



**Insurance Ireland Submission to the Central Bank of Ireland (CBI)  
Consultation on Enhanced Governance performance and  
accountability in financial services:**

**Regulation and Guidance under the Central Bank (Individual  
Accountability Framework) Act 2023**

**13 June 2023**

## **INTRODUCTION**

Ireland is a thriving global hub for insurance, reinsurance and captives and Insurtech. Ireland's insurance market is the fifth largest in the EU, and our Reinsurance market is the second largest. Our members represent around 95% of the companies operating in the Irish market, making Insurance Ireland a strong leadership voice for the sector.

Insurance Ireland members are progressive, innovative and inclusive, providing competitive and sustainable products and services to customers and businesses across the Life and Pensions, General, Health, Reinsurance and Captive sectors in Ireland and across the globe.

In Ireland, our members payout more than €13bn in claims annually and safeguard the financial future of customers through €112.3bn of life and pensions savings. Our members contribute €1.6bn annually to the Irish Exchequer and the sector directly employs over 18,000 people in high skilled careers.

The role of Insurance Ireland is to advocate on behalf of our members with policymakers and regulators in Ireland, Europe and Internationally; to promote the value that our members create for individuals, the economy and society; and to help consumers understand insurance products and services so that they can make informed choices.

## **OVERALL OBSERVATIONS**

Insurance Ireland welcomes the opportunity to share industry feedback relating to the guidance and implementation of the Central Bank (Individual Accountability Framework) Act 2023.

Insurance Ireland believes the Framework will support consumer confidence in the financial services by demonstrating that the industry operates to appropriate conduct standards. It is important to point out that Insurers already operate to high standards of conduct and compliance under the existing regulatory requirements, for example in terms of full compliance with the CBI's existing Fitness and Probity (F&P) regime. It will be important that the Framework works for the consumer, for regulated entities, and for the Regulator. A clear and transparent regulatory and supervisory approach will be an essential element to this.

While past events may have demonstrated that instances of reckless and unethical behaviours by senior individuals operating within the financial services can and do lead to material consumer detriment, it should be noted that these instances are thankfully rare events. We acknowledge however, that these events (when they occur), are serious and harmful breaches of trust, which reduce consumer confidence and should be dealt with appropriately.

Insurance Ireland and our members appreciate and welcome the balanced tone of the consultation from the CBI. It is vital that the Framework is to be applied in a way that is predictable, proportionate and reasonable and that it takes account of the circumstances that apply at the time of any event, rather than enforcing with the benefit of hindsight. It is reassuring for financial services firms, from non-executive directors down to front line staff, that the CBI has committed to this approach at the time of any issue, which removes the risk of being judged by future events. We also appreciate the commitment from the CBI at recent financial services events and speaking engagements to providing regular examples of good/poor practice observed in relation to the supervisory approach of the Framework, once implemented, and perhaps even delivering roadshows with feedback. This is important in ensuring that all industry participants are aware of the CBI expectations under the Framework.

The insurance industry operates in a very tight and competitive marketplace for talent with many other industries in Ireland. This demonstrates the need for the application of the Framework to be proportionate and balanced otherwise the industry will find it difficult to attract the best talent as the risk of individual sanction will be greater than in other industries.

Ultimately, Insurance Ireland and our members agree that where events happen leading to poor consumer outcomes or damage to the integrity of the financial system, the root cause must be identified and rectified, and structures be in place to prevent this from happening again, which is the aim of the Framework.

### ***Proportionality***

However, we do have some concerns about the proportionality of the proposed Framework. From the conduct standards through to the Senior Executive Accountability Regime (SEAR), all RFSP's are treated the same for risk purposes. Notwithstanding some exemptions under SEAR, small cross-border firms in run-off, or group insurers with no retail clients, or Captives, are all required to implement the same Framework as a large retail insurer with thousands of retail consumers. This is not reflective of a proportionate risk based approach and can result in an unfair regulatory burden on some firms, that is not commensurate with the risk posed, either to consumers or to the integrity of the market.

Further we would call on the approach adopted by the UK with the Senior Managers & Certification Regime (SMCR), and Australia with the Banking Executive Accountability Regime (BEAR) in which a proportionate application of the regime to certain firms was applied. When implementing the SMCR, we note that the FCA adopted an approach of limited scope firms, core firms and enhanced firms based on different criteria as set out in the FCA papers.<sup>1</sup> By allowing a differing number of applicable SMF roles for each category of firm, and thereby additional Prescribed Responsibilities for each category of firm and relevant SMF, we believe this demonstrated a proportionate and fair approach to the implementation of the regime, based on the nature, scale, complexity, size and structure of a firm.

Similar to the UK approach, the Australian approach depends on the type of entity, with entities classified as either 'core compliance entities' or 'enhanced compliance entities' under the Financial Accountability Regime (FAR). Core compliance entities would be subject to all the obligations under the FAR except for the requirement to submit accountability maps and statements to the Australian Prudential Regulation Authority and Australian Securities & Investments Commission. Additionally, while firms may be initially classed as a core firm, where they believe it to be more suited to their business model, the regime allow such firms to elect to opt up to become enhanced firms and become subject to greater regulation and scrutiny. These are two options that offer true proportionality and we call on the CBI to consider implementing the legislation in a similar manner.

Overall, the Framework allows the CBI to implement greater personal sanctions on individuals than regulators of other industries. This means that individuals, particularly senior individuals, are carrying a higher level of personal risk working in financial services than in other industries, even when they are doing the best they can and delivering positive outcomes for consumers.

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<sup>1</sup> FCA, *The Senior Managers and Certification Regime: Guide for FCA solo-regulated firms*, p.8, <https://www.fca.org.uk/publication/policy/guide-for-fca-solo-regulated-firms.pdf>.

There is therefore an absolute need for the application of the Framework to be proportionate and balanced otherwise the insurance industry will find it difficult to attract and retain the best talent, as the risk of individual sanction will be greater than other industries which are also very strong in Ireland and have the capacity to match and exceed what the financial services sector can offer, e.g. Fintech, broader IT sector, Data Protection. The regime should, if implemented proportionately, predictably and practically, have a 'warming' as opposed to a 'chilling' effect on the industry by ensuring that all actors know and understand their responsibilities. It is essential that the industry and the CBI work to achieve this goal.

### ***Timelines***

Insurance Ireland supports the phased approach to the implementation of the three pillars (conduct standards; changes to F&P and SEAR). However there are factors specific to certain sectors and entities which will impact on their ability to deliver all of the changes by the stated dates. It is accepted that many firms will need to update contracts to reflect the changes in job description to the Statements of Responsibility to avoid employment disputes. Therefore, for many firms, it is an operational challenge to propose, negotiate and conclude new contracts by the end of 2023. Firms with a large unionised labour force (domestic and cross border) will need to engage in discussions with union representatives to deliver contractual and cultural changes. Cross border firms will need to accommodate local employment/labour laws also. This is highly likely to take more time than is envisioned under the guidance.

We fully appreciate the political momentum to have the Framework implemented in some way by the end of 2023. However given the breadth of the requirements, it is very difficult for firms to be able to fully implement the conduct standards and F&P changes by December 2023 and SEAR by July 2024, especially as some elements of SEAR may be necessary to fully deliver on the conduct standards in terms of ownership.

Following intensive discussions with our members on the issues affecting the delivery of the Framework, Insurance Ireland suggests that the CBI consider allowing a more pragmatic transition period for firms to have fully implemented the Framework. This could be done in a similar way to the approach following the Operational Resilience feedback (CP140). While firms were bound by the Guidance from December 2021, a two-year transitional period was allowed for firms to make the changes that were needed to implement the guidance in full. During this period, firms had to report to the CBI on the plans and actions that had been completed as they advanced towards full compliance with the provisions in order to evidence progression. A similar transitional period for the IAF would allow for contractual negotiations, technological solutions and other operational issues to be overcome to ensure that the objectives of the framework are achieved in practice. It would also allow firms to demonstrate progression to the CBI and the regulator to have a good view of where the industry is in delivering the framework.

If the CBI chooses not to consider a realistic transition period, the timelines must be revised to allow for practical and pragmatic implementation to ensure that the objectives of the initiative can be delivered as planned. The six-month timeline for implementing a framework as material and fundamental to the financial services sector as the IAF Conduct standards and F&P changes is very difficult to meet, even where firms prioritise resources to address these requirements.

The timelines need to be revised to allow a pragmatic implementation period of:

- Twelve months for F&P changes & the Common Conduct Standards (i.e., June 2024)
- A further six months for the Additional Conduct Standards (applicable to PCFs and CF1s) and SEAR (i.e., December 2024)

Many of the changes needed for the additional conduct standards will likely need to be done in line with SEAR and it makes sense to align the two. Furthermore as set out in our answer to Q3 below, should the CBI adopt the suggestion to allow Prescribed Responsibilities (PRs) to be assigned to CF1s in certain situations, it would be logical to align the implementation timelines for the two.

Should the CBI progress with this ambitious timeline, it will need to allow flexibility on a case-by-case basis and support for firms which are legitimately struggling to meet the implementation date.

We note the messaging from the CBI that it is expected that SEAR will eventually expand beyond banks, insurers and asset managers, and we fully expect that a further consultation would take place prior to any such changes, to ensure that learnings from this first implementation phase are appropriately incorporated.

### *Allocation of Prescribed Responsibilities*

Unsurprisingly, the allocation of prescribed, inherent and other responsibilities led to much discussion across our membership, with a variety of approaches under discussion. Overall, it is clear that there is some disparity in the prescribed responsibilities assigned to the PCFs. In some cases, the prescribed responsibilities as defined appear to require a PCF to have both design and management of frameworks (first line role) and oversight of the same frameworks (second line role). This is a conflict as the same PCF should not be responsible for setting and checking metrics. For example, the role of the Chief Risk Officer (*PCF14*): *'Overall responsibility for managing the firm's risk function including risk controls, setting and managing risk exposures and reporting directly to the Board on risk management matters.'* The reference to *'managing'* the risk controls is generally a first line task. We have set out some more examples in our response to Q2.

It is unclear from the guidance how an individual who is not a PCF role holder and who may have core responsibilities / prescribed responsibilities within an organisation is to be treated for the purposes of the Framework – e.g., the Head of Human Resources or the Head of Propositions. This leads to a risk that PCFs are overburdened with Prescribed Responsibilities (PRs), particularly for smaller firms such as cross border or firms in run off, or indeed that the CEO may become a 'dumping ground' for the PRs. Our members have suggested two options that should be open for firms to take to avoid this risk by applying a pragmatic approach:

- Firms should be permitted (where appropriate) to allocate certain responsibilities to CF1 roles (significant influence functions), such as Human Resources for people management PRs and Propositions for PR 24. This would support the implementation of SEAR and Additional Conduct Responsibilities at the same time, as the Additional Conduct Responsibilities apply to CF1's.
- The introduction of a PCF for 'Other Overall Responsibility function' (similar to SMF18 under SMCR) would provide additional flexibility for firms, noting it would need to be structured so that Prescribed Responsibilities could be allocated to that role and would be a sensible approach to applying PR's which may not have a natural alignment to existing PCF role holders.

### ***Independent Non-Executive Directors (INEDs)***

Insurance Ireland's INED Council welcomed the clarity offered by the publication of the guidance and the requirements. The CBI has been clear that while the inclusion of INEDs in scope is not reflected in similar initiatives in other countries, the standards to be met by these individuals in their role as Non-Executive Director will relate purely to their non-executive oversight functions and will be limited to what should reasonably be expected of individuals in that context. However, it is understandable that INEDs may have some trepidation in terms of the CBI approach to supervision and enforcement of the requirements, especially in terms of some of the confusing language around the applicable personal responsibilities which appear to blur expectations between executive and non-executive directors. We have set this out in more detail in Appendix One.

### ***Link to Consumer Protection Code (CPC)***

Clarity will be needed on the application of the Consumer Protection Code (CPC) in terms of the proposed Business Standards. The CPC applies to incoming cross-border firms and Irish consumers only; whereas IAF/SEAR would also apply to all cross border firms. Applying CBI conduct rules to cross border firms results in a double layer of conduct regulation for these firms. It is also worth noting that the first stage of the CPC discussion has now been closed with no discussion on the proposed Business Standards, which reduces the industry's ability to engage on the subject. Further we would highlight the implementation of the Business Standards would not be feasible under the current proposed CBI timelines.

The CPC Review Consultation Paper is yet to be published. Assuming this consultation period lasts three months, feedback on the Consultation and implementation of the Business Standards would be near impossible for firms to implement effectively by December 2023. Firms cannot implement effectively what has not yet be published and finalised. Therefore we would once again ask to CBI to consider our proposed phased timelines for July 2024 and December 2024.

### ***Directors & Officers Insurance***

The impact on Directors and Officers (D&O) insurance is not considered within the consultation. Directors and Officers Liability cover protects company directors and officers against claims arising from any wrongful acts, incorrect decision making or actions taken whilst managing the business or within the scope of regular work duties. While we believe that existing wordings may include broad insuring clauses for regulatory investigations, this framework and its corresponding level of personal sanction may yet raise difficulties for the provision of this insurance.

This may well be a specific concern for Board members, including INEDs. Board members with different particular skillsets may find themselves more at risk if they are considered to be the 'finance person' or the 'IT person' of the Board – a balanced Board with collective responsibility may operate differently than a set of separately accountable individuals with separate mandates (statements of responsibility) and this could impact on the conditions for D&O insurance. The collective responsibility of the Board is important and should be maintained, and we are pleased to see the CBI also highlighting this.

### ***Application to CBI***

Finally, the FCA has applied the SMCR to its own staff and governance structures, as has the Australian regulator, and the CBI should follow this approach and apply the IAF/SEAR

internally to its own governance. This allows the Regulator to encounter some of the real-life scenarios that will apply to regulated firms.

## Questions

### 1. What are your views and comments on the draft SEAR Regulations and related draft guidance?

There is an element of proportionality within the SEAR draft regulations, in that a reduced list of Prescribed Responsibilities (PRs) is applicable to low risk investment firms and incoming third country branches. This is logical based on the nature, scale and complexity of these entities and reflects the reduced risk associated with a low PRISM rated entity. However, it is illogical not to apply this approach to other low PRISM rated entities, such as certain cross border firms and firms in run-off. We would be keen to understand why the approach taken for low risk investment firms was not replicated across low PRISM rated firms as a whole.

Echoing the views of the CBI in their recent public engagements that the CBI are looking at the learnings of other jurisdictions when implementing this regime, we believe this approach would help achieve the CBI's commitment to proportionality within the Consultation Paper and reference the experiences of the 'core' and 'enhanced' regimes within the UK SMCR and Australian BEAR set out earlier.

### 2. Do you agree with our proposed approach to the Inherent Responsibilities?

Throughout the draft regulations, there are references to 'management functions' and for PCFs that are specific to insurance firms, references to 'underwriting function', 'claims function' and 'investment function'. Conversely, the EUROPEAN UNION (INSURANCE AND REINSURANCE) REGULATIONS 2015 (SII) define function as "*within a system of governance, means an internal capacity to undertake practical tasks and includes the risk management function, the compliance function, the internal audit function and the actuarial function.*" Therefore, the CBI appear to be extending the concept of a 'function' and for many firms they may have a PCF responsible for claims, underwriting etc., but not necessarily a dedicated 'function' in support of these such as those that firms must have for risk, internal audit, compliance and actuarial. We suggest that in the feedback, the CBI should more closely align to Solvency II for the insurance specific elements, which is well understood by the insurance sector and less open to differing interpretations.

As noted earlier, in practice risk is owned by the first line and the role of the second line is oversight and challenge, with the third line (internal audit) providing independent oversight. However, the inherent responsibilities as iterated appear to merge the first and second line roles into one, meaning that it is very difficult to identify a primary owner. For example, the role of the Chief Risk Officer (*PCF14*): "*Overall responsibility for managing the firm's risk function including risk controls, setting and managing risk exposures and reporting directly to the Board on risk management matters.*" The reference to '*managing*' the risk controls is generally a first line task. Additionally, the '*setting and managing risk exposures*' aspect of this responsibility differs from the responsibilities assigned to the CRO in the Corporate Governance Requirements (CGR) and the language should be aligned.

Other issues:

- For *PCF's 11, 12, 13 and 14* in relation to "*reporting to the Board*", this should be expanded to include "*or relevant Board sub-committee*". In practice, a significant part of the reporting from these roles will be to the Board Audit Committee or Board Risk Committee.

- For PCF49 CIO, it seems unreasonable that the CIO is responsible for “*managing the firm’s information*”, and may be more appropriate to include “*Overall responsibility for managing the firm’s use of technology and controls to ensure firm information is available as required.*”
- For PCF52 AML/CTF, the current definition suggests this role runs the AML / CTF activities operationally, whereas in practice (for insurers at least) this is more commonly an oversight role. It may be more appropriate to state “*Overall responsibility for ensuring a robust anti-money laundering / counter financing of terrorism framework is in place within the firm.*”
- For PCF52 AML/CTF, general insurers are not deemed designated persons under the AML/CTF legislation – it would not make sense for them to have to allocate this responsibility to someone when they are out of scope of the legislation.

### **3. Do you agree with our proposed approach to the Prescribed and Other Responsibilities?**

Some of the PRs are similarly unclear between the lines of defence. For example, PR26- “*the responsibility for leading the development of a framework for and monitoring the implementation of the conduct requirements including ensuring accuracy, completeness and timely production and submission of the firm’s conduct information*”, could well span both the responsibility of 2<sup>nd</sup> Line (Development of a Conduct Framework – Head of Compliance) and 1<sup>st</sup> Line (accuracy, completeness and timely production of conduct information), depending on how the company is set up. Also, some RFSP’s may be organised along divisional lines, for example retail versus corporate divisions. In this instance for example, it might be logical to have two persons occupying the Head of Material Business Line role and two Heads of Claims.

While we understand the rationale for the approach to the Inherent, Prescribed and Other Responsibilities, the sheer volume of the responsibilities to be assigned is materially impactful on a PCF’s role. Again, for smaller firms such as those in run off, the PCF population would be relatively small as many of the roles are not relevant for these firms. Therefore, there is a real risk that the same few people are subject to the responsibilities that are not necessarily relevant for them but need to be assigned to someone in the organisation. The way the PR’s are drafted mean that the majority of these would likely sit best with a CEO – this risks the CEO becoming a ‘dumping ground’ for responsibilities. This risks introducing an additional ‘chilling effect’ in terms of attracting talent the sector.

As above, we suggest the following to mitigate this risk:

- Firms should be permitted (where appropriate) to allocate certain responsibilities to CF1 roles (significant influence functions), such as Human Resources for people management PRs and Propositions for PR 24. This would support the implementation of SEAR and Additional Conduct Responsibilities at the same time, as the Additional Conduct Responsibilities apply to CF1’s.
- Similar to the UK approach, the introduction of a PCF for ‘Other Overall Responsibility function’ (SMF18) which provides some flexibility which would be a sensible approach to applying PR’s which may not have a natural alignment to existing PCF role holders.

Permitting CF1s to be allocated some PRs would achieve the CBI’s objective of “*not intend[ing] to provide prescriptive guidance in terms of the allocation of Prescribed Responsibilities.*” On the contrary, restricting the allocation of PRs to PCFs only, could restrict the allocation of PRs to a pre-defined list of functions which was designed at a different time and for a different purpose, than the current proposed list of PRs. If firms could allocate PRs to CF1s this would assist in achieving the aim of the framework in providing “*firms the flexibility*



*to allocate responsibilities in a manner that accommodates different business models and organisational structures.”*

In addition, allowing CF1s to hold certain PRs could assist in achieving the aim of allocating responsibilities “*to the most senior individual, with the appropriate authority, responsible for that area.*” We understand that this may somewhat extend the scope of SEAR by ensuring the inclusion of CF1s into responsibility maps and requiring statements of responsibility. However, according to our members, where the PCFs will have dependencies on CF1s, the relevant CF1s may already be listed on these documents.

It seems somewhat of a gap not to have a HR PCF when many of the PRs are focussed on people strategy, such as:

- *PR14 – “Responsibility for monitoring implementation of effective policies and procedures for succession planning, induction, training and professional development of staff.”* This monitoring of the implementation of policies and procedures for succession planning, induction, training and development would naturally sit under Human Resources.
- *PR29 – “Responsibility for overseeing the adoption of the firm’s policy on diversity and inclusion.”*

Similarly, PR24- “*Responsibility for oversight and governance of the development, design and distribution of products, review of products and sale and post-sale arrangements to ensure fair customer outcomes.*”, would dovetail with a PCF for Propositions, for example.

Feedback from the CBI at recent seminars indicate that there is no intention to make the HR role a PCF role or introduce any further new PCF roles, so these could potentially be assigned to a CF1.

It should be noted that the wording of the responsibilities is very broad (and some which cover both first and second line responsibilities as already stated) which, while helpful for firms to an extent, can lead to legal issues in terms of disputes relating to objectives and job roles and many of our members have been advised that translation of regulatory responsibilities into contractual obligations would need to be very clear. This exacerbates the issues with a short implementation period and considerably adds to the cost of implementing the framework.

Clarity is needed for the insurance sector on a number of PRs that simply do not apply to the sector, but are not circumstance/sector specific as per the consultation. Given the position that all PRs must be applied, the expectation of these firms needs to be confirmed. These include:

- *PR19 – “Responsibility for managing the firm’s treasury management functions and associated risks.”*
- *PR23 – “Responsibility for the firm’s compliance with client asset requirements.”*

For General Insurance firms, PR22 (“*Responsibility for managing the anti-money laundering/ countering the financing of terrorism (‘AML/CFT’) function in order to address the firm’s money laundering and terrorist financing risks including the development, implementation and oversight of a robust AML/CFT framework including, effective systems and controls.*”) would not be applicable.

In the same vein, in some instances firms will have existing derogations from the CBI for certain requirements and it is not clear how these will transfer to the SEAR.

It is also worth noting that having a PR for DEI (*PR29- "Responsibility for overseeing the adoption of the firm's policy on diversity and inclusion"*) brings in a PR for an activity which is not actually a regulatory requirement, although highly recommended in messaging. Only PR's for established regulatory requirements should proceed, in order to continue to allow firms to apply regulatory requirement in a way that is proportionate to the nature, scale and complexity of the business.

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

Insurance Ireland agrees with this approach. It is vital that regulation does not inhibit those firms that wish to support inclusion and has implemented a role for PCF's to job share and this will be beneficial to enhancing diversity in senior positions. It may also encourage more descriptive and robust administration in signing off of tasks.

However, some operational uncertainties remain. For example - where the PCF role exists for the same business line but different geographical territories. This might include a *PCF Head of Sales/PCF16 Branch Managers*. It is not clear whether two people hold the same Prescribed Responsibility based on the different territories they are operating within, given the message from the CBI that responsibilities can only be shared in one specific circumstance.

This provision also deviates somewhat from that which is set out in the underlying legislation. Section 6(3)(e) of the draft SEAR regulations states that "*where the firm has allocated an allocated responsibility to more than one PCF holder, the firm shall explain its rationale for doing so, together with the arrangements for the effective operation of that joint allocation of responsibility.*" However 2.4.10 of the CBI's guidance paper states that "*with the exception of job sharing, per paragraph 2.3.1 above, Prescribed Responsibilities should not be shared*".

Sections 2.8.10 and 2.8.14 are also inconsistent with section 2.4.10 of the guidance paper, where the CBI notes that "*it is possible that more than one PCF role holder will be responsible under SEAR for an aspect of the firm's affairs.*" So while the legislation allows multiple PCFs to hold responsibilities, the CBI guidance does not. As a result, we would welcome clarification on the CBI's position with regard to the sharing responsibilities among PCFs.

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

We do not agree with the mandatory application of certain PR's to INEDS and this would appear to contravene collective decision making. An INED's role is one of oversight and challenge, and in the UK the application of the regime to INEDs is limited to Chair of certain Board Committees e.g., Remuneration Committee; Risk Committee etc. We are of the view this is a more appropriate approach for INEDs.

It is worth noting that the Companies Act 2014 does not differentiate between directors and NEDS in terms of duties and does not refer to INEDS at all. It is also unclear from the guidance which legislative instrument takes precedence in any enforcement action and this should be included in the ASP guidance. The nature of the individual accountability regime may be at odds with the collective responsibility requirements set out in Corporate Governance requirements and Companies Acts. Allocation of what are currently operated (and legally obliged) as collective roles to individuals could result in unintended behaviours and may result in divided or divisive boards.

As noted above, the Framework is expected to have a material impact on attracting and retaining talent, particularly from an INED perspective. Personal accountability is a very onerous requirement for an individual who is applying for a role within a firm and, particularly for non-insurance related roles such as INEDs, these skills are transferable outside of the sector and people may well choose to leave the sector.

#### **6. Do you agree with our proposed approach to the Statements of Responsibilities?**

The introduction of a ten year requirement for record keeping does not appear to be in line with the six years statute of limitations for the framework. It would be good to understand the rationale for this misalignment. Further, we believe this potentially breaches data retention rules under GDPR – whereby a firm can only retain data for the purpose for which it is intended. If the data can only be used for six years from when the individual leaves the firm, this brings into question the legal basis for a ten year retention period. We suggest that the CBI engages with the DPC to clarify the requirements in this regard.

#### **7. Do you agree with our proposed approach to the Management Responsibilities Map?**

The Annex contains good examples of what is expected of firms with regards to these documents. While we appreciate the CBI's position that SEAR should not be left to the HR department, but instead a firm-wide approach, the reality is that the requirements will be more onerous on HR and compliance teams as these are live documents, and will require the establishment of procedures in places where changes needed to certain roles. The ongoing monitoring and ensuring that changes in job profiles result in updates to the Statements and the Maps will result in an increased administrative burden.

As noted in Appendix One, clearer guidance on how committees are overseen would be welcomed e.g., steering committees for projects versus standing committees. PR37 should be updated for **only material changes** otherwise become a paper exercise.

The wording relating to '*keep up to date*' and '*review when changes happen*' are somewhat contradictory – we suggest the requirement be worded in a more pragmatic manner, such as a half-yearly/annual review as well as updating when **material** changes occur.

#### **8. Do you agree with our proposed approach to submission of documents?**

We welcome this approach, however, we note that the CBI often has multiple requests to the same group of companies, despite the fact that regulatory requests are supposed to be centralised through the desk supervisors to avoid over burdening firms. Multiple regulatory requests are very onerous for firms, particularly as they tend to include the same teams and the CBI must ensure where such files are requested that a reasonable notice is given before a deadline (taking account of public holidays).

For Core Risk Assessments (CRAs), the CBI typically allows a ten business day notice period to provide the information requested – this could perhaps be replicated here.

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

Our members have raised concerns relate to the training aspect of the IAF in terms of outsourcing. It can be difficult for firms to have appropriate oversight of staff turnover in third party support firms, for example and may well result in longer notice periods needed to allow for training and negotiation of contracts.

It is unclear therefore how certification will work in practice for outsourced CFs and how an RSFP can issue certification if the employee is not employed by them or the holding company. On a practical level, it is difficult to look through staff documentation on a third party, as well as considering the legal data protection/GDPR implications. The guidance also assumes that the principal firm will have the authority to implement the disciplinary process as set out in the Conduct standards. This does not usually form part of any outsourced agreement.

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

The split of reasonable steps under SEAR and Additional Conduct Standards should be made clearer, particularly if the suggestion above on timelines is taken on board. It needs to be recognised that there is a high degree of subjectivity in this element of the framework and again, we welcome the CBI commitment to take care to avoid '*hindsight bias*'. However, this still allows a high level of subjectivity, and what is 'reasonable' in a high rated PRISM entity may not be 'reasonable' in a low rated firm. This is another reason why the ongoing feedback from the CBI's supervision of the Framework is so important and needs to be communicated to the industry.

The reasonable steps for non-PCFs appear to be materially more onerous than for the conduct standards which seems illogical.

There also appears to be ambiguity where there is a suspicion or expectation alone of a potential conduct breach / offence is reportable to the CBI under the conduct standards. Under section 4.38 a conduct standard breach is reportable within five days of conclusion of the disciplinary process. In 4.36 of the draft guidance, the CBI states that it would expect firms to apply due process, however the issues of employee appeals should be considered in this context. While we note the CBI believe they should be kept updated on an appeal should an employee make one on a decision, clarity should be provided by CBI whether this will go on an employee record with the CBI, and therefore affect that employee long-term.

Given the seriousness of the consequences for CFs for breaching a conduct standard, it is essential that firms are given sufficient time to complete disciplinary investigations prior to reporting to the CBI. It is not clear whether making a report to the CBI in the absence of completing due process would be considered a breach of the employees' rights. Reporting to the CBI should only be completed after due process has been completed.

Section 6.1.1 reporting obligations should only apply where PCF/CF1 actually becomes aware of such an issue, which is not clear in the guidance. The reference to having a '*suspicion or expectation of*' such an offence/ contravention is very wide.

Our members also raised concerns about the potential conflict between legal privilege requirements and the requirements imposed on CF1s to report matters to the regulator. A Head of Legal / General Counsel who is classified as a CF1 has an obligation to take reasonable steps to ensure conduct standards are met and in particular taking reasonable

steps includes the requirement to report matters to the CBI. In circumstances where a Head of Legal cannot detail the reasonable steps that it has taken on account of legal professional privilege, there is no clear protection in the draft regulations and guidance. There is some concern that the requirement, if enacted, will potentially encroach on legal privilege. Indeed we note this issue was previously considered by the PRA in the implementation of the SMCR. Therefore in looking at the learnings adopted in other jurisdictions of similar regimes, which the CBI has previously stated they would do, we would ask that there be an exception created for the Head of Legal with regard reasonable steps and legal privilege.

We note that following discussions on the practical impacts of this in the UK, the PRA chose to adopt the approach of certain exemptions for the Head of Legal. In Ireland however the critical difference is, in the UK individuals certified as holding 'significant influence' do not need to comply with the SMCR and do they have any reasonable steps obligations. This is the critical difference between the regimes as under IAF/SEAR it is the regulatory requirement for CF1s to comply with the Additional Conduct standards specifically 'prompt disclosure to the CBI'. An exemption from this requirement, or some clear process around the issue, is necessary to preserve the independence and role of legal as an advisory function and furthermore to ensure that the General Counsel/Head of Legal is not limited in their ability to perform their legal role in the best interests of their client (i.e. the regulated firm).

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

As noted earlier in the paper, we welcome the explicit reference of 'at the time of consideration' and exclusion of hindsight bias. However this is not an exhaustive list and requires a PCF to be proactive to mitigate and prevent wider risks. This is one area where the additional detail on good/poor practice as the Framework embeds would be particularly beneficial.

There is also a potential conflict between a director's primary duty to the company under Company Law and their duty under the IAF and from a legal perspective. Legal precedent and legislation dictates the obligations under Company Law must be met first and foremost. We propose this is explicitly acknowledged by the CBI so that PCFs continue to abide by Company law, without fear of potential sanction under the IAF.

The phrasing of the guidance could be updated, as currently it refers PCF's must have "*reviewed and challenged the relevance, accuracy and completeness of the information available to them, sought out additional information where necessary and whether appropriate action was taken by the individual on the basis of the review (or "corroborate, challenge and consider the wider implications of the information available to them and seek additional information where necessary.")*" This is somewhat confrontational language and it could be rephrased to encourage collaboration between different departments rather than having the potential to undermine trust.

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

Currently under the existing Fitness & Probity Regime, staff who follow a prescribed script / routine under are exempt Fitness & Probity Requirements. These staff generally perform administrative tasks in accordance with a prescribed procedure and are overseen by a CF who satisfies F&P and the Minimum Competency Code (where applicable). It is concerning

that this will bring very junior employees within scope of the conduct standards whereas more senior staff not carrying out roles identified as CF's will fall out of scope. This will also bring a significant number of staff within scope of the Conduct Standards and will create additional administrative burden and costs.

The obligations for CF1 and PCF role holders under the Additional Conduct Standards are very broad and, while not required under the Guidance, in practice firms will need to take steps (over and above training and notification) to undertake work to ensure role holders have a defensible position on the areas they are responsible for. This is another reason that the effective date for the Additional Conduct Standards should align with SEAR.

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

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

Our members have highlighted a lack of certainty with the Temporary Officer process and what the CBI expectations are for protected/annual leave. There also appears to be a contradiction between text and footnote in this section. Footnote 9 in respect of 2.9.12 states "*Under Regulation 11 of the PCF Regulations, Temporary Officers **will not be** subject to SEAR.*" However, 2.9.12 states "*During the temporary occupancy of a PCF role whereby an individual has been pre-approved under Section 23 of the 2010 Act, **while the SEAR and the Duty of Responsibility will apply**, the consideration of reasonable steps will reflect the particular circumstances of the individual.*"

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

The approach of proportionality, predictability and reasonable expectations is somewhat inconsistent with the proposed extension of due diligence requirements to the entire CF population (7.2.15 of the guidance paper). The CBI is proposing to include CFs 3-11 in professional body checks or 'regulator checks', judgement searches and regulator checks. This creates an unreasonable burden on firms with a large CF population (e.g. manual nature, additional costs for conducting judgment searches, administration to support etc), and appears to be neither proportional nor risk based. It takes around one hour per CF to complete ongoing due diligence F&P checks and expanding the requirement to CF3-11s will substantially increase the administration burden on the relevant teams. This is in addition to the supplier technology for some checks such as financial soundness etc.

We therefore request that the CBI consider maintaining its current position (in line with the 2018 F&P Guidance) with regard to due diligence checks for CFs 3-11 who are not currently in scope of the additional checks, or consider initial due diligence with annual self-certification thereafter. The removal of the ability of firms to rely of self-certification is likely to be a huge administrative task and consideration should be given to allowing for self-certification for certain roles or even a reasonable proportion of staff.

Further clarification on whether firms are required to issue certificates of compliance (under the enhanced F&P) to the CFs themselves, or whether the certificates only need to be created and stored, should the CBI request them at a future date. There is also a query on how this can be done for outsourced staff where the CF is outsourced to an unregulated entity.

We are hearing from our members that there is an increasing trend of individuals holding off tendering resignations from current roles until they have obtained CBI approval, which impacts on the ability of firms to be able to obtain a reference from the current employer and therefore complete the CBI approval process.

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

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

It is important at all times that clarity regarding timelines is maintained to ensure firms are complying with the regulations. However, the stated timelines for reporting in the Consultation are very short, compared to other jurisdictions such as the UK, where the FCA allows seven working days for SMFs with a verbal/email notification as soon as practical.

The degree to which this area overlaps with employment law makes consideration of the regulations more complex. As required by the CBI where formal disciplinary action is taken, certain timelines must be maintained. This however can become more complex when one considers the implication of conduct standards, fair procedures requirements, and the relatively tight timeline of the requirement to submit such breaches to the CBI. Further we would also seek clarity on situations where an issue may be identified and resolved.

Given the seriousness of the consequences for CFs for breaching a conduct standard, it's essential that firms are given sufficient time to complete disciplinary investigations prior to reporting to the CBI. It would not be practical to have to make a notification to the CBI while the window for appeals was still open/ongoing as this may provide a distorted view of the individual(s) concerned, which may be overturned during the process. The breach should only be reported once the disciplinary and appeal processes have both fully concluded. In the UK as the vast majority of Conduct Rule breaches are reported annually so a similar issue is avoided.

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

We believe the new PCF of Head of Material Business Line needs further clarity and would ask the CBI to provide examples of the scope of this role. It would also be helpful to understand if multiple PCFs can be in place considering the split between corporate and retail business.

We also note a high level of prescription in the requirements here, such as financial criteria. This appears to contradict the CBI's stated approach to not be prescriptive and it should be for the firm to determine. It would also be good to understand when the CBI expects that this role would come into operation.

**Appendix One – Requests for Clarification**

During our discussion, our members raised a number of practical issues and concerns that we would appreciate clarity on from the regulator.

## Responsibilities

- On PR9,10,11 – there is a potential overlap between the role of Committees and/or the Chairs of Committees (Audit, Risk etc.) and the allocation of these Prescribed Responsibilities (“PRs”). If the role of a committee is to oversee a function (and the role-holder), and assess their performance and deal with any issues or underperformance in the function or by the role-holder, then the PR is covered by the committee under its terms of reference, or by the Chair ensuring the PR objective is met. Adding further PRs to this may contradict or be inconsistent with the role of the Chair, or impede the CEO in the operation of their role overseeing and directly managing the management team.
- On the same PRs, please provide detail on what is expected from INEDs exercising “oversight of the function and the Head of Internal Audit, Compliance and the CRO” respectively? What level of involvement is expected from the INED, e.g., are they expected to be involved in setting goals and objectives and performance reviews?
- Two of the PR’s that have to be assigned to a NED probably would best fit with a Chair of RemCo and Chair of NomCo (PR6 and PR12 respectively – “overseeing the development of, and embedding positive culture, consumer protection and conduct risk into, the firm’s remuneration policies and practices” and “responsibility for leading the development and monitoring implementation of effective policies and procedures for succession planning, induction, training, and professional development of all members of the Board”). Given there may not be a RemCo or NomCo in all entities, or only in place at a Group level, what is the CBI expectation?
- PR37 – “Where the firm has established a specific steering committee to address regulatory matters, responsibility for managing the operation of the committee and for providing comprehensive and timely reporting to senior management and to the board.” Many insurance firms have specific regulatory steering committees; some are standing horizon scanning committees and some are specific to one initiative and are disbanded after implementation. How should these be allocated?
- PR36 – “Where the firm outsources its internal audit function, responsibility for taking reasonable steps to ensure that every person involved in the performance of that function is independent from the persons who perform external audit.” The ability of specific PCFs to oversee every individual involved in an external audit is very difficult as it is generally up to the audit firm completing the work to ensure the competency and performance of the individuals involved.
- PR16- “Responsibility for managing the firm’s internal stress tests and ensuring the accuracy and timeliness of information provided to the CBI for the purposes of stress-testing.” This would typically sit with more than one individual as stress tests are performed across a number functions and is therefore difficult to assign. Can the CBI be more specific on what they are looking for in relation to this PR?
- For PR26 “Responsibility for leading the development of a framework for and monitoring the implementation of the conduct requirements including ensuring accuracy, completeness and timely production and submission of the firm’s conduct information.” It is unclear if this relates to conduct risk in relation to managing interactions with customers or to the conduct standards requirements outlined in the IAF.
- PR18 (“responsibility for managing the calculation and maintenance of the firm’s financial resources including accuracy of capital, funding and liquidity”), looks like it may be split between CFO (financial resources) and CRO/HoAF (capital, funding and liquidity). This might be a sector specific difference – in banks responsibility for



capital/funding/liquidity may lie entirely with Finance, in Insurance they can lie with Actuarial. Could this be clarified?

- PR22 (“*Responsibility for managing the anti-money laundering/ countering the financing of terrorism (‘AML/CFT’) function in order to address the firm’s money laundering and terrorist financing risks including the development, implementation and oversight of a robust AML/CFT framework including, effective systems and control*”), the AML responsibilities, are covered by the Inherent Responsibility for PCF52 (“*responsibility for managing the operation of the firm’s anti-money laundering/counter financing of terrorism functions*”), what is the rationale therefore for having an additional PR?
- Only one PCF can be assigned a PR but more than one can be held responsible for contravening the Duty of Responsibility. This seems contradictory and more clarity is needed on how this would happen in practice.
- What is the CBI’s expectation where a PCF reports to another PCF and only one PCF holds ultimate responsibility?

### **Definitions**

- Further clarity is needed on reference to ‘*Matrix Management Arrangements*’ an ‘*non-complex firms*’. The CBI should include a clear meaning of these in the feedback.

### **Other**

- Rationale for the decision not to make the HR role a PCF role?
- What CBI guidance takes precedence? For example, this proposed guidance states that only one PCF can be held responsible for Climate Risk but feedback from CP151 implies that this is collective responsibility requiring commitment from many PCFs.
- Regarding the level of knowledge and experience that a person with such functions could reasonably be expected to have (reasonable steps) – who is making that determination and if the CBI, what level of seniority/experience can we expect such an individual have in making this assessment?
- Para 5.4 in Guidance- “*providing information in a piecemeal or ambiguous manner could be considered as an effort to conceal or evade the detection of information*”. The CBI needs to be mindful that such information needs to be gathered carefully and in future consideration of potential issues that an individual may face and is not necessarily an effort to obfuscate
- A PCF/CF1 is obligated to report any potential or actual offence/contravention/legal proceedings to the CBI, but the obligation to report disciplinary action arising from a breach of the conduct standards rests with the PR3 (see 4.38 in the guidance). So, there could be a scenario where the same obligation is placed on multiple individuals throughout the organisation which could lead to confusion because of unclear reporting obligations. CBI clarification would be beneficial.
- What would happen to the data on Conduct Standards if a breach was notified to the CBI but then subsequently overturned?
- List of enhanced check includes ‘regulator check’ twice – is this intended?

### **Ends**