

ONPOINT / A legal update from Dechert's Financial Services Group

Ireland's Individual Accountability Framework ("IAF") – What You Need to Know

Authored by Carol Widger, Emmet Quish, Doireann O'Daly and Helen McCormack

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Introduction

The Central Bank (Individual Accountability Framework) Act 2023 (the "**Act**")¹ was signed into law on 9 March 2023. The Act amends several existing pieces of legislation² and is amongst the most significant pieces of legislation impacting the powers of the Central Bank of Ireland ("**Central Bank**") in recent years. The key objectives of the Act are to improve the management of risk in regulated financial service providers and outcomes for consumers. The Act has four distinct elements:

1. A new Senior Executive Accountability Regime ("**SEAR**");
2. Enhancements to the Central Bank's existing fitness and probity regime ("**F&P Regime**");
3. New conduct standards for regulated financial service providers ("**RFSPs**") and their staff; and
4. Enhanced Central Bank enforcement powers, including updates to the Central Bank's Administrative Sanctions Procedure ("**ASP**").

The Central Bank has now launched a consultation³ on key aspects of the implementation of the Act, including the publication of draft regulations⁴ and draft guidance⁵ (together, the "**Consultation**"). It should be noted that this OnPoint summarises the provisions of the Act and the Consultation, the latter of which is subject to change.

¹ Central Bank (Individual Accountability Framework) Act 2023 - available [here](#).

² Central Bank Act, 1942; Central Bank Reform Act 2010; European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011; Central Bank (Supervision and Enforcement) Act 2013; Freedom of Information Act 2014.

³ Central Bank of Ireland, *Consultation Paper 153 - Enhanced governance, performance and accountability in financial services Regulation and Guidance under the Central Bank (Individual Accountability Framework) Act 2023* March 2023 - available [here](#).

⁴ *ibid*, *Annex 1 to Consultation Paper 153 – Draft Regulations* - available [here](#).

⁵ *ibid*, *Annex 2 to Consultation Paper 153 – Draft Guidance on the Individual Accountability Framework* - available [here](#).

Timeline and Application

The introduction of new conduct standards, enhancements to the F&P Regime and amendments to the ASP will apply to all RFSPs and in-scope holding companies.⁶

During its initial phase, SEAR will apply 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 that underwrite on a firm commitment basis and/or deal on own account and/or are authorised to hold client assets; and
- Incoming third-country branches of the above.

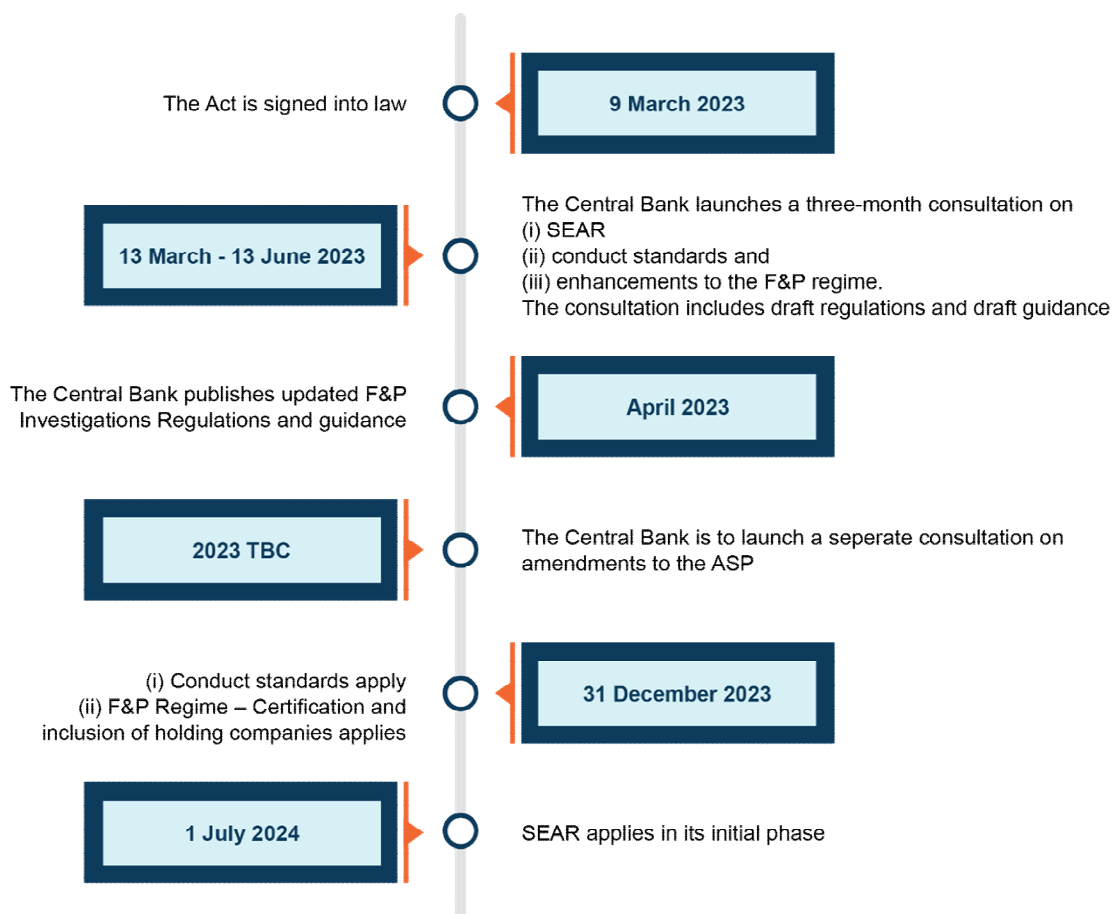
The Central Bank intends to extend the scope of SEAR to other sectors in due course, with amendments to be made to incorporate lessons learnt from the initial roll-out phase.⁷

⁶ A “holding company” means any of the following established in the State –

- (a) a financial holding company, within the meaning given by point (20) of Article 4(1) of the Capital Requirements Regulation;
- (b) a mixed financial holding company, within the meaning given by point (21) of Article 4(1) of the Capital Requirements Regulation;
- (c) an insurance holding company, within the meaning given by Regulation 215(1) of the European Union (Insurance and Reinsurance) Regulations 2015 (S.I. No. 485 of 2015);
- (d) an investment holding company, within the meaning of the European Union (Investment Firms) Regulations 2021 (S.I. No. 355 of 2021).

Throughout the remainder of this OnPoint within the context of changes made to the F&P Regime and ASP, reference to “RFSPs” should be construed as including reference to in-scope holding companies.

⁷ The Central Bank anticipates that in its initial implementation, SEAR will apply to approximately 150 firms. See: Central Bank of Ireland *Enhanced governance, performance and accountability in financial services: the Individual Accountability Framework - address by Deputy Governor Derville Rowland* 18 April 2023 – available [here](#).



Background

The Central Bank first recommended reforms to enhance the accountability of senior individuals in regulated entities in its 2017 submission to the Law Reform Commission.⁸ The Act's core concepts were propounded in the Central Bank's 2018 report, "*Behaviour and Culture of Irish Retail Banks*".⁹ This report was published partly in response to the Financial Stability Board's April 2018 report, "*Strengthening Governance Frameworks to Mitigate Misconduct Risk: A Toolkit for Firms and Supervisors*".¹⁰ It was also inspired by the UK's Senior Managers and Certification Regime,¹¹ and by the Central Bank's desire to address perceived cultural failings identified in RFSPs during the 2008 financial crash.¹²

⁸ Central Bank of Ireland, *Central Bank of Ireland Response to the Law Reform Commission Issues Paper "Regulatory Enforcement and Corporate Offences"* December 2017, pg 32 – available [here](#).

⁹ Central Bank of Ireland, *Behaviour and Culture of Irish Retail Banks* July 2018 – available [here](#).

¹⁰ Financial Stability Board, *Strengthening Governance Frameworks to Mitigate Misconduct Risk: A Toolkit for Firms and Supervisors* 20 April 2018 – available [here](#).

¹¹ For more information, please consult our UK Financial Services Sector team, and their 2017 insights paper, available [here](#).

¹² Fn 8, Fn 9.

The Act also reflects a more general, growing trend in Ireland towards demanding accountability and engagement from directors.¹³

SEAR

The purpose of SEAR is to define senior individuals' responsibilities in RFSPs and to strengthen the Central Bank's power to hold individuals accountable for regulatory breaches in the area for which they are responsible.

SEAR and Individuals

Applicability

SEAR will apply to individuals holding "senior executive functions". This definition essentially aligns with that of persons performing pre-approval controlled functions ("PCFs").¹⁴

SEAR will apply to all PCFs, including independent and non-executive directors. The Consultation acknowledges that although independent and non-executive directors do not manage a RFSP's business in an executive capacity, they play an essential role as members of the board in respect of the oversight of the firm and in its governance framework.

SEAR will apply to incoming third-country branches but will not apply to incoming European Economic Area ("EEA") branches. SEAR will also apply to outgoing branches (i.e., branches of Irish-authorized institutions) as the Central Bank requires a clear line of sight on issues arising with respect to that branch and who is responsible.

The Consultation recognises that job sharing, temporary hires and outsourcing are common solutions in many RFSPs. The Consultation suggests that:

- Each job-sharing individual should have full accountability for the relevant responsibility attributable to their role, and this accountability will be discharged where the person can demonstrate that they took reasonable steps to discharge the responsibility.
- Temporary hires will be subject to SEAR, and reasonable steps in respect of the duty of responsibility (see point 3 below) will apply with reference to the person's individual circumstances.
- The Consultation suggests that outsourced roles must be overseen by a PCF role holder within a RFSP.

¹³ This is evident from the judgment in *Powers v Greymountain Management Ltd [In Liquidation] & Ors* [2022] IEHC 599 – available [here](#); and the 2018 Central Bank settlement agreement conducted with Mr Michael Walsh, former non-executive director and Chairman of Irish Nationwide Building Society (a copy of the settlement agreement can be found [here](#)).

¹⁴ FN 5, pg 18; Oireachtas Select Committee on Finance, Public Expenditure and Reform, and Taoiseach Debate - *Central Bank (Individual Accountability Framework) Bill 2022: Committee Stage* 30 November 2022 – available [here](#).

Responsibilities

PCFs will have:

- Inherent responsibilities by the nature of their role (“**Inherent Responsibilities**”);
- Prescribed responsibilities (“**Prescribed Responsibilities**”); and
- Other responsibilities (“**Other Responsibilities**”).

Inherent Responsibilities are automatically allocated to the relevant PCF, in accordance with the Consultation. For example, the Consultation provides that:

- A PCF1 Executive director will be responsible for ‘Directing the business of the firm’; and
- A PCF2A Non-executive director will be responsible for ‘Overseeing and monitoring the strategy and management of the firm’.

The Consultation includes a list of Prescribed Responsibilities that an in-scope RFSP must allocate to PCFs. For example, a PCF must be allocated to each of the following:

- PR1 ‘Responsibility for the firm’s performance of its obligations under the Senior Executive Accountability Regime’;
- PR2 ‘Responsibility for the firm’s performance of its obligations under the Fitness and Probity Regime (including certification)’; and
- PR21 ‘Responsibility for developing structures and mechanisms to oversee, monitor and assess the appropriateness and performance of the firm’s outsourcing framework, including outsourcing arrangements and associated outsourcing risks’.

The Consultation provides that RFSPs will be afforded the flexibility to allocate Prescribed Responsibilities to personnel in a way that accommodates different business models and organisational structures.

Other Responsibilities will not be applicable to all RFSPs but are intended to capture the allocation of responsibilities relating to business areas or projects that are not already captured under Inherent or Prescribed Responsibilities and should be reflected in the statement of responsibilities for the individual. Other Responsibilities may be allocated to individuals for projects outside the normal course of business, e.g., a significant IT project.

Duty of responsibility

The Act introduces a ‘duty of responsibility’ for an individual with an Inherent, Allocated or Other Responsibility for an aspect of the affairs of a RFSP. Such individuals must take “*any steps that it is reasonable in the circumstances*” to ensure that the affairs of the RFSP are “*conducted so as to avoid contravention by it of its obligations under financial services legislation*” in the area of business for which they are individually responsible. A breach of this duty of responsibility by a PCF will constitute a prescribed contravention, which the Central Bank may sanction through the ASP or any other enforcement tools available to it.

If a RFSP commits a prescribed contravention of financial services legislation, the Central Bank will consider if the individual took any steps that it would be reasonable to take in the circumstances to avoid such a contravention. The Consultation includes a list of considerations that the Central Bank will take into account in determining whether reasonable steps were taken, including the nature, scale and complexity of the business of the RFSP, the functions of the person in relation to the RFSP, and the level of knowledge and experience of the person.

SEAR and RFSPs

RFSPs will be required to prepare the following:

- Define Inherent, Prescribed and Other Responsibilities for each PCF role and prepare statements of responsibilities noting the assigned responsibilities of such PCFs;
- Prepare a management responsibility map at an entity level, clarifying the management and governance structure of the RFSP's lines of authority, and ensuring accountability for same.

The goal of these mapping exercises is to aid the Central Bank in possible investigations, promote proper conduct and to promote the individual responsibility of PCFs.¹⁵

Comment

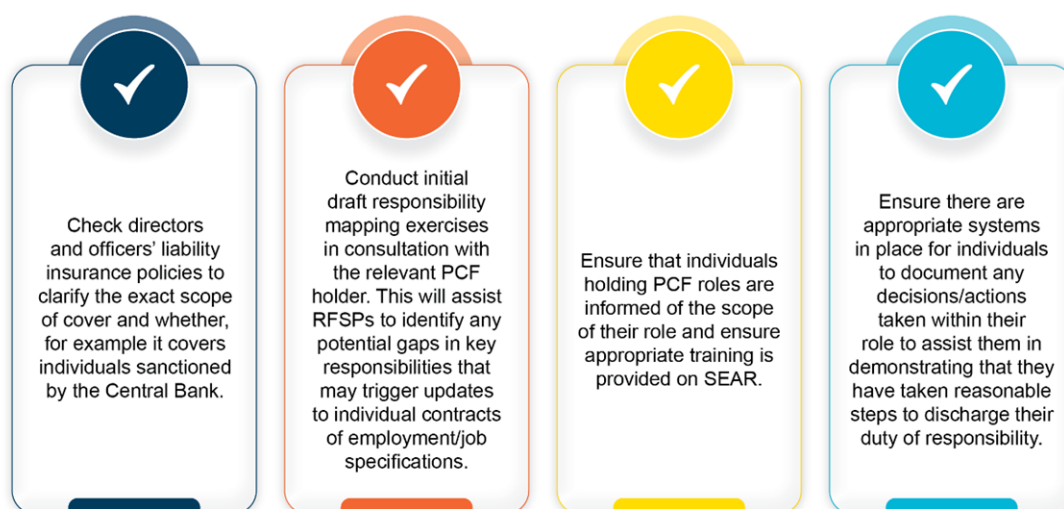
RFSPs should note that agreeing a statement of responsibility with an individual PCF may be an involved process. Moreover, it should be noted that an individual's statement of responsibility will feed into a RFSP's entity level map: accordingly, one individual could have the capacity to delay a RFSP finalising their entity-level map.

RFSPs should note that the introduction of the duty of responsibility for persons with Inherent, Allocated or Other Responsibilities may increase employee and director demands for detailed minutes of meetings and evidence of decision-making processes.

Action items

Although SEAR will apply to RFSPs on a phased basis, there are some practical steps that all RFSPs can take now to ensure they are prepared for the introduction of SEAR:

¹⁵ This ensures that senior executives will not be able to avail of the "Murder on the Orient Express Defence" a defence used where individuals claim that as everyone was involved in misconduct, no one can be responsible for same. Blanaid Clarke, "Senior executive accountability and responsibility in financial institutions" [2021] Irish Jurist 2021, 66.



Enhancements to F&P Regime

The existing F&P Regime, through which the Central Bank currently oversees and investigates PCFs and CFs, will be amended by the Act. While the amendments suggest more of a re-focus (rather than a reform) of the F&P Regime, there will be some important changes that will impact RFSPs, outlined below.

Impact on RFSPs/Individuals

- The Act will require RFSPs to certify in writing that they are satisfied that any persons carrying out a CF¹⁶ comply with the F&P standards. RFSPs will not be permitted to allow an individual to perform a CF role unless a certificate of compliance with fitness and probity standards is in force in relation to the individual. The Consultation provides that RFSPs are required to carry out the certification process in respect of all individuals in CF roles:
 - prior to appointment (or in the case of a PCF, prior to the submission of an individual questionnaire, or IQ, to the Central Bank);
 - on an annual basis; and/or
 - in respect of any new CF role(s) assumed, in advance of an individual's appointment to same.

RFSPs will also be required to maintain the information collected in respect of the certification process for a minimum of six (6) years after that individual has ceased to perform the CF on behalf of the RFSP.

- As a general point, the Central Bank may investigate a person if there is reason to suspect the person's fitness and probity and an investigation is warranted in the circumstances. The Central Bank has published updated regulations and guidance in respect of F&P investigations, suspensions and

¹⁶ (a) in relation to a RFSP, a function prescribed in regulations made under section 20 of the Central Bank Reform Act 2010, as a controlled function in relation to a RFSP, and

(b) in relation to a holding company, means a function prescribed in regulations made under section 20 of the Central Bank Reform Act 2010, as a controlled function in relation to a holding company.

prohibitions procedures, which applied from April 2023 (“**Updated Rules**”)¹⁷ and introduced the following changes:

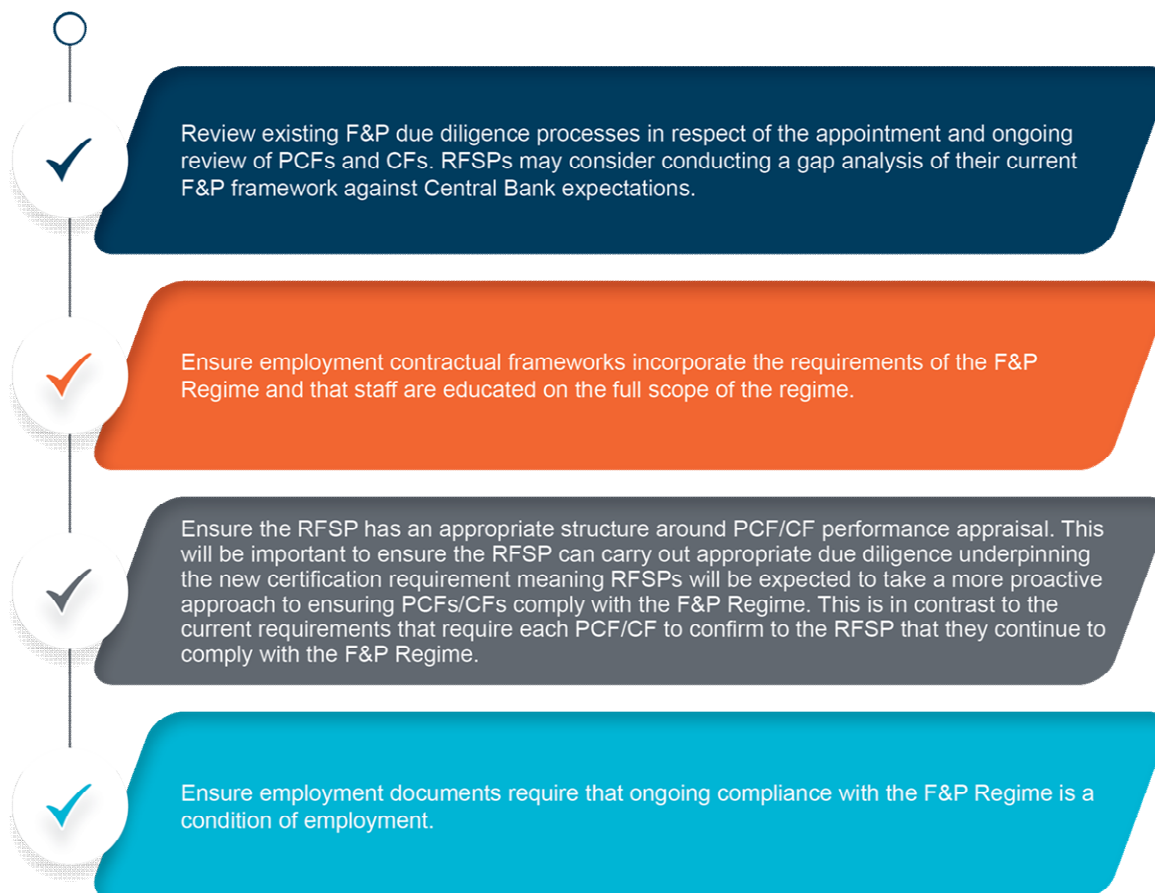
- The Central Bank can now investigate an individual who formerly performed a CF provided that they performed the role within the shorter of the following periods: (a) the period since 19 April 2023; or (b) six (6) years before the date on which an investigation is commenced.
- The period of validity of a suspension notice issued by the Central Bank has increased from three (3) months to six (6) months. Suspension notices confirmed by the Central Bank may now be appealed to the Irish Financial Services Appeals Tribunal. The period for which the High Court may extend a suspension notice has also increased from three (3) months to six (6) months. The Central Bank may make subsequent applications to the High Court to further extend a suspension notice up to a maximum of twenty-four (24) months. Where the Central Bank considers that a person should not perform a CF during the course of an investigation of that individual, the Central Bank may suspend a person from that role without affording them the opportunity to make submissions.
- Prohibition notices will now only take effect when confirmed by the High Court or agreed in writing.
- Certain requirements have been introduced to ensure the independence of an investigation and associated decision-making procedures.

It is noteworthy that the Updated Rules extend the application of the F&P Regime to individuals performing certain CF roles in holding companies.

¹⁷ Central Bank Reform Act 2010 (Procedures Governing the Conduct of Investigations) Regulations 2023 – available [here](#). Central Bank of Ireland, *Fitness and Probity - Investigations, Suspensions and Prohibitions: Guidance* April 2023 – available [here](#).

Action items

Some practical steps RFSPs can take now to ensure they are prepared for these changes to the F&P Regime include the following:



New Conduct Standards

The Act introduces the following set of new conduct standards:

- Business Conduct Standards relevant to all RFSPs;
- Common Conduct Standards relevant to all CFs; and
- Additional Conduct Standards relevant to all PCFs and persons who may exert significant influence on the conduct of a firm's affairs (collectively, the "**Standards**").

The purpose of these changes is to set general conduct standards for all RFSPs and individuals that can be directly enforced by the Central Bank. The Central Bank is consulting on Business Conduct Standards as part of a different workstream and accordingly, they are not included in the scope of the Consultation.

Impact of Standards on RFSPs/Individuals

The Standards are summarised below. The Consultation also includes practical guidance on how RFSPs and CFs are expected to comply with them.

RFSPs	Standard
Business standards – apply to all staff of the RFSP	<ul style="list-style-type: none"> ■ Act in the best interest of customers and of the integrity of the market ■ Act honestly, fairly and professionally ■ Act with due skill, care and diligence ■ Do no mislead customers ■ Maintain adequate financial resources ■ Control and manage the RFSP's affairs and systems sustainably, responsibly and in a sound and prudent manner ■ Prevent, identify and manage conflicts of interest ■ Engage and cooperate in good faith and without delay with the Central Bank/other regulators ■ Disclose to the Central Bank promptly any matter of which the Central Bank would reasonably expect notice
Individuals	Standard
Common conduct standards – apply to CFs only	<ul style="list-style-type: none"> ■ Act with honesty and integrity ■ Exercise due skill, care and diligence ■ Cooperate in good faith and without delay with the Central Bank and similar foreign authorities ■ Act in the best interests of customers and treat them fairly and professionally
Additional conduct standards – apply to PCFs only	<ul style="list-style-type: none"> ■ Ensure that the RFSPs' business is controlled effectively, in accordance with obligations under financial services regulation ■ Ensure delegated tasks are assigned to an appropriate person with effective oversight ■ Ensure the Central Bank is informed of matters it would reasonably expect notice of

The concept of 'reasonable steps' is central to the Standards, meaning that in-scope individuals will be expected to take reasonable steps to achieve compliance with the Standards. RFSPs will be required to provide training on an initial and ongoing basis to CFs to ensure that such individuals have appropriate knowledge of the Standards.

There are open questions with respect to the scope of individuals subject to the Additional Conduct Standards in particular. For example, it will be important to determine if these standards will extend to those individuals who exercise significant influence on the conduct of a RFSP's affairs but who do not hold a PCF role, i.e., Head of Legal.

Action items

There are some practical steps that RFSPs can take now to ensure they are prepared for the introduction of the Standards:



RFSPs may consider carrying out initial training for those to whom Common Conduct Standards and Additional Conduct Standards apply.



RFSPs will be required to “*establish, maintain and give effect to policies on how the common conduct standards are integrated into the conduct of the affairs*” of the RFSP. Consideration should be given to how the Standards will be embedded in the RFSP in its employment contractual framework, i.e., contracts of employment and employee appraisals should refer to the Standards, where appropriate. RFSPs should consider whether consultation and/or employee consent is required to implement the necessary changes.



RFSPs may consider reviewing whistleblowing procedures to incorporate processes to be followed in case of a breach of the Standards by an individual.



RFSPs with branches may wish to review governance arrangements to support individuals carrying out a PCF to comply with the Standards.

Enhanced Central Bank Enforcement Powers

The purpose of this pillar of the IAF is to enhance the Central Bank’s enforcement powers. The Act also extends the scope of the Central Bank’s ASP to certain holding companies.

One of the key changes proposed by the Act is the removal of the so-called “participation link” between the conduct of an individual and a firm’s wrongdoing, that requires the Central Bank to first prove that a RFSP breached financial services legislation before pursuing individuals. The Act provides that individuals may be pursued for failure to take reasonable steps to secure that the affairs of the RFSP are “*conducted so as to avoid contravention by it of its obligations under financial services legislation*”.

It is noteworthy that the burden of proof for such contraventions is the civil standard, i.e., on the balance of probabilities.

Relevant considerations

The Act includes a list of relevant considerations the Central Bank must take into account when considering potential sanctions/the level of financial penalties to be imposed on a person, including:

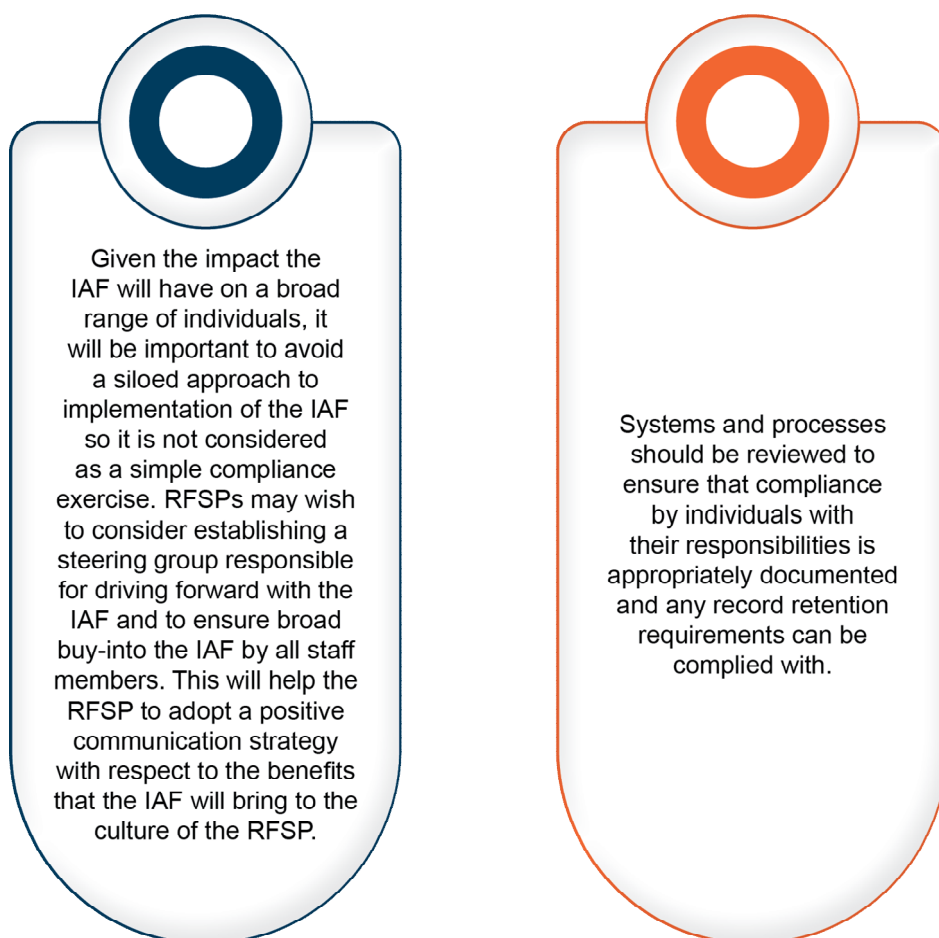
- the seriousness of the prescribed contravention;

- the effect of the prescribed contravention;
- the conduct of the person during and after the person's commission of or participation in the prescribed contravention;
- the previous record of the person;
- any consideration relating to pending or possible criminal proceedings; and
- any matter relevant to the financial position of the person.

The Central Bank intends to launch a separate public consultation on the changes to the ASP in mid-2023.

Next steps

In addition to the practical steps noted in this OnPoint, there are some general positive, pro-active steps we would advise RFSPs to take now to prepare for the introduction of the IAF:



We will be monitoring developments with respect to the Consultation and would be happy to assist with any queries you may have regarding the Act in general.

This update was authored by:



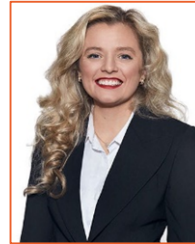
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