

**General Scheme of
Central Bank (Individual Accountability Framework) Bill 2021**

Long Title

A bill to confer powers on the Central Bank of Ireland to strengthen and enhance individual accountability in the management and operation of regulated financial services providers; to provide for obligations on regulated financial services providers with respect to governance, management arrangements and senior executive accountability; to provide for conduct standards setting out standards of behaviour for regulated financial service providers and individuals performing functions in regulated financial service providers; to provide for the sanctioning of individuals who breach their responsibilities under financial services legislation; to prescribe responsibilities and provide for the allocation of responsibility and accountability for the management and operation of regulated financial service providers to individuals; to prevent potential serious damage to the financial system in the State, support the stability of that system and to protect users of financial services; to amend and extend Part IIIC of the Central Bank Act 1942, and Part 3 of the Central Bank Reform Act 2010. For those purposes to provide for amendments to the Central Bank Acts 1942 to 2013 and to provide for related matters.

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Acts Referred to

Central Bank Act 1942 (as amended)

Central Bank Reform Act 2010

Part 1

General Provisions

Head 1: Short title, collective citation and commencement

Provide that:

1. This Act may be cited as the Central Bank (Individual Accountability Framework) Act.
2. The Central Bank Acts 1942 to 2014 and this Act may be cited together as the Central Bank Acts 1942 to 2021.
3. This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or different provisions.

Explanatory note

This Head is a standard provision.

Head 2: Definitions

Provide that:

In this Act

“Act of 2010” means the Central Bank Reform Act 2010;

“Act of 2013” means the Central Bank (Supervision and Enforcement) Act 2013;

“Appeals Tribunal” means the Irish Financial Services Appeals Tribunal;

“Bank” means the Central Bank of Ireland;

“Commission” means the Central Bank Commission;

“controlled function” has the meaning given to that term in section 18 of the Act of 2010;

“Court” means the High Court;

“Deputy Governor” means a Deputy Governor of the Bank;

“ECB” means the European Central Bank;

“EEA country” means a country that is a member of the European Economic Area;

“Governor” means the Governor of the Bank;

“financial services legislation” means—

- (a) the designated enactments;
- (b) the designated statutory instruments;
- (c) the Central Bank Acts 1942 to 2014 and statutory instruments made under those Acts;
and
- (d) this Act and statutory instruments made under it.

“Minister” means the Minister for Finance;

“pre-approval controlled function” has the meaning given to that term in section 18 of the Act of 2010;

“prescribed contravention” has the same meaning as set out in section 33AN of the Principal Act;

“Principal Act” means the Central Bank Act 1942 (as amended);

“regulated financial service provider” means –

- (a) a financial service provider whose business is subject to regulation by the Bank under the Central Bank Acts or under a designated enactment or a designated statutory instrument,
- (b) a financial service provider whose business is subject to regulation by an authority that performs functions in an EEA country that are comparable to the functions performed by the Bank under the Central Bank Acts or under a designated enactment or designated statutory instrument, or
- (c) a financial service provider whose business is subject to supervision by the ECB under a designated enactment.

An expression used in this Act and also in the Principal Act has, unless the contrary intention appears, the same meaning in this Act as in the Principal Act.

References in this Act to a regulated financial service provider, shall, unless the context otherwise requires, be read as including a person who was a regulated financial service provider at the relevant time.

Explanatory note

This Head is a standard provision.

Head 3: Interpretation

Provide that:

Section 3 of the Act of 2013 is amended by inserting the following definitions:

“senior executive accountability regime” means the obligations by regulation issued pursuant to [section 51A];

“senior executive function” means a pre-approval controlled function carried on by, for, or on behalf of a regulated financial service provider to whom the senior executive accountability regime applies.

“pre-approval controlled function” has the meaning given to that term in section 18 of the Act of 2010.

Explanatory note

This Head is a standard provision.

This head provides that a Senior Executive Function is the equivalent of a pre-approval controlled function as defined in the Act of 2010 for the purposes of this Bill in respect of those financial sectors that are subject to the Senior Executive Accountability Regime.

The detail of the scope of SEAR is in Head 4.

Part 2

Senior Executive Accountability Regime

Head 4: Senior Executive Accountability Regime

Provide that:

Section 48 of the Central Bank (Supervision and Enforcement) Act 2013 is amended, to provide for a regulation-making power allowing the Central Bank to impose obligations on regulated financial service providers (RFSPs), or designated classes of RFSPs, with respect to the establishment, management, monitoring and reporting of governance and management arrangements of RFSPs including provisions allowing the Central Bank to provide for inherent, prescribed and other responsibilities for persons in senior executive functions (SEFs), statements of responsibilities for SEFs, and management responsibility maps for in-scope RFSPs.

Explanatory note

This head provides a regulation making power for the Central Bank to give effect to the Senior Executive Accountability Regime (SEAR). The SEAR will ensure greater transparency and clearer accountability within the financial services sector by giving the Central Bank powers to impose obligations on RFSPs to set out clearly where responsibility and decision-making lies within the RFSP including by making provision for the following:

- responsibilities that are inherent to each SEF;
- prescribing responsibilities which RFSPs must allocate to individuals carrying out SEFs;
- the identification and allocation of other responsibilities by RFSPs to relevant SEFs;
- imposing requirements on RFSPs to provide a statement of responsibilities to the Central Bank for SEFs which clearly sets out their role and areas of responsibility;
- imposing requirements on RFSPs to produce a management responsibility map documenting key management and governance arrangements in a comprehensive and accessible way within a single source of reference.

The population of SEFs is aligned to the list of pre-approval controlled functions (PCFs) prescribed by regulations made under section 22 of the Central Bank Reform Act 2010.

The individual responsibilities of each SEF (*i.e.* their inherent responsibilities, as well as any prescribed and/or other responsibilities allocated to the individual) must be documented in a statement of responsibility. These statements are individual to each SEF and are intended to promote clarity, transparency and accountability for individual responsibilities within the RFSP. The

additional clarity provided in the statement of responsibility will also enhance the Central Bank's ability to hold individuals to account for regulatory breaches in the area for which they are responsible.

Each in-scope RFSP will be required to produce a management responsibility map. The purpose of the management responsibility map is to describe the management, governance and reporting arrangements of the RFSP in a clear single source of reference to include governance arrangements for the board, board committees and other decision making committees or groups, reporting lines of SEFs, including within the wider RFSP group, and, if relevant, the interaction between the RFSP's and the RFSP group's governance and management arrangements.

The legislation will not define the sectors to be included in SEAR, as this will be provided for by the Central Bank Regulations under section 48 of the 2013 Act. It is intended, however, that SEAR will apply initially to the following sectors:

- Credit institutions (excluding credit unions);
- Insurance undertakings (excluding reinsurance undertakings, captive (re)insurance undertakings and Insurance Special Purpose Vehicles);
- Investment firms which underwrite on a firm commitment basis and/or deal on own account and/or are authorised to hold client monies/assets; and
- Third country branches of the above

Other sectors may be brought within the scope of SEAR in the future, after the legislation is enacted.

Head 5: Duty of responsibility of persons performing Senior Executive Functions

Provide that:

A legal duty is imposed on individuals performing "*senior executive functions*" in regulated financial service providers (RFSPs) within the scope of the Central Bank's senior executive accountability regime to take reasonable steps to avoid their firm committing or continuing to commit a "*prescribed contravention*" in relation to the areas of the business for which they are individually responsible.

To provide that an individual will breach this legal duty where:

- at a time when the individual was performing a senior executive function, the RFSP committed or continued to commit a prescribed contravention;
- the individual was, at that time, responsible for the business area relevant to that prescribed contravention; and
- the individual did not take reasonable steps to avoid the prescribed contravention occurring or continuing.

To provide that a breach of this duty by an individual will be a prescribed contravention and therefore enforceable against that individual under Part IIIC of the Central Bank Act 1942.

To provide that the Central Bank will be required, when assessing whether the individual took reasonable steps to avoid the prescribed contravention occurring or continuing, to have regard to all relevant circumstances and to provide for a non-exhaustive list of examples of those circumstances.

1. A person commits a prescribed contravention for the purposes of Part IIIC of the Central Bank Act 1942 where all of the following are satisfied:
 - (a) the person is performing, or has at any time performed, a senior executive function in relation to a regulated financial service provider,
 - (b) there has at that time been (or continued to be) a prescribed contravention by the regulated financial service provider,
 - (c) the senior executive function performed by the person was at that time responsible for the management or oversight of the regulated financial service provider's activities in relation to which the contravention by the regulated financial service provider occurred, and
 - (d) the person performing the relevant senior executive function did not take reasonable steps to avoid the contravention by the regulated financial service provider occurring (or continuing).

2. When assessing whether the person performing the relevant senior executive function took reasonable steps for the purposes of subsection (1)(d), the Bank shall have regard to all relevant circumstances, which may include but are not limited to the following:
 - (a) the nature, scale and complexity of the business of the regulated financial service provider;
 - (b) the relevant senior executive function and the responsibilities of that function;
 - (c) the level of knowledge and experience that a person performing the relevant senior executive function could reasonably be expected to have had in their position at the relevant time;
 - (d) the level of knowledge and experience that the person performing the relevant senior executive function had at the relevant time;
 - (e) whether the person took such steps as a person in his or her position could reasonably have been expected to take to:
 - (i) ensure there were appropriate and effective systems (including risk management systems), controls and governance arrangements in place,
 - (ii) ensure the effective oversight of any delegation of responsibilities, and the implementation of effective safeguards against inappropriate delegation,
 - (iii) implement appropriate and effective procedures for identifying and remediating problems that could arise, and
 - (iv) apply such systems, controls, arrangements, safeguards and procedures to the circumstances of the case; and
 - (f) whether the person performing the relevant senior executive function acted in accordance with any statutory, common law and other legal obligations.

Explanatory note

Part IIIC of the Central Bank Act 1942, as amended, provides the Central Bank with the power to administer sanctions in respect of the commission of prescribed contraventions. Such contraventions can include a breach of a provision of a designated enactment, including any instrument made thereunder, or a designated statutory instrument.

This Head will insert a new Part 8A (section 51A) into the Central Bank (Supervision and Enforcement) Act 2013 to provide that a person who is performing a Senior Executive Function (SEF) role commits a prescribed contravention as provided for in Part IIIC of the Central Bank Act 1942 where the criteria set out in subsection (1) are met.

Subsection (2) provides that the Bank, when assessing if the person performing the relevant senior executive function has taken reasonable steps to avoid the contravention by the regulated financial service provider occurring (or continuing), must take account of all relevant circumstances including any of the circumstances set out in the provision that may apply.

This Head will facilitate holding individuals to account and provide a range of tools to address misconduct.

The duty of responsibility will be an important part of the Senior Executive Accountability Regime (SEAR). SEAR will require regulated firms to which the regime applies to identify and document the responsibilities of senior individuals performing “*senior executive functions*” within them. The duty of responsibility will underpin those responsibilities by imposing a legal obligation on senior individuals in relation to their discharge. Senior individuals will be required to take reasonable steps to avoid their firm contravening legal and regulatory requirements in the areas of the firm’s business for which they are individually responsible. The Central Bank will be able to take enforcement action and impose administrative sanctions on individuals who breach the duty of responsibility.

Senior individuals subject to the duty of responsibility will be able to make sure they comply with the duty by taking reasonable steps to prevent their firm breaching its obligations in the business area for which they are responsible. Where a firm is in breach of its obligations and the Central Bank is considering whether the relevant individual discharged their duty as required, the Central Bank will be required to consider all relevant circumstances. The legislation will provide examples of the circumstances that may apply in a given case.

Part 3

Conduct Standards

Head 6: Standards for Businesses

Provide that:

Obligations be imposed on regulated financial service providers (RFSPs) with respect to expected standards of conduct (the standards for businesses).

Obligations be imposed on regulated financial service providers (RFSPs) with respect to expected standards of conduct (the standards for businesses) so that a RFSP shall

- conduct its business professionally, honestly, ethically and with integrity;
- conduct its business with due skill, care and diligence, and take appropriate steps to prevent or effectively manage conflicts of interest;
- act in the best interests of its customers and treat them fairly and professionally;
- maintain adequate financial resources and control and manage its affairs and systems sustainably, responsibly, and in a sound and prudent manner;

- arrange adequate protection for clients' assets when it is responsible for them;
- deal with its regulators in good faith and in an open and cooperative way and shall disclose to the Central Bank promptly, proactively and appropriately anything relating to the firm of which the Central Bank would reasonably expect notice.

That the Central Bank shall have a regulation making power allowing it to specify additional detail with respect to the operation of the standards for businesses.

That a breach of the standards for businesses will be a "prescribed contravention" and therefore enforceable against an RFSP under Part IIIC of the Central Bank Act 1942.

Explanatory note

This head provides for the introduction of standards for businesses that will apply to RFSPs.

The standards for businesses comprise one element of a suite of conduct standards and legal obligations being introduced in this legislation and include the common conduct standards that will apply to persons performing Controlled Function (CF) roles (including Pre-Approval Controlled Function (PCF) Roles) in RFSPs, and additional conduct standards which also apply to individuals in senior roles.

The Standards for Businesses create a single reference point setting out in clear and simple terms the conduct standards that all RFSPs, regardless of sector, must meet. The Standards for Businesses will also provide an essential counterbalance to conduct standards imposed on individuals under the Common Conduct Standards and the Additional Conduct Standards.

It is proposed that the Standards for Businesses will be further elaborated on through Central Bank regulations which will specify additional detail with respect to the operation of these Standards.

A breach of the Standards for Businesses will be a "prescribed contravention" and therefore the Central Bank can take direct enforcement action against and may impose sanctions on an RFSP responsible for such a breach.

Head 7: Common Conduct Standards

Provide that:

Obligations be imposed on persons performing controlled functions (CFs) in regulated financial service providers (RFSPs) with respect to expected standards of conduct (the common conduct standards).

Non-exhaustive lists of behaviours relevant to a person's compliance with the common conduct standards will be provided so that a person who is subject to the standards is aware of what is expected of them.

The Central Bank shall issue practical guidance for persons to whom the common conduct standards apply and that the Central Bank will have regard to the guidance in determining whether there has been a breach of the common conduct standards.

That a breach of the common conduct standards will be a "prescribed contravention" and therefore enforceable against such persons under Part IIIC of the Central Bank Act 1942.

That it shall be a defence to any enforcement action in relation to a breach of the common conduct standards if the person can show that they acted reasonably in all of the circumstances of the case.

The Central Bank shall have a regulation making power allowing it to impose requirements on RFSPs to notify CFs of the common conduct standards that apply to them and to provide training to them in this regard, and to report disciplinary action arising from breaches of the common conduct standards to the Central Bank.

That RFSPs will also be required to establish and maintain policies setting out how RFSPs will embed the common conduct standards throughout their respective organisations.

That failure by a RFSP to comply with a requirement imposed under regulation, or failure to establish and maintain policies setting out how the RFSP will embed the common conduct standards throughout their organisation, will be prescribed contraventions and therefore the RFSP may be subject to administrative sanctions under Part IIIC of the Central Bank Act 1942.

Explanatory note

This head provides for the introduction of common conduct standards that will apply to persons performing Controlled Function (CF) roles (including Pre-Approval Controlled Function (PCF) Roles) in Regulated Financial Service Providers (RFSPs).

The introduction of common conduct standards for all CF staff in RFSP will provide clarity as to the standards of behaviour the Central Bank expects of individuals working in the financial services industry.

The common conduct standards comprise one element of a suite of conduct standards and legal obligations being introduced in this legislation and include the additional conduct standards (which also apply to individuals but only to individuals in the most senior roles) and the standards for businesses (which apply to the firms themselves).

CF and PCF roles are prescribed by regulation under Part 3 of the Central Bank Reform Act 2010 which contains the framework for the Central Bank's fitness and probity regime.

To ensure that each individual is aware of and understands the expectations of them, the head will provide that the Central Bank will have the power to make regulations obliging RFSPs to-

- (a) notify all relevant persons of the conduct standards that apply to them;
- (b) provide suitable training to its staff on the conduct standards; and
- (c) report in a timely manner any disciplinary action arising from breaches of the conduct standards to the Bank.

RFSPs will also be required to establish and maintain policies setting out how RFSPs will embed the common conduct standards throughout their respective organisations.

The head will provide that failure by a RFSP to comply with a requirement of the regulations, or a failure by a RFSP to comply with the obligation to establish and maintain policies setting out how the RFSP will embed the conduct standards throughout the organisation will be prescribed contraventions and will be enforceable against the RFSP under Part IIIC of the Central Bank Act 1942.

The common conduct standards require that in respect of conduct relating to the activities of RFSPs, that CFs shall-

- (a) Act honestly, ethically and with integrity;

- (b) Act with due skill, care and diligence;
- (c) Be cooperative with the Central Bank and other regulators or authorities and deal with them in good faith and without delay;
- (d) Act in the best interests of customers and treat them fairly and professionally; and
- (e) Observe proper standards of market conduct.

In order to provide clarity as to the behaviour that is expected of a person subject to the common conduct standards it is intended to include a detailed but non-exhaustive list of examples of the expected behaviours under each of the headings a) to e) within the primary legislation so that the person who is to be subject to the standards will have a clear understanding of the behaviour that is expected of them.

The conduct standards are:

- (a) acting honestly, ethically and with integrity, including, without limitation, and by reference to any guidelines published:
 - (i) by operating in compliance with the firm's systems and controls, processes, policies and procedures,
 - (ii) by participating appropriately in any decision-making, including collective decision making, that the relevant person may perform or contribute to,
 - (iii) by acting without bias,
 - (iv) by weighing only legitimate interests of the regulated financial services provider, its staff, customers and other persons with whom it is engaged, in decision making and actions taken,
 - (v) by taking appropriate steps to identify and prevent or appropriately manage conflicts of interest,
 - (vi) by adhering to ethical standards of the regulated financial service provider,
 - (vii) by providing, information, records, opinions, advice or explanations which are correct and accurate and which do not mislead,
 - (viii) by not misusing or misappropriating, directly or indirectly, assets or information of the firm, customers or any other person,
 - (ix) in complying with all obligations and standards imposed by or under law, or set out in the professional Standards of an applicable professional regulatory body;
 - (x) by avoiding causing detriment or damage to customers, the regulated financial service provider and its related undertakings, and the financial system, and
 - (xi) by appropriately escalating or reporting, and by not impeding others from escalating or reporting, improper conduct or matters adversely affecting the activities or interests of the regulated financial service provider and its related undertakings, customers, the financial system and relevant stakeholders;

- (b) acting with due skill, care and diligence, including, without limitation, and by reference to any guidelines published:
- (i) by taking appropriate steps to identify and prevent or appropriately manage conflicts of interest;
 - (ii) by exercising sound judgment in any decision-making, including collective decision making, that the relevant person may perform or contribute to, and by ensuring that such decisions are properly informed,
 - (iii) by adequately overseeing and controlling delegated responsibilities and, where appropriate, challenging information provided by persons to whom such responsibilities have been delegated,
 - (iv) by the relevant person ensuring he or she has appropriate knowledge of the firm's business activities, the legal and regulatory framework applicable to those activities, and the risks associated with those activities,
 - (v) by complying with all obligations and standards imposed by or under law, when operating and complying with the firm's systems and controls, processes, policies and procedures,
 - (vi) by appropriately escalating or reporting, and by not impeding others from escalating or reporting, improper conduct or matters adversely affecting the activities or interests of the regulated financial service provider and its related undertakings, customers, the financial system and relevant stakeholders, and
 - (vii) by providing information, records, opinions, advice or explanations which are correct and accurate and which do not mislead;
- (c) cooperating as appropriate with the Central Bank and other regulators or authorities and dealing with them in good faith and without delay, including, without limitation, and by reference to any guidelines published:
- (i) by not directly or indirectly providing false, inaccurate or misleading information, records or explanations to the Central Bank or other regulators or authorities,
 - (ii) by responding to requests and requirements of the Central Bank and other regulators or authorities in an open and timely manner,
 - (iii) by disclosing all relevant information or records when requested or required to do so by the Central Bank and other regulators or authorities and doing so in an open and timely manner,
 - (iv) by not directly or indirectly destroying, withholding, hiding or putting beyond the reach of the Central Bank and other regulators or authorities information or records which has been requested or required or which may be relevant to the performance of their functions,

- (v) by not engaging in evasive, misleading or obstructive conduct in the course of their engagement and dealings with the Central Bank and other regulators or authorities,
- (vi) by complying with any obligations imposed pursuant to legislation by the Central Bank or by other regulators and authorities and doing so in a timely manner and in any event within any reasonable specified time periods,
- (vii) by attending for any meetings and/or interviews that have been requested or required by the Central Bank and other regulators or authorities and answering any questions and providing any information requested or required during the course of those meetings and/or interviews;

In paragraph (c) above, “other regulators or authorities” means such regulators or other authorities who carry out the functions of a competent authority with respect to regulation of financial services, or other functions comparable to those carried out by the Bank, and other European Union Member State and overseas regulators.

- (d) acting in the best interests of customers and treating them fairly and professionally, including, without limitation, and by reference to any guidelines published:
 - (i) by not directly or indirectly causing detriment, damage to or an unfair outcome for customers;
 - (ii) by complying with all obligations and standards imposed by or under law in relation to the treatment of and dealings with customers;
 - (iii) by providing, and by not impeding the provision of material information to customers in a way that seeks to inform customers, where the person is aware, or ought to be aware, of such material information, and of the fact that such information should be provided to customers,
 - (iv) by providing customers with clear, accurate, up to date and adequate information, and by providing this information on a timely basis having regard to the urgency of the situation and the time necessary for the customer to absorb and react to the information provided,
 - (v) by ensuring any advice given or recommendations made to customers regarding financial services and products are suitable for the relevant customer having regard to their characteristics, their circumstances, their sophistication or vulnerability and the range of choices available to the customer,
 - (vi) by not misleading customers in relation to the real or perceived advantages of any product or service,
 - (vii) by ensuring that any conflict of interest does not result in damage or detriment to or an unfair outcome for customers,
 - (viii) by not exerting undue pressure or undue influence on a customer,

- (ix) by providing adequate protection of, and control over, a customer's assets,
 - (x) by acknowledging, and seeking to resolve, any complaints received from customers, and
 - (xi) by effectively handling errors or mistakes which affect customers, and by seeking to disclose and resolve same in a timely manner;
- (e) observing proper standards of market conduct, including, without limitation, and by reference to any guidelines published, by complying with relevant market codes and trading venue rules, and by not engaging in or permitting a breach of any obligations or standards imposed by or under law in relation to market conduct.

The list of examples to be included in the primary legislation will be non-exhaustive and will be further underpinned by guidelines from the Central Bank providing practical guidance in relation to the common conduct standards.

The head provides that the common conduct standards will impose binding obligations on individuals with respect to expected standards of conduct in the performance of their roles in RFSPs. This means that a breach of the common conduct standards will be a "prescribed contravention" and therefore the Central Bank can take direct enforcement action against and may impose sanctions on such persons under Part IIIC of the Central Bank Act 1942.

The head provides that where the Central Bank determines that a breach of the common conduct standards has occurred, it will, in determining the sanctions to be imposed for a breach ensure that the sanction is proportionate and appropriate, by taking into consideration a range of factors including matters such as, the nature, seriousness and impact of the contravention; the conduct of the natural person during and after the contravention; the relevant previous record of the natural person and the financial position of the natural person.

The purpose of the head is to promote individual accountability and drive positive behaviour for each person carrying out activities in the financial services industry by setting out clearly the standards of conduct expected of them by the Central Bank. The head will also impose obligations on firms to underpin the importance of ensuring an effective culture of ethical compliance throughout regulated financial service providers.

Head 8: Additional Conduct Standards for persons in senior roles

Provide that:

Additional obligations are imposed on senior persons performing pre-approval controlled functions (PCFs) and other persons who exercise significant influence on the conduct of a regulated financial service provider's (RFSPs) affairs (together referred to as 'persons in senior roles') with respect to expected standards of conduct (the Additional Conduct Standards).

Breach of an Additional Conduct Standard will be a "prescribed contravention" and therefore enforceable against such persons under Part IIIC of the Central Bank Act 1942.

It will be a defence to any such enforcement action if the person can show that he or she acted reasonably in all of the circumstances of the case, and to provide a non-exhaustive list of matters that may be relevant to assessing whether a person acted reasonably.

The Central Bank shall have a regulation making power allowing it to impose requirements on RFSPs to notify persons in senior roles of the additional conduct standards that apply to them and provide training to them in this regard, and to report disciplinary action arising from breaches of the Additional Conduct Standards to the Central Bank.

Failure by a RFSP to comply with a requirement imposed under regulation will be a prescribed contravention and therefore the RFSP may be subject to administrative sanctions under Part IIIC of the Central Bank Act 1942.

Explanatory Note

This head provides for the introduction of additional conduct standards which form part of the proposed Individual Accountability Framework (IAF).

The additional conduct standards will impose binding obligations on persons in senior roles (persons performing pre-approval controlled functions (PCFs) and other persons who exercise significant influence on the conduct of an RFSP's affairs) with respect to expected standards of conduct in the performance of their roles. Pre-approval controlled functions (PCFs) are a subset of controlled functions (CFs) within the meaning of the Central Bank Reform Act 2010. They are senior roles within a regulated financial services provider (RFSP) including such roles as chief executive, executive or non-executive director, heads of functions, and branch managers. These additional conduct standards apply to all PCFs within all RFSPs, as well as other persons who have the ability to exercise significant influence over the affairs of a RFSP.

The additional conduct standards will apply to all persons in senior roles regardless of whether the RFSP in which they perform the role is in scope of the Senior Executive Accountability Regime (SEAR).

The additional conduct standards will apply in addition to the common conduct standards, provided for in Head 7.

The additional conduct standards will require persons in senior roles:

- a)* to ensure that the business of the RFSP for which the person is responsible is controlled effectively;
- b)* to ensure that the business of the RFSP for which the person is responsible complies with relevant regulatory requirements;
- c)* to ensure that any delegation of tasks for which they are responsible is to an appropriate person and that they oversee the discharge of the delegated task effectively;
- d)* to disclose promptly, proactively and appropriately to the Central Bank any information of which the Central Bank would reasonably expect notice; and
- e)* to participate effectively in collective decision making.

So that each individual is aware of and understands the expectations of them, the head will provide that the Central Bank will have the power to make Regulations obliging RFSP to-

- (a) notify all relevant persons of the additional conduct standards that apply to them;
- (b) provide suitable training to relevant persons on the additional conduct standards;
and
- (c) report in a timely manner any disciplinary action arising from breaches of the conduct standards to the Bank.

A breach of the additional conduct standards will be a “prescribed contravention” and therefore the Central Bank can take action against such persons under Part IIIC of the Central Bank Act 1942.

The head will provide that failure by a RFSP to adhere to the requirements to inform and train staff will be a prescribed contravention and is enforceable under against the RFSP under Part IIIC of the Central Bank Act 1942.

Head 9: Breaches of Conduct Standards by firms and individuals

Provide that:

1. A breach of the Common Conduct Standards, or of the Additional Conduct Standards is a basis for forming an opinion to suspect or conclude that a person is not of such fitness and probity as is appropriate to perform a controlled function.
2. The Bank may impose sanctions for non-compliance with the Common Conduct Standards, the Additional Conduct Standards, or the Standards for Businesses under Part IIIC of the Principal Act.

Explanatory note

This Head is intended to enable the Central Bank to take effective action against persons or firms who breach the Conduct Standards which apply to them. It provides for the Bank to take action, as appropriate, under either or both of the Fitness and Probity Regime and the Administrative Sanctions Procedure.

The Fitness and Probity Regime, established by the Central Bank Reform Act 2010, empowers the Central Bank to assess whether persons performing controlled function roles are fit and proper according to a range of criteria. If the Head of Financial Regulation (Deputy Governor – Prudential Regulation) is of the opinion that there is reason to suspect the fitness and probity of a person performing a controlled function, and an investigation is warranted into that person's fitness and probity, the Head of Financial Regulation may conduct an investigation. In the course of this process, the person may be suspended from the performance of some or all controlled functions. If a person is found not to be fit and proper, the Bank has the power to issue a prohibition notice, preventing the person from performing a controlled function or restricting them in the performance of some or all controlled functions.

The Administrative Sanctions Procedure (ASP), established under Part IIIC of the Central Bank Act 1942, as amended by the Central Bank and Financial Services Authority of Ireland Act 2004, provides for a range of sanctions which the Bank can impose on a person or firm for a breach of financial services legislation. These sanctions range from a caution or reprimand to monetary penalties and disqualification from holding certain positions.

The first provision to be made by way of amendment to the non-exhaustive lists in sections 25(3) and 43(2) of the Act of 2010.

Part 4

Fitness and Probity Regime

Head 10: Certification

Provide that:

Section 21 of the Central Bank Reform Act 2010 is amended to provide:

1. That a regulated financial service provider (firm) may not allow a person to perform a controlled function unless the firm has certified in writing that it is satisfied that the person complies with the applicable standards of fitness and probity; and
2. That the Central Bank may make related regulations specifying requirements in relation to certification, the due diligence that firms must undertake prior to certifying persons in controlled function roles, the adoption of fitness and probity policies and procedures, and related matters.

Explanatory Note

This head provides for an amendment to section 21 of the Central Bank Reform Act 2010 to strengthen the existing obligations on firms in relation to the fitness and probity of their key personnel. A firm would be required to certify in writing, for each person in a controlled function role, that it is satisfied that the person meets the standards. This would serve to intensify the focus of firms on the fitness and probity of their key personnel and their procedures in this regard.

The proposed regulation making power will allow the Central Bank to make regulations:

- Requiring firms to adopt fitness and probity policies and procedures to ensure persons in controlled function roles meet the appropriate standards;
- Requiring firms to carry out specific due diligence checks on persons in controlled function roles;
- Specifying formal requirements for firms in relation to their obligations under section 21, *e.g.* in relation to the period of validity of certification;
- Specifying requirements for firms in relation to the reporting of related information to the Central Bank.

A breach of such regulations by the firm would be a prescribed contravention for the purposes of the ASP and could therefore lead to enforcement action. Such regulations would therefore supplement and inform the proposed certification requirement and also further strengthen the existing section 21 obligation on firms to ensure their key personnel meet the fitness and probity standards.

Head 11: Investigation of persons formerly performing Controlled Function roles

Provide that:

Section 25(2)(a) of the Central Bank Reform Act 2010 is amended to enable the Head of Financial Regulation of the Central Bank (*i.e.* the Deputy Governor, Prudential Regulation) to conduct an investigation in relation to the fitness and probity of a person who previously performed a controlled function (CF) role but no longer does so at the time when an investigation is being commenced.

Explanatory Note

This head provides for the amendment of section 25 of the 2010 Act to ensure that the Central Bank can investigate individuals who the Bank suspects pose a danger to consumers or the financial system, irrespective of whether they continue to perform a CF role at the time when an investigation is being commenced. The head will provide for a specified time period to apply in this regard (from the date on which the person last performed a CF role to the commencement of the investigation) but will include an exception to that where the Bank is of the opinion that there is reason to suspect that the relevant person has engaged in serious misconduct in relation to a regulated firm; where the person has misled the Central Bank; where the person has failed to disclose certain required information to the Central Bank; where the person has failed to comply with an evidentiary notice; or where the person has been convicted of certain serious criminal offences relevant to a person's honesty and integrity.

Head 12: Confirmation of Suspension Notices

Provide that:

Section 29 of the Central Bank Reform Act 2010 is amended to clarify that the Head of Financial Regulation (Deputy Governor, Prudential Regulation

) can confirm a Suspension Notice where a function is being carried out, and not exclusively in circumstances where a fitness and probity investigation is ongoing.

Explanatory Note

Section 26 of the 2010 Act provides that a suspension notice can be issued at any time during which the Central Bank, the Deputy Governor or the Governor are carrying out any function under Chapter 3 or Chapter 4 of the 2010 Act.

This includes functions that may be carried out after the conclusion of an investigation in accordance with section 41. However, section 29 of the 2010 Act, which provides for confirmation of suspension notices subsequent to their initial issue, requires that the Deputy Governor be satisfied that "*in the circumstances an investigation is still warranted*" (section 29(1)(b)) [Emphasis added].

This amendment to section 29 will ensure that it aligns with section 26.

Head 13: Duration of Suspension Notices

Provide that:

Section 29(4) of the Act of 2010 is amended to allow the Head of Financial Regulation (*i.e.* the Deputy Governor, Prudential Regulation) to issue a suspension notice to a person for up to 6 months.

Section 29 of the Act of 2010 is amended to include an express right of appeal of the suspension notice to the High Court.

Section 31(2) of the Act of 2010 is amended to allow the High Court to extend the duration of a suspension notice for such period as it sees fit but not longer than 24 months.

Explanatory note

A suspension notice may be issued to a person who is subject to investigation in relation to their fitness and probity to perform a controlled function under section 25 of the 2010 Act. This head provides for the amendment of section 29(4) of the 2010 Act to extend the duration of the effect of a suspension notice that has been confirmed by the Deputy Governor, Prudential Regulation, from the current 3 months to 6 months.

The head will further provide an appeal mechanism to allow the person served a confirmed suspension notice to appeal the suspension to the High Court. The head will provide that any further appeal to the Court of Appeal on a point of law would require leave.

The head provides for the amendment of section 31 of the 2010 Act to extend the period by which the High Court may extend the duration of a suspension notice from the current 3 months, to a maximum of 24 months, as the Court orders. This extension period is over and above the initial term of the suspension notice, as confirmed by the Deputy Governor and extends the potential duration of a confirmed suspension notice to a cumulative of 30 months.

Head 14: Information-gathering powers and applicant firms

Provide that:

Section 23(2) of the Central Bank Reform Act 2010 Act is amended to clarify that the information gathering powers available to the Central Bank for the purposes of considering whether or not to approve a person for appointment to perform a pre-approval controlled function (PCF), apply to persons who have applied for authorisation, but whose application has not yet been determined ('Applicants').

That the information gathering powers set out in section 23(2) apply to:

- Applicants or regulated financial service providers (RFSPs) proposing a person for appointment to perform a PCF,
- officers or employees of either an Applicant or a regulated financial service provider, and
- persons who are proposed for appointment to the PCF role.

That a new section 23(8) be inserted for the purpose of defining 'Applicant'.

Explanatory Note

This amendment is required to ensure that the Central Bank can exercise the information gathering powers under section 23(2) of the 2010 Act where a firm proposing a person for appointment to a PCF (*i.e.* a senior role in the firm) is still at the authorisation application stage (*i.e.* its application has

not been decided by the Central Bank). Usually, the firm will request the Central Bank to assess the persons they are proposing for appointment to PCF roles while the firm's application for authorisation is still ongoing. In these cases, the amendment will allow the Bank to gather information required to assess persons for the PCF roles and issue both the firm's authorisation and the PCF approval at the same time. The amendment specifies that Applicants are in scope of section 23(2) of the 2010 Act. It is also necessary to define 'Applicant' for the purposes of section 23 of the 2010 Act.

Head 15: Application of Fitness and Probity Regime to Financial Holding Companies

Provide that:

The scope of Part 3 of the Act of 2010 (and the Fitness and Probity Standards as appropriate) is amended such that the fitness and probity regime is extended to apply to the directors/staff of holding companies established in Ireland.

The following definition of "holding company" be inserted into section 18(1) of the Act of 2010 after the definition of "controlled function":

"holding company" means any of the following entities when established in the State:

- (a) a financial holding company within the meaning of point (20) of Article 4(1) of the Capital Requirements Regulation;
- (b) a mixed financial holding company within the meaning of point (21) of Article 4(1) of the Capital Requirements Regulation;
- (c) an insurance holding company within the meaning of Regulation 215(1) of the European Union (Insurance and Reinsurance) Regulations 2015 (S.I. No. 485 of 2015);
- (d) a mixed financial holding company within the meaning of Article 2(15) of Directive 2002/87/EC.

Section 18(2) of the Act of 2010 is replaced with the following:

- (2) This Part applies to and in relation to:
 - (a) regulated financial service providers other than credit unions, and
 - (b) holding companies.

Section 18(3) of the Act of 2010 is replaced with the following:

- (3) On and from a date to be fixed by the Minister by order, this Part applies to and in relation to all regulated financial service providers, including credit unions, and holding companies.

Section 21 of the Act of 2010 is replaced with the following:

- (1) A regulated financial service provider or holding company shall not permit a person to perform a controlled function unless –
 - (a) the regulated financial service provider or holding company is satisfied on reasonable grounds that the person complies with any standard of fitness and probity in a code issued under section 50, and

(b) the person has agreed to abide by any such standard.

Section 22 of the Act of 2010 is amended by inserting a new subsection (3A) as follows:

(3A) Without prejudice to the generality of subsection (2), the Bank may, pursuant to that subsection, prescribe a controlled function in a holding company as a pre-approval controlled function if such controlled function is one to which a person who holds an office or position mentioned in subsection (4) reports directly.

Section 23 of the Act of 2010 is amended by deleting “regulated financial service provider” and substituting with “regulated financial service provider or holding company” in each place where it occurs.

Part 3, Chapters 3, 4 and 5 of the Act of 2010 are amended by deleting “regulated financial service provider” and substituting with “regulated financial service provider or holding company” in each place where it occurs.

Explanatory note

Holding companies come within the scope of some elements of the current regulatory framework, including assessments of directors/staff of holding companies. However, the fitness and probity regime does not currently apply to directors or staff of holding companies and mixed financial holding companies (holding companies) as they are unregulated entities. Accordingly, the intention of this head is to provide for an amendment to the scope of Part 3 of the 2010 Act such that the fitness and probity regime is extended to apply to the directors/staff of holding companies established in Ireland.

Head 16: ECB Competence for PCF Assessment of Key Function Holders

Provide that:

Section 23A of the Act of 2010 is amended to reflect that the European Central Bank (ECB), not the Central Bank of Ireland, has competence for the pre-approval controlled function (PCF) assessment of individuals who are proposed for appointment to key function holder (KFH) positions in “Significant Institutions”.

The Act of 2010 is amended by deleting section 19 and replacing with the following:

In this Chapter:

“relevant obligations” has the same meaning as in Part IV of the Central Bank Act 1997;

“key function holder” means a person other than a member of the management body (within the meaning of the European Union (Capital Requirements) Regulations 2014 (S.I. No. 158 of 2014)), who is responsible for the management of a significant supervised entity (within the meaning of the SSM Framework Regulation) and whose appointment is subject to approval by the ECB pursuant to its competence under Article 4(1)(e) of Council Regulation (EU) No 1024/2013 of 15 October 2013.

The Act of 2010 is amended in subsections 23A (1) and 23A(3) as follows:

23A.

- (1) A significant supervised entity (within the meaning of the SSM Framework Regulation) which is a regulated financial service provider shall not appoint a person to its management body (within the meaning of the European Union (Capital Requirements) Regulations 2014 (S.I. No. 158 of 2014)), **or where not already part of the management body, as a key function holder**, unless the Bank has notified the entity in writing that the ECB has approved the appointment of the person to the management body **or as a key function holder**.

[...]

- (3) For the purposes of the making of a decision by the ECB as to whether or not to approve a person under subsection (1), the Bank may request the person, or a specified officer or employee of the entity that proposes to appoint the person to the management body, **or as a key function holder**, by notice in writing to do any one or more of the following:
- (a) produce a specified document or documents to the Bank;
 - (b) provide specified information to the Bank;
 - (c) produce to the Bank documents of a kind described in the notice;
 - (d) answer a question or questions set out in the notice;
 - (e) attend before a specified officer or employee of the Bank for interview.

Explanatory Note

The European Central Bank (ECB) has determined that it has competence in relation to fit and proper assessment of Key Function Holders (KFHs) in significant institutions. The ECB's list of significant institutions is updated regularly, and institutions are included based on at least one of the following criteria: total value of its assets exceeds €30 billion; its economic importance, for the country where it is based or the EU economy as a whole; the total value of its assets exceeds €5 billion and the ratio of its cross-border assets/liabilities in more than one other participating Member State to its total assets/liabilities is above 20%; or it has requested or received funding from the European Stability Mechanism or the European Financial Stability Facility. A supervised bank can also be considered significant if it is one of the three most significant banks established in a particular country.

The ECB's competence is based on Article 4(1)(e) of the Single Supervisory Mechanism (SSM) Regulation, which states that the ECB has exclusive competence to ensure compliance with acts which impose requirements on credit institutions to have in place robust governance arrangements, "including the fit and proper requirements for the persons responsible for the management of credit institutions." However, section 23A of the 2010 Act limits the competence of the ECB in respect of fit and proper assessments of appointments to the "management body". Therefore, an amendment to section 23A of the 2010 Act is required to align with Article 4 of the SSM Regulation and reflect that the ECB, not the Central Bank of Ireland, has competence for the Pre-Approval Controlled Function (PCF) assessment of KFHs in significant institutions.

Head 17: Clarification in respect of Prohibition Notices

Provide that:

Section 43(1) of the Act of 2010 is amended to clarify that a prohibition notice may be issued in respect of any and all controlled functions, with conditions attached if required, in respect of any and all regulated financial service providers and for whatever duration is appropriate.

Explanatory Note

This amendment is required to clarify that a prohibition notice may be issued in respect of any and all regulated financial service providers

Head 18: Discontinuance or varying of Prohibition Notices

Provide that:

The Central Bank Reform Act 2010 is amended by the insertion of a new section to enable the Central Bank or a person who is prohibited by the Central Bank (as confirmed by an order of the High Court) to apply to the High Court for an order discontinuing or varying the prohibition notice at a later stage.

Explanatory Note

The 2010 Act does not currently provide any definite mechanism for someone who is prohibited (as confirmed by an order of the High Court under s. 45) to apply to the High Court for an order discontinuing or varying the prohibition notice at a later stage and where circumstances have changed. The lack of a defined process in this regard is unhelpful and leads to uncertainty for all parties.

A prohibition notice may apply for a specified period or indefinitely. In the case of a prohibition of indefinite duration that has been confirmed by the Court, where the Court has decided not to issue an order with effect “until further order of the Court” (s. 45(8)(b)), it is desirable, in the interests of justice, that explicit provision be made for varying or setting aside a prohibition notice at some later stage.

The test for granting an application to vary/remove a prohibition notice is stated to be a material change in circumstances, such that, if those circumstances had existed at the time of the application for confirmation, a different decision would have been taken.

The wording of the amendment will be based on that in Regulation 14 of the Irish MiFID II Regulations 2017 (SI 375/2017), concerning an application to revoke an authorisation under those regulations.

Part 5

Enforcement Investigations and Sanctions

Head 19: Extension of scope of enforcement and breaking of the participation link

Provide that:

The following provisions of the Central Bank Act, 1942 are amended:-

- (i) Section 2(4)
- (ii) Section 33AN – definition of “disqualification direction”
- (iii) Section 33ANC(1)(b) and (2)(c)
- (iv) Section 33ANE(2)(b) and 3(c)
- (v) Section 33ANF(1)(b) and (2)(c)
- (vi) Section 33AO(2)
- (vii) Section 33AQ(2), (3)(d), (5), (5)(c) and (8)

- (viii) Section 33AP(1), (2)(c), (3), (4) and (5)
- (ix) Section 33AR(2) and (2)(a)
- (x) Section 33AS(3)(b)
- (xi) Section 33AT(2)
- (xii) Section 33AU
- (xiii) Section 33AV(1)(b) and (3A)
- (xiv) Section 33BB(1)
- (xv) Section 33BC(1)(b) and (2)(b)
- (xvi) Section 33BF(a)

The following Regulations are amended:-

- (i) European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (as amended) (S.I. No. 352 of 2011) – Regulation 132A(4)

The amendments to the above provisions shall provide for the following:-

- (i) That a defined term of “person to whom this Part applies” be included, which would apply to both regulated financial services providers and persons performing a controlled function and/or a pre-approval controlled function within the meaning of section 18 of the Central Bank Reform Act, 2010;
- (ii) That the concept of “person concerned in the management” of a regulated financial services provider be removed from the 1942 Act;
- (iii) That the concept of “person concerned in the management” is replaced with references to persons performing a controlled function and/or a pre-approval controlled function within the meaning of section 18 of the Central Bank Reform Act, 2010;
- (iv) That the defined term of “person to whom this Part applies” be used in respect of ancillary amendments to provisions that apply to both regulated financial services providers and persons performing a controlled function and/or a pre-approval controlled function within the meaning of section 18 of the Central Bank Reform Act, 2010;
- (v) That the Central Bank would be capable of commencing an ASP enforcement investigations or inquiries in respect of the following persons:-
 - (a) Regulated financial services providers who have committed or are committing prescribed contraventions;
 - (b) Persons who are or were at the relevant time performing a controlled function and/or a pre-approval controlled function within the meaning of section 18 of the Central Bank Reform Act 2010 who have committed or are committing prescribed contraventions;
 - (c) Persons who are or were at the relevant time performing a controlled function and/or a pre-approval controlled function within the meaning of section 18 of the Central Bank Reform Act 2010 who have participated or are participating in the commission of a prescribed contravention by regulated financial services providers.

That there be ancillary amendments to the identified statutory provisions to cater for the above three scenarios e.g. insertion of defined term “person to whom this Part applies”.

- (vi) That subject to the transitional and saver provisions, references to persons performing a controlled function and/or a pre-approval controlled function within the meaning of section 18 of the Central Bank Reform Act, 2010 shall be read as including persons who held those offices or positions at the relevant time – See section 2(6) of the 1942 Act and *Fingleton -v- The Central Bank of Ireland* [2018] IECA 105.

In relation to the transitional and saver amendments, to provide:

- (i) That any enforcement investigation that has already been commenced at the time of the commencement of the new Act will not be subject to the amendments relating to the statutory commencement of an investigation;
- (ii) That where any Part IIIC inquiry has been commenced by service of a Notice of Inquiry pursuant to section 33AP of the 1942 Act at the time of the commencement of the new Act, the inquiry will not be subject to the amendments relating to the conduct of an inquiry and will proceed on the basis of the existing statutory framework;
- (iii) That the amendments relating to enforcement investigations and inquiries will apply to any such investigations or inquiries commenced post the commencement of the new Act;
- (iv) That any person who was a “person concerned in the management” of a regulated financial services provider up to the date of the commencement of the new Act would remain liable for their pre-commencement participation in the actions of a regulated financial services provider. Any pre-existing participation by these individuals would survive the abolition of the concept of a “person concerned in the management” of a regulated financial services provider post-enactment.
- (v) That in most cases persons performing a controlled function and/or a pre-approval controlled function within the meaning of section 18 of the Central Bank Reform Act, 2010 would only be liable for participation in prescribed contraventions by a regulated financial services provider that occurred post-commencement of the Act. However, if they were also “persons concerned in the management” pre-commencement, then they would remain liable for their pre-commencement participation in the actions of a regulated financial services provider;
- (vi) That persons performing a controlled function and/or a pre-approval controlled function within the meaning of section 18 of the Central Bank Reform Act, 2010 would only be liable for direct enforceability of prescribed contraventions that they have committed or are committing as and from the date of the commencement of the new Act and that there be no retrospective liability for matters that occurred pre-commencement (except for participation by persons who were also “persons concerned in the management”).

Explanatory Note

To properly implement the Individual Accountability Framework (IAF) and to seek to positively impact the culture of financial services firms, the scope of the ASP under Part IIIC of the 1942 Act requires amendment to align it with the broader IAF proposals and to ensure that those who are to

be made subject to the IAF are also subject to the associated enforcement process. These amendments will abolish the concept of a “person concerned in the management” of a regulated financial services provider. Further, the ASP would be expanded by these amendments to apply to all persons performing a controlled function (CF) and/or a pre-approval controlled function (PCF) within the meaning of section 18 of the Central Bank Reform Act, 2010.

The amendments will provide for direct enforceability for Common Conduct Standards that will apply to all CFs and PCFs and the Duty of Responsibility. The Central Bank’s approach to enforcement action will remain unchanged and will remain proportionate and risk-based. This means that in deciding whether to take enforcement action, the Central Bank will continue to consider the extent to which such action will promote compliance by the regulated entity and within the industry or sector. Further, the Central Bank will consider the proportionality of the enforcement action, and how that action delivers on the strategy, objectives and policies of the Central Bank, including the proper and effective regulation of financial institutions and markets, and ensuring that the best interests of consumers of financial services are protected. The Central Bank will continue to take enforcement action against firms and individuals only in instances where it is the appropriate regulatory response. Proportionate enforcement action will remain an integral part of the Central Bank’s regulatory strategy, which provides for the regulation of institutions and markets through risk-based supervision, underpinned by a credible threat of enforcement.

Internationally, in April 2018, the Financial Stability Board identified lack of accountability as a key cultural driver of misconduct, and recommended that national authorities identify and assign key responsibilities and hold individuals accountable. Without the package of amendments making up the IAF, including the expanded scope of the ASP in this amendment, serious concerns would arise about the capability of the current framework to credibly underpin and ultimately deliver the IAF, and the Central Bank’s ability to deliver on its mandate in an effective, timely and cost efficient manner. These reforms will provide clarity and greater administrative consistency and fairness to all involved, including those who are or may be the subject of enforcement action.

Given the proposed expanded scope of the ASP, the abolition of the concept of a “person concerned in the management”, the introduction of direct enforceability of legal obligations on CFs and PCFs and the various amendments to the investigative and inquiry processes in Part IIIC of the 1942 Act, it will be necessary to provide for detailed and clear transitional provisions in the new Act. These provisions will have to specify when and in what circumstances the new amendments apply and how pre-existing wrongdoing, investigations and inquiries will be dealt with post-enactment.

This head will also allow for direct enforcement by the Central Bank against individuals for prescribed contraventions *via* the ASP in respect of an individual’s wrongdoing by breaking the “participation link”, which until now limited enforcement against an individual to circumstances where the individual participated in a prescribed contravention by a regulated financial services provider (RFSP).

Under the relevant existing provisions of Part IIIC of the Central Bank Act 1942, the Central Bank cannot pursue individuals directly for breaches in their own right. The “participation link” requires the Central Bank to first prove a prescribed contravention against a RFSP before it can take an action against an individual, *i.e.* the Central Bank must show that the individual “participated” in the RFSP’s breach. This may not be appropriate or possible in every single case as it may not accurately reflect an individual’s conduct in respect of the wrongdoing under investigation. It can also result in delays in finalising individual investigations and/or inquiries in circumstances where the wrongdoing against a RFSP must first be established as a matter of proof before an individual can be sanctioned.

Head 20: Statutory commencement of an Administrative Sanctions Procedure investigation by the Central Bank

Provide that:

Part IIIC of the Central Bank Act, 1942 is amended, to put enforcement investigations in the context of the Administrative Sanctions Procedure on an express statutory basis, and to provide:-

- (i) that the Central Bank can commence an investigation where circumstances suggest to the Bank that a person has committed or participated in a prescribed contravention;
- (ii) that such an investigation is commenced by service of a notice in writing of the proposed investigation on the person who is the subject of the investigation;
- (iii) that the notice shall specify the circumstances suggesting that the person has committed or participated in a prescribed contravention;
- (iv) that up to the point of the service of a notice of inquiry under section 33AP of the 1942 Act, the notice could be amended at any time to incorporate other emerging prescribed contraventions/participation or to remove prescribed contraventions/participation that are no longer being investigated;
- (v) that the investigation could be ceased at any time and for any reason, including upon settlement under Part IIIC, without specifying the reasons for the cessation;
- (vi) that unless the investigation is otherwise ceased or settled, the Central Bank shall prepare a report at the conclusion of an investigation which would be served on the subject;
- (vii) that the investigation subject would have a right to make submissions on any matter contained in the report and the Bank would have a right of response;
- (viii) that if the matter proceeds to inquiry, the report and submissions would then be sent to the inquiry.

Explanatory Note

This amendment is part of the suite of reforms to Part IIIC and the ASP process to cater for the introduction of SEAR and the Conduct Standards. Whilst this reform will apply to all investigations, including investigations of regulated financial services providers, it is considered to be particularly necessary to provide clarity in respect of the investigation process to individuals who may be subject to investigations following the introduction of the individual accountability framework proposals. It is also integral to the other reforms being sought in respect of the ASP.

The gathering of information by the Central Bank's Enforcement Directorate through statutory information requests, interviews and the activities of authorised officers, following the referral of a case from a supervisory team, is referred to as an "enforcement investigation" but there is no one express statutory provision explicitly conferring on the Central Bank a power to conduct an enforcement investigation. This amendment will strengthen the existing provisions and will provide an express statutory provision dealing with ASP enforcement investigations.

Head 21: Absolute privilege for statements and documents

Provide that:

Part IIIC of the 1942 Act is amended to provide for a defence to a defamation action for any statements made at inquiry, including any documents produced, on the basis that they are subject to absolute

privilege. To provide that anything said or done at a Part IIIC inquiry, in a report from a Part IIIC inquiry or in any other communication to or by the inquiry shall be absolutely privileged.

Explanatory Note

The amendment is intended to ensure that all parties to an inquiry pursuant to the ASP under Part IIIC of the 1942 Act are afforded protections in line with those in several similar regulatory regimes. The proposed amendment would also facilitate open and fulsome interactions, both written and oral, between the inquiry and its participants. Further, it seeks to align the ASP with similar protections for participants in section 25 investigations under Part 3 of the Central Bank Reform Act, 2010. Pursuant to section 38 of the 2010 Act absolute privilege attaches to evidence provided in the context of section 25 investigations and hearings as well as to any reports prepared pursuant to those investigations.

This amendment is an essential protective measure for inquiry members and all inquiry participants, including legal practitioners and witnesses, which is already provided for in other Central Bank enforcement processes.

Head 22: Documentary evidence

Provide that:

Part IIIC of the Central Bank Act 1942 is amended to provide for a statutory presumption at a Part IIIC inquiry that documentary evidence shall be admissible as *prima facie* evidence of the truth of its contents. To provide:-

- (i) That information in a record shall be presumed to be admissible at an inquiry as *prima facie* evidence of the truth of any fact or facts contained therein;
- (ii) That if an inquiry subject objects to the admissibility of the information in a record, the inquiry (who are the Bank for the purposes of Part IIIC) shall make a decision in relation to the objection having regard to and considering:- (a) that the inquiry shall be conducted with as little formality and technicality and as quickly as possible (section 33AY(1) of the 1942 Act); (b) that at an inquiry the Bank must observe procedural fairness but is not bound by the rules of evidence (section 33AY(2) of the 1942 Act); (c) any of the additional fairness circumstances specified in the proposed section;
- (iii) That information contained in a record shall not be admitted if the inquiry (who are the Bank for the purposes of Part IIIC of the 1942 Act) are of the opinion that in the interests of fairness the information should not be admitted having regard to:- (a) whether or not it is reasonable to infer that the information is reliable; (b) whether it is reasonable to infer that the record is authentic; (c) any risk that the admission or exclusion of the information will result in unfairness to the inquiry subject.
- (iv) To provide for certain additional provisions adapted for a Part IIIC inquiry akin to sections 14(5), 14(6), 14(7), and 18 of the Civil and Criminal Law Miscellaneous Provisions Act, 2020

Explanatory Note

This amendment will insert a specific statutory provision into Part IIIC of the 1942 Act in relation to the admission of documentary evidence, modelled on the provisions of the Criminal Evidence Act 1992 and Chapter 3 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020, with amendments to cater for the fact that the inquiry is not a criminal process or a court of law. The

proposed amendment operates as no more than a presumption of admissibility which can be displaced by the inquiry of its own motion or following an objection by an inquiry subject, in accordance with the procedural safeguards outlined.

Head 23: Investigation Reports

Provide that:

Part IIIC of the Central Bank Act 1942 is amended to provide that an inquiry will have regard to an investigation report produced by the Bank at the conclusion of an enforcement investigation. To provide:-

- (i) That the inquiry (who are the Bank for the purposes of Part IIIC of the 1942 Act) shall have regard to and consider an investigation report produced at the conclusion of an ASP enforcement investigation;
- (ii) That the inquiry shall consider any written submissions made by an inquiry subject to an investigation report;
- (iii) That the inquiry shall consider any response by the Bank to any submissions of the inquiry subject to an investigation report;
- (iv) That the inquiry shall not be bound by any matter contained in an investigation report, an inquiry subject's submissions or any response of the Bank.
- (v) That there be an ancillary amendment to section 33AP to ensure that an investigation report and any related submission or response is sent to an inquiry subject in conjunction with the Notice of Inquiry.

Explanatory Note

The investigation report is a product of comprehensive investigation and substantial engagement between the Central Bank and the subject of the investigation, aimed to bring the facts to light and highlight both areas of agreement and outstanding issues for consideration by independent decision makers. This amendment will assist the Bank in deriving benefits and efficiencies from the investigative stage of the enforcement process. The formal consideration of the investigation report by the inquiry may avoid the need for the inquiry to re-investigate fundamental matters coming before it and may also avoid unnecessary delays for investigation subjects and the unnecessary duplication of resources for the Central Bank. This amendment will also allow for the identification of issues and conflicts of fact at an early stage via the production of the investigation report and subsequent submissions, the consideration of which at inquiry would in turn lead to more focused and efficient hearings. The amendment is also intended to ensure consistency of treatment of investigation reports across all inquiries.

Head 24: Presentation of results of investigation

Provide that:

Part IIIC of the Central Bank Act 1942 is amended to insert an express statutory power to present before the inquiry the matters that have been referred pursuant to section 33AO or section 33AR. To provide:-

- (i) That the Central Bank may designate officers, employees or other suitably qualified persons to present to the inquiry in relation to the matters which have been referred pursuant to section 33AO or section 33AR of the 1942 Act, which would include leading evidence, examining witnesses and making legal submissions where necessary;
- (ii) That whoever has been designated by the Central Bank to present to the inquiry shall not take any part in the decisions at the conclusion of an inquiry;
- (iii) That the inquiry (who are the Bank for the purposes of Part IIIC) shall not be bound by anything presented in relation to the matters that have been referred for decision at inquiry.

Explanatory Note

This amendment is required to provide for a specific statutory power in Part IIIC to enable the Bank to designate a person to present the matters underlying the referral to the inquiry to the person designated to conduct that inquiry. It is considered that such a power would increase the efficiency and reduce costs and time involved. The inquiry will still inquire into the matters underlying the referral but will be assisted in the conduct of the inquiry by a designated person (or persons) to present the case.

The amendment will provide for additional constitutional and fair procedures safeguards:

- (i) the presenting person will have no involvement in decision making and
- (ii) the person(s) conducting the inquiry will not be bound by any matter so presented.

These safeguards have been included in order to preserve the constitutional integrity of the inquiry process and to insulate the amendment from potential future challenges.

Head 25: Obstructive actions at inquiry

Provide that:

A new subsection is inserted into section 33BA of the Central Bank Act 1942 so that the Central Bank may apply to the High Court for an order where a person obstructs an inquiry.

Explanatory Note

The existing legislation makes it a criminal offence to obstruct an Inquiry. In cases, however, where a criminal prosecution would be disproportionate or impractical, the Bank has no other means of addressing non-compliance. This Head would provide a civil remedy as an alternative to criminal prosecution. This would be much quicker and more effective in ensuring compliance. The possibility of criminal prosecution acts as a deterrent but, in practice, would only be pursued in the most extreme cases.

Head 26: Duty of confidentiality

Provide that:

The Central Bank Act 1942 is amended by the insertion of a new provision imposing a duty of confidentiality on recipients of specified documents furnished by the Central Bank to potential witnesses for the purposes of the witnesses providing information, evidence and/or documents to the Bank in the conduct of an Inquiry.

Explanatory Note

This amendment seeks to ensure that information or records given to potential witnesses of an inquiry remain confidential. The amendment will also provide for a criminal offence in circumstances where a recipient of such information/record discloses it otherwise than in accordance with the provision.

Head 27: Publication of information disclosed at inquiry

Provide that:

Part IIIC of the Central Bank Act 1942 is amended to provide that the Central Bank may prohibit the publication of certain information which is disclosed in the course of a hearing or Inquiry Management Meeting held in public.

Explanatory Note

This amendment seeks to incorporate a specific provision into the 1942 Act enabling the Central Bank to prohibit the publication of certain information which is disclosed in the course of a hearing or Inquiry Management Meeting held in public. This will allow the Bank to protect the privacy and data protection rights of individuals.

Head 28: Publication of inquiry transcripts etc.

Provide that:

The Central Bank Act 1942 is amended to include a provision allowing the publication by the Bank of certain documents, such as procedural directions, decisions and transcripts of hearings which are in the public interest in understanding how the inquiry will work and the current status of the inquiry.

Explanatory Note

The default position under the 1942 Act (s.33AZ) is that ASP Inquiries are to be held in public. A legislative change is required to the 1942 Act to expressly allow the publication by the Bank of certain documents which are in the public interest in terms of enabling the public to understand (a) how the inquiry will work and (b) the current status of an ongoing inquiry. These documents might include procedural directions, decisions and transcripts of hearings.

The proposed amendment also requires the Bank to be satisfied that a person's reputation would not be unfairly prejudiced by the publication.

Head 29: Disqualification sanction

Provide that:

Sections 33AQ(3)(d) and 33AQ(5)(c) of the Central Bank Act 1942 are amended so that the disqualification sanction caters for the abolition of the concept of a “*person concerned in the management*” and for the expanded scope of the Administrative Sanctions Procedure (ASP) to persons performing controlled functions. To provide:-

- (i) That the current text of sections 33AQ(3)(d) and 33AQ(5)(c) be deleted and substituted with amended text:

“a direction disqualifying a natural person for such period and on such conditions as may be specified in the direction from carrying out a controlled function, any specified part of a controlled function, any other specified controlled function or part thereof, or any and all controlled functions, in the regulated financial services provider, in any other specified regulated financial services providers or in any and all regulated financial services provider”

- (ii) That the concept of “person concerned in the management” of a regulated financial services provider be removed;

- (iii) That the disqualification sanction would be amended to align it more closely with prohibition notices in section 43 of the Central Bank Reform Act 2010 and that the Bank could issue a disqualification direction on the following basis to avoid a one-size-fits-all approach and bring greater flexibility and proportionality:-

(a) That the disqualification would be for such period and on such conditions as specified by the Bank;

(b) That an individual could be disqualified from the controlled function in issue, a specified part thereof, any other specified controlled function or part thereof, or any controlled function in a regulated financial services provider, specified regulated financial services providers or any regulated financial services provider.

Explanatory Note

Currently, the Central Bank can sanction a “*person concerned in the management*” by disqualifying that person from being concerned in the management of a regulated financial services provider for the period specified in the direction. To reflect the amended scope of the Administrative Sanctions Procedure (ASP) and to align this sanction with the introduction of SEAR and the Conduct Standards, amendments are required to the disqualification direction sanction.

The amendment seeks to align the disqualification direction sanction more closely with prohibition notices under the 2010 Act, albeit with amendments to account for the differences between the two processes, and to introduce greater flexibility and precision to what is currently a one-size-fits-all provision. This will enable the Central Bank to tailor a proportionate sanction to fit the circumstances of the individual and the case.

Head 30: Monetary sanctions for individuals

Provide that:

Monetary sanctions imposed on individuals for breach of conduct standards by the Central Bank under Part IIIC of the Central Bank Act 1942 (as amended) shall be effective, proportionate and dissuasive and that, in assessing an appropriate sanction, the Bank shall take into account all relevant circumstances, including, where appropriate-

- (a) The nature, seriousness and impact of the contravention concerned,
- (b) The conduct of the individual concerned during and after the contravention,
- (c) The relevant previous record of the individual concerned, and
- (d) The financial position of the individual concerned.

The Central Bank may publish guidelines in respect of the determination of appropriate sanctions and the level of any monetary penalty to be imposed on a natural person under this Part.

Explanatory Note:

This amendment provides that the Central Bank, when sanctioning an individual for a breach of conduct standards, must ensure that the sanction is proportionate and dissuasive and takes all relevant circumstances into account when making a decision on the sanction. The head further provides for guidelines in relation to those sanctions.

Head 31: Confirmation of Sanctions by the High Court

Provide that:

Section 33AW of the Principal Act is amended to provide greater clarity as to the role of the High Court in confirming sanctions imposed pursuant to Part IIIC.

Explanatory Note

Section 33AW of the Central Bank Act 1942 (as amended) provides for when decisions of the Bank (including decisions on the imposition of sanctions) under Part IIIC take effect. This head will amend that section to clarify the role of the High Court in confirming sanctions imposed under Part IIIC.

Head 32: Publication of settlements

Provide that:

Section 33BC of the Central Bank Act 1942 is amended to expressly provide that the Bank shall publish particulars relating to resolution of an ASP with a person or entity entered into pursuant to section 33AV of the 1942 Act. To provide:-

- (i) That the Bank shall publish such of the statutory particulars specified in section 33BC(3) of the 1942 Act relating to the resolution pursuant to section 33AV of the 1942 Act as it thinks appropriate in the circumstances;
- (ii) That the decision to publish shall be subject to the considerations in section 33BC(4) of the 1942 Act relating to professional secrecy, confidentiality and/or unfair prejudice to a person's reputation.

Explanatory Note

This amendment to section 33BC is to expressly provide for the publication of information in circumstances where the Central Bank has entered into a settlement agreement with a person

subject to the ASP under Part IIIC of the 1942 Act and does not involve any substantive change to the Central Bank's current publication obligations in relation to settlements which have been confirmed by case law. The provision includes a safeguard to ensure that the Bank considers all relevant circumstances set out in section 33BC(4) of the 1942 Act including potential damage to a person's reputation before publication of the settlement. This amendment will provide greater clarity and certainty to participants in the ASP process.

Head 33: Disclosure to the Bank of privileged material

Provide that:

A new section 33A be inserted into the Central Bank (Supervision and Enforcement) Act, 2013 to provide for a privilege "safe harbour" for persons who wish to voluntarily submit privileged legal material to the Central Bank for the purpose of the performance of its functions without such limited disclosure to the Central Bank constituting a waiver of privilege *vis-à-vis* third parties generally. To provide:-

- (i) That privileged legal material has the same meaning as in section 33(1) of the 2013 Act and that "privilege owner" be defined as any person to whom the legal professional privilege in the privileged legal material belongs;
- (ii) That the person to whom the legal professional privilege belongs may enter into an agreement to provide the legally privileged material to the Central Bank and that the agreement shall specify the purposes for the disclosure to the Central Bank;
- (iii) That in providing this privileged material to the Central Bank, the privilege owner shall only be deemed to have waived legal professional privilege as against the Central Bank and not as against any other person. Further, there will be no deemed onward waiver of any other legally privileged information which has not itself been disclosed to the Central Bank;
- (iv) That to qualify for the legal privilege "safe harbour", the disclosure to the Central Bank must have been in connection with the performance by the Central Bank of its functions under financial services legislation;
- (v) That if the privileged legal material forms part of an investigation or inquiry pursuant to the Central Bank's functions, the fact that the material is legally privileged shall not prevent its disclosure to a subject who is not the privilege owner where it forms part of the evidence in that investigation or inquiry. The recipient shall treat the material in accordance with its status as legally privileged material and shall keep it confidential. Any inquiry or investigation hearing where the privileged legal material forms part of the evidence may be heard fully or partially in private to consider the relevant privileged material and to maintain its status as legally privileged material;
- (vi) That the Central Bank may use the legally privileged information for the purposes specified in the limited disclosure agreement;
- (vii) That in order to protect against the abuse of the "safe harbour" by persons or entities looking to utilize the statutory scheme to shield information that is not actually legally privileged, if the Central Bank has reasonable grounds for believing that the information is not subject to legal professional privilege then it may bring an application to the High Court to determine whether or not legal professional privilege has been legitimately claimed over the material. This application is similar to an application under section 33 of the 2013 Act and may be held in camera if necessary;
- (viii) That the legally privileged information will be exempt from Freedom of Information requests;

- (ix) That, in order for the Central Bank to perform its functions under the Central Bank Acts and EU legislation, the legally privileged information will be subject to both the protections and disclosure requirements pursuant to section 33AK of the 1942 Act and professional secrecy. The legally privileged information will be deemed to be "confidential information" for the purposes of section 33AK and where any onward disclosure of the privileged material is made by the Central Bank pursuant to subsections (3)(a) or (5) of section 33AK for the purposes of criminal reporting and/or the performance of the Bank's functions, this disclosure shall not be deemed to be a waiver of legal professional privilege in the disclosed material.

Explanatory Note

This amendment to the 2013 Act provides for a legislative "safe harbour" for the disclosure of information subject to legal professional privilege. The provision does not compel the disclosure of legally privileged information, but rather, provides a legally robust and clear mechanism to facilitate this limited disclosure to the Central Bank should a person voluntarily wish to disclose legally privileged material for the purposes of the performance of the Central Bank's functions under financial services legislation and should the Central Bank agree to such disclosure. This provision to the greatest extent possible, mirrors and make explicit the main legal protections that the Central Bank provides in the general limited waiver agreements that have been executed by it to date. The inclusion of the provision seeks to remove any doubt in relation to the status of material following disclosure and to insulate it from any potential litigation and disclosure requests by third parties.

Part 6 Miscellaneous Provisions

Head 34: Amendment of section 33AK of the Principal Act

Provide that:

Section 33AK(3)(a)(vi)(I) of the Principal Act is amended by deleting "2001" and substituting with "2014".

Explanatory note

To bring the latest Companies Act into scope.

This head provides for the amendment of section 33AK of the Central Bank Act 1942 to update the reference to the Companies Act in that section with regard to disclosure of information.

Head 35: Amendment of section 33AQ of the Principal Act

Provide that:

Section 33AQ of the Principal Act is amended to provide that if sanctions are imposed under this section, the person or firm on whom the sanctions are imposed is to be informed of the fact that the person or firm has the right to appeal to the Irish Financial Services Appeals Tribunal.

Explanatory note

This head amends section 33AQ of the Central Bank Act 1942 to provide that a firm or person who is subject to sanctions is advised by the Central Bank of their right to appeal a decision of the Bank to the Irish Financial Services Appeals Tribunal (IFSAT).

Head 36: Amendment of section 34 of the Principal Act

Provide that:

Section 34 of the Principal Act is amended in subsection (1), by deleting “the Third Schedule” and substituting with “Schedule 4”.

Explanatory note

This head amends section 34 of the Central Bank Act 1942 in order to correct an incorrect reference “The Third Schedule” was substituted for “Schedule 4” by the Central Bank and Financial Services Authority of Ireland Act 2003.

Head 37: Amendment of section 57G of the Principal Act

Provide that:

Section 57G of the Principal Act is amended in subsection (1A), by deleting “the Governor has exercised the powers conferred by subsections (9) and (9A) of section 33C in relation to the decision,” and substituting with “the decision concerns a matter relating to the stability of the State's financial system”.

Explanatory note

The Central Bank Reform Act 2010 deleted section 33C of the Principal Act and substituted it with Schedule 2 which sets out a list of designated enactments and designated statutory instruments

The effect of the subsection is unchanged, but provides for the fact that section 33C was repealed by the Act of 2010.

Head 38: Amendment of section 61G of the Principal Act

Provide that:

Section 61G of the Principal Act is amended in subparagraph (1)(a)(ii), by deleting “or Regulatory Authority”.

Explanatory note

The Regulatory Authority was abolished by the Act of 2010.

Head 39: Amendment of section 41 of the Act of 2010

Provide that:

Section 41(1) of the Central Bank Reform Act 2010 is amended to change the reference to “the Bank and the Governor” to “the Bank or the Governor”.

Explanatory Note

This proposed amendment is necessary to ensure legislative and procedural certainty and in order to simplify the position in the 2010 Act in respect of who must receive an investigation report and carry out certain resulting functions thereafter.

Head 40: Amendment of section 43 of the Act of 2010

Provide that:

Section 43(3)(a)(i)(I) of the Act of 2010 is amended to replace the incorrect reference to Chapter 4, with a reference to Chapter 3, of Part 3 of that Act.

To amend section 43(12) of the Central Bank Reform Act 2010 to change “those purposes” in section 43(12) to “the purposes of this Part”.

Explanatory Note

This head provides for the amendment of section 43(3)(a)(i)(I) to refer to Chapter 3 of Part 3 (instead of “this Chapter”) so that the key provisions dealing with the conduct of investigations contained in Chapter 3 of Part 3 are encapsulated.

This amendment is required to clarify in section 43(12) of the 2010 Act that “those purposes” are the purposes of Part 3 of the Act.

Head 41: Amendment of section 46 of the Act of 2010

Provide that:

Section 46(2)(b) of the Central Bank Reform Act 2010 is amended to correct a typographical error, which incorrectly refers to section 43(6) instead of section 43(7).

Explanatory Note

This head seeks to amend the reference in section 46(2)(b) of the Act of 2010 to the correct subsection (7) of section 43.