraged firms to be more accountable for ensuring the F&P of the defined population and enforced more rigor and consistency around annual checks, which in turn has a positive impact on conduct, with Regulatory References providing firms with information to make informed decisions on hiring, where information has been provided.

(c) In terms of lessons learnt from the SMCR, the following issues have been raised as a concern by firms through industry feedback to the UK regulators in response to recent discussion papers and calls for evidence:

(i) SMF Pre-approval / authorization: Currently all individuals allocated an SMF function require pre-approval by the UK Regulators before undertaking the role and responsibilities outlined in the proposed SORs. This includes individuals which have been previously approved to undertake an SMF role. The UK Regulators set a performance target at 90% of SMF applications to be decided within 90 days.

(A) In recent years, partly due to the expansion of the SMCR to solo-regulated firms and the increases in the scope of firms the FCA supervises, approval applications regularly take over 90 days to review and approve, noting that this time period starts from the time that a case officer has been assigned. Since the extension to solo regulated firms the FCA has never met its performance target.

(B) As a result, it can take weeks before a case officer has been assigned to the application. Overall, this elongated process puts a particular strain on firms to ensure that there is appropriate allocation and oversight of the relevant perimeter / responsibilities during this extended application period. The accountability for these responsibilities either fall to the CEO / Head of Overseas Branch or are allocated to an existing and suitable SMF in the interim period. However, this can cause resource and capacity constraints and issues relating to the span of control, which creates its own risks. The FCA's "12 Week Rule" akin to the CBI's "temporary roles" proposal, has not been effective in creating flexibility here as there is confusion within the industry as to its application, creating regulatory and compliance risk.

(C) While the CBI by comparison has a more streamlined process and has much shorter turn around periods on PCF applications, we would like to raise the issue ahead of the IAF / SEAR implementation to ensure the CBI consider current resource levels and/or consider other alternatives to blanket pre-approval for all

PCF functions / candidates therefore allowing resources to be targeted on a risk based approach to certain PCF roles, applications, candidates and/or firms with a higher PRISM rating. Such alternatives include:

(I) taking a more risk-based approach that takes into account an individual's experience in similar PCF roles, whether in the same firm or different firms, in Ireland or hold a similar position abroad (e.g. in the UK) e.g. where individuals already hold existing PCF role in a firm, it should not need to face the same rigour when applying for either a similar function in the existing firm or a similar function in another firm;

(II) consider direct approval or a lighter assessment of individuals who hold a similar function in a different jurisdiction as per the regime comparison included in DP 23/1 appendices. and for firms with higher numbers of applications, a single case officer could be beneficial in efficiently and effectively dealing with the request.

(III) introduction of a Notified Person requirement in certain specified circumstances, where only notification from the firms to CBI is required, rather than needing to receive the CBI's pre-approval.

(ii) Increase in Scope: The SMCR has been designed by the UK regulators to accommodate the evolving nature of regulation, by ensuring that each SMF has inbuilt/inherent responsibilities, supported by the additional flexibility for firms to identify and allocate overall (local) responsibilities where appropriate, taking into consideration the activities the firms undertakes and its business model. In more recent years, the PRA and FCA has consulted on introducing / mandating the allocation of other responsibilities which are more specific in nature, for example responsibility for Climate Risk.

(A) There is a danger that the SMCR is used by the regulators in this way to enforce new strategic priorities without appropriate consultation or cover specific updates and/or changes in regulation. As such, mandating responsibilities in this way, without appropriate industry consultation and feedback undermines the concept of inherent responsibilities and reduce the inbuilt flexibility of the SMCR, going against the principles of proportionality and appropriateness. Overall, this would add to the complexity of the regime and go against the principles of proportionality and appropriateness. We would warn against any such scope creep over the longer term by CBI citing the same concerns as the UK financial services industry.

(iii) Timeliness of Consultations and Implementation Timelines / Deadlines: From the rollout of the initial the SMCR to the banking industry, further staged rollouts to other financial services firms, and the most recent extension to solo-regulated firms, the timeliness of the consultation, final rules, and implementation deadlines of the SMCR were appropriate and proportionate to the work required to meet the regulatory expectations.

Irish Funds

13 June 2023