A joint response to the PRA and FCA's joint consultation on
Strengthening accountability in banking: forms, consequential and transitional aspects

26th February 2015

The British Bankers' Association (BBA) and the Association for Financial Markets in Europe (AFME) welcome the opportunity to respond on behalf of their members to the joint FCA and PRA consultation paper CP14/31 and CP28/14 "*Strengthening accountability in banking: forms, consequential and transitional aspects*" [1](the Consultation Paper).

The BBA is the leading trade association for the UK banking sector with more than 200 member banks headquartered in over 50 countries with operations in 180 jurisdictions worldwide. Eighty per cent of global systemically important banks are members of the BBA. As the representative of the world's largest international banking cluster the BBA is the voice of UK banking enabling us to represent our members domestically, in Europe and on the global stage. Our network also includes over 80 of the world's leading financial and professional services organisations. Our members manage more than £7 trillion in UK banking assets, employ nearly half a million individuals nationally, contribute over £60 billion to the UK economy each year and lend over £150 billion to UK businesses.

AFME represents a broad array of European and global participants in the wholesale financial markets, and its members comprise all pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. AFME participates in a global alliance with the Securities Industry and Financial Markets Association through GFMA (Global Financial Markets Association) to communicate the industry standpoint on issues affecting the international, European and UK capital markets.

Before responding to the PRA and FCA's specific questions we highlight below some more general comments.

The logistical challenges remain

We note that many of the concerns raised in our response to the original consultation paper still remain unaddressed and that, as a result, the logistical challenges with implementation continue to be an issue for our members, particularly when there is no further clarity about the timeline. In order to address those concerns and challenges, we welcome the continued dialogue with the regulators and support through the outreach programme, looking to the publication of the final rules well in advance of implementation dates.

[1] http://www.fca.org.uk/static/documents/consultation-papers/cp14-31.pdf

The forms rely too much on ticking boxes and are too prescriptive

We support the PRA and FCA's general principles-based approach to supervision that requires supervisors to exercise their judgement.

In our view the proposed forms supporting the Senior Managers' Regime are not aligned with this approach. The forms appear to have been imported wholesale from those used in the Approved Persons Regime, (most recently updated in October 2014 to include enhanced disclosures) with even more boxes added. They promote a prescriptive, one-size-fits-all methodology and perpetuate a (longer) tick-box approach. We think the forms warrant further consideration to ensure they meet the needs of the regime and are easy to use. We and our members would be happy to work with the PRA and FCA to improve their usability.

As an example, and without limitation to the generality of the preceding paragraph, requiring the complexity of a Senior Manager's role to be described on the proposed Statement of Responsibilities form in no more than 300 words is unrealistic and will not deliver an appropriate degree of granularity. Were this 300-word limit to remain (which we do not support) extensive cross-referencing to supporting documentation would be required. Failing this, further documents detailing a Senior Manager's role will have to sit behind their Statement of Responsibilities, which the regulator will remain unaware of, despite the fact that they will form part of the Senior Manager's full responsibilities. We consider that all relevant information should be contained in one place without extensive cross-referencing to other documents describing inter alia governance procedures, Statement of Responsibility, the responsibilities map and the individual's job description in order that the individual, the firm and the supervisor understand what responsibilities are being assumed. We note that such cross-referencing is currently prohibited.

Changes to the regime have been introduced

We have noticed that a number of substantive changes to the regime proposed in July have been introduced in this 'technical' consultation. In particular we note that:

- Firms are now required to report reaches or suspected breaches of the Conduct Rules by a PRA Certified Person within 7 days to the PRA. Given that the population of Certified Persons is significantly larger than that of Senior Managers; this change will be a significant extra burden for firms. We urge that reporting in respect of breaches by both FCA and PRA certified persons should be on a quarterly basis as initially proposed;
- It appears to us (but please clarify) that certified persons now have to be identified earlier than we had anticipated, at day 1, with a certificate issued by the end of the transition period 12 months later;
- key functions 28 and 29 have been added to the FCA Statement of Responsibility form.; we are unclear why these additional categories are required by the FCA and an indication of their purpose would be welcome along with additional guidance on the type of roles that the FCA anticipates being captured by these sections that are not otherwise captured in other parts of the PRA and FCA Statement of Responsibilities. In relation to Key Function 29 in particular, we consider that this function is so vague that it will be very difficult to assign this responsibility in practice, and;

- When submitting a grandfathering notification a Statement of Responsibility template and Responsibility Map must also now be submitted.

While we have reviewed the Consultation Paper and associated Annexes and Appendices, we cannot be certain that we have identified all the changes to policy introduced by this technical Consultation Paper. At the very least we would urge the regulators to identify any changes to the policy regime in order for us to effectively describe them to and consult on them with our members.

Grandfathering

We note that the Consultation Paper has confirmed that grandfathering will be available for existing controlled functions and their corresponding Senior Management Functions listed in the table at para 2.7 and welcome the proposal that such individuals need not apply for fresh approval.

We would appreciate confirmation that the allocation of additional and new responsibilities to individuals in SIF roles will not prevent their being grandfathered. Otherwise it would result in few roles being eligible to be grandfathered which, we understand, is not the intention.

These new roles are:

- Ensuring the firm's performance of its obligations under the senior management regime, including implementation and oversight;

- Ensuring the firm's performance of its obligations under the employee certification regime, including implementation and oversight;

- Compliance with the requirements of the regulatory system in relation to the management responsibilities map;

- Ensuring the induction, training and professional development of all persons performing designated senior management functions on behalf of the firm and all members of the firm's management body; and

- Allocation of all prescribed responsibilities

We believe that such individuals should be eligible for grandfathering despite the fact that they have taken on a responsibility that did not exist before and that has been created by this new regime. As we note below in our answer to question 1 consideration should also be given to grandfathering current approved persons who operate in the parent company but will now also be carrying out senior management functions in a subsidiary firms.

Role sharing

Roles are sometimes shared within banks. The mid-2014 consultation approached this issue purely in the context of two individuals who do the same job but on different days or at different times. This is the exception. More common role-sharing arrangements arise from the use of matrix management structures or demarcated responsibilities where two or more individuals both work full time and have responsibility for particular aspects of a job.

This type of role-sharing – often described as a co-head arrangement - is of particular importance; it commonly exists within our members' organisational structures and should not be ignored simply for regulatory convenience. Industry and regulators need to work together to work out how it will be addressed, we suggest via an industry/regulator working group, which we would be happy to join.

For instance where the responsibilities of the co-heads are clearly distinct - perhaps one co-head covers Asia and one co-head covers EMEA - then it would be quite wrong for the EMEA co-head to be jointly responsible for actions taken solely in respect of Asia, and *vice versa*.

Our members would like it to be clarified that the concept of joint liability will not be extended to roles such as co-heads, and what treatment it is proposed will apply in that situation.

There is also a different but again common business model, whereby a senior individual outside the UK has overall responsibility for a strategy, but others below him/her, based in the UK, implement it. We assume that in this case the senior individual outside the UK who sets the strategy will be in scope for the senior management function, and not those who just implement it, taking their instructions from the non-UK individual.

Structural reform

There is a need to ensure that the ring-fencing and senior managers' regimes remain coherent recognising that statements of responsibility may change as new bank structures are developed.

Answer to specific questions

Q1: [PRA and FCA]: Do you agree with the proposed approach to grandfathering existing approved persons into Senior Management Functions?

Grandfathering

Generally yes, but the issue arises of the grandfathering of those individuals that will in the future be undertaking a mix of old and new senior manager regime functions – for instance responsibility for the oversight of the senior managers' regime, performance of obligations under the Certification Rules or compliance with responsibilities map requirements.
We would appreciate confirmation that the allocation of additional and new responsibilities to individuals in SIF roles will not prevent their being grandfathered.

We also wonder why the authorities are requiring notification of the rationale for a function not being grandfathered – it is not clear what the benefits of this are or how it would apply.
Parent-subsidiary responsibilities

The current arrangements allow for current approved persons for the relevant authorised firm to be grandfathered to the new SMRs for that firm. The situation may arise in some of our member firms which have board members and senior executives who are approved for the 'lead' firm but who will also be carrying out SMR responsibilities for subsidiary firms which are in-scope of the new regime. Where these subsidiaries are wholly owned by the lead or main group firm and their governance arrangements apply to all relevant regulated entities, consideration should be given to allowing grandfathering of individuals across relevant entities where those entities are owned by the group entity and the individual and SMF held is to be the same in the subsidiary firm as in the parent entity.

For example a subsidiary entity has its own risk committee (with a Chair) that ultimately reports into the Group Risk Committee. The Chair of the group risk committee may be the Senior Manager for this function in the subsidiary but may not currently be approved for the subsidiary entity

Could the FCA/PRA agree to the Group Risk Committee chairman being grandfathered into the subsidiary entity firm, even though s/he is not currently registered with that subsidiary, providing the role is the same and s/he meets group requirements?

If this cannot be covered by the grandfathering arrangements we would propose that a similar arrangement is agreed to expedite the allocation and approval of SMRs spanning multiple firms of the same group where the individual may only be registered with the lead firm.

In-flight applications

Paragraph 2.21 states that if a firm does not know whether its application will be processed in time by the regulators to be grandfathered or treated as an in-flight application, *'firms should make a combined application and a grandfathering notification which would cover both eventualities.'* This requirement potentially undermines the grandfathering process; the regulators should provide greater clarity on the cut-off date if applications are to be treated as grandfathered.

Applications for Approved Persons who will no longer be Senior Managers

The CP suggests that firms would need to continue making applications for Approved Person status right up to the date of commencement, even where it is clear that that application will lapse/approval will fall away on commencement. We would propose that, in the 12 weeks prior to commencement date, relevant firms should be allowed to cease applying for Approved Persons who will not be grandfathered to SMFs. The individual would be performing the function for less than a 12 week period, as is permissible for temporary cover.

Grandfathered SMF's agreement to Statement of responsibility

The December CP did not set out the process for obtaining agreement and acceptance from grandfathered SMF's for the Statement of Responsibilities and the Management Responsibility Map.

***Q2:** [PRA and FCA]: Do you agree with the regulators' proposed Statement of Responsibilities template and the Significant Change of Responsibilities form?*

No

The form reads as a check list not as an agreed full record of the individual's responsibilities which could be referred to by the individual, the firm and the supervisors, which we believe it should be.

We agree with the objective of ensuring that Statements of Responsibilities are as clear and succinct as possible. However, we consider the 300 word limit to be arbitrary and unhelpful. In general, the proposed guidance on the compilation of Statements of Responsibilities is unnecessarily inflexible and does not take sufficient account of the need for firms to describe responsibilities fully and to set them properly in the firm's governance context. It is both necessary and appropriate for firms to explain or refer to the governance framework through which those responsibilities are discharged which necessarily introduces a level of complexity. It should be acknowledged that doing so will not be perceived to be a dilution or qualification of responsibility or a failure to be clear and succinct.

One possible idea is that the Statement of Responsibility could be appended to the role description.

In any case, any Statement of Responsibility template should include a signature box so that a Senior Manager can confirm their agreement to it. An electronic form and process will help avoid unnecessary paperwork and duplication of information.

We note that:

- There is very limited reference to co- head shared responsibilities.
- There is a 300 word limit. This is insufficient.
- The forms are not user-friendly and would benefit from re-designing

In relation to the template itself we think it would be helpful if there was room for a brief description of an individual's role at the start of the form, prior to the sections indicating which responsibilities they have been allocated. It would also be useful to have much greater clarity around what should be included in Section 3.3 Q29 versus Section 3.4 and Section 4.

Q3: *[PRA]: Do you agree with the PRA proposed approach to applications and notifications for persons in scope of the senior manager's regime?*

We note that section 5 of the Long Form A, which relates to fitness and propriety requirements, seems duplicative. For example the question about whether or not a person has been subject to criminal proceedings appears to be asked twice in section 5.01.1a.

Section 5.01.3 asks about arrests or charges (in our view there is a significant distinction between the two) in relation to a prosecution that that did not result in a criminal conviction. Firstly it seems to be against the concept of natural justice that individuals should be required to report an arrest, charge or investigation that did not result in a criminal conviction. Secondly we do not understand how firms are able to verify information that the candidate might, or might not, supply in this regard. Similar considerations apply to the new obligation to report searches.

There also appears to be a degree of duplication at section 5.01.5 b and c referring to criminal investigations and 5.02.3 b and c in relation to civil proceedings.

We note that section 6 refers to a handover certificate, which is not a requirement of the new regime. References to the handover certificate should therefore be removed (particularly as in the case of Form A it is unlikely to be available at the point of its submission) and replaced with a broader term such as 'handover arrangements'. There are also references to handover certificates in Long and Short Form A, which should be removed.

Q4: *[PRA]: Do you agree with the PRA's proposed revised approach to receiving notifications of Conduct Rule breaches, including Form L?*

No. If the reporting obligation is confirmed as being 7 days, this will create a significant extra burden for firms as they strive to put in place the considerable administrative change required by the regimes.

We urge instead that reporting in respect of breaches by both FCA and PRA certified persons should be on a quarterly basis as initially proposed.

Q5: [FCA]: Do you have any comments on the FCA's proposed form for quarterly notifications of conduct rule breaches and disciplinary action for FCA certification employees and other conduct rules staff (Form H)?

We note the request for reporting at the point a suspected breach is identified and have the following comments:

- We request clarity as to how the information will be used by the regulator. This should be specifically stated in order to comply with current ICO guidance. In addition and considering current employment practice, employees have a right of reply before a sanction is recorded against them. It is critical therefore that we understand how this information will be used, reported and stored by the regulator.
- Where suspected breaches have been reported, and not found to be upheld, firms will expect confirmation from the regulator that the information has been erased and not retained against persons identified. We would recommend the regulator(s) outline how they propose to manage the requirement to regularly erase this information.

- We note the likelihood of an increased number of Subject Access Requests to the regulator and recommend consideration be given to this impact.

We note that the table at Section 4 of Form H, which firms use to describe the breach or suspected breach details, requires the individual's National Insurance Number. Where non-UK persons are the subject of a breach notification there will be no National Insurance Number. Generally form H, section 4 is too restrictive and lacks the opportunity for explanation or context where required.

Section 4 also requires the firm to specify the date or period of breach. Where it is notifying a suspected breach this information may not be available depending on the information the firm has at that time and the status of the investigation. The form needs to provide sufficiently flexibility for use both for suspected and actual breaches.

Since both forms H and L will have to be submitted via the FCA's Connect system - we believe that this will mean that the FCA will by default be aware of notifications to the PRA for its certified population (i.e. MRTs). FCA Form H and PRA Form L should be therefore be merged since they will provide similar information via the same channel.

The Form H declaration requires the firm to notify the FCA *'immediately if there is a material change to the information provided*'. Does this supersede the requirement to update the regulator on a quarterly basis? If a suspected breach is found to have occurred and a disciplinary warning issued, should the firm update the regulator immediately or at the next quarterly cycle? We suggest this updated information be incorporated into the next quarterly breach report.

Q6: [FCA and PRA]: Do you have any comments on the proposed Application for variation of a conditional approval form, or the proposed Grandfathering notification form?

We ask the regulators to confirm our understanding that both forms L and K will be in electronic format and will be submitted via Connect.

Q7: [PRA & FCA]: Do you agree with PRA and FCA's proposed approach to Forms as set out in this Chapter?

As we note above we believe the approach to forms continues the existing tick-box approach, but in a longer format. The forms should be fundamentally revised so that it is clear what the objective of each form is, that firms are able to provide the regulators with the information that they need, that there is a degree of flexibility whilst also ensuring consistency across firms where necessary in order that they can act as a holistic description of the relationship between the individual, his or her employer and the supervisor. Limiting descriptions to 300 words and preventing the cross-referencing to other relevant documents is unhelpful.

Firms use the Connect system to make applications and notifications to the FCA (see 10C.9.11 R.1). The new forms should be compatible with Connect. Connect must provide sufficient security / privacy as it will also be used for applications for those NEDs requiring approval. Further guidance should be provided on whether applications will be accepted in other formats in order to protect confidentiality.

Q8: [FCA]: Do you have any comments on the FCA's proposed consequential Handbook changes, or think more are needed?

The CP introduces a variety of amendments and new requirements within the handbook and rules section as a result of the new rules and impact on existing arrangements. We have not reviewed these in detail, but from an initial assessment we have identified a number of issues and queries which require further clarification. These include:

- Inconsistencies in rule changes
- Changes to definitions which appear questionable/confusing
- It is correct that the new C-CON breaches and disciplinary action section does not impose any record-keeping requirements
- Impact of rule changes to existing approved persons arrangements which will remain in force for non-relevant firms (outside SMR regime) not clearly articulated and therefore is likely to cause confusion; and
- Some consequential changes in the rules not being properly covered on consulted upon hence could easily be overlooked and result in weakness in firms ability to adhere to new regime

Part A (1.1.2 R 1 c) of draft C-CON states that SMFs and Certified Persons will be covered immediately from commencement - even though firms will not be required to have issued certificates to their Certified Persons by that date. Part B of draft C-CON further states that the regime will apply to that group plus other employees at a later date, (presumably 12 months after the 1st commencement date). What is the position of new employees (or internal transfers) who take up a CP role in the intervening transitional period and become subject to C-CON from the point at which they take up the role? Would they need to be certified from day 1 onwards until the end of the transitional period?

Lastly we are concerned at the proliferation of new definitions e.g. 'senior management function', 'SMF manager', and 'significant responsibility function' that will sit alongside the current glossary definitions of 'senior management', 'senior personnel' etc. This could be confusing with so many terms being used to describe, in some cases overlapping, populations. Could the existing and new definitions please be rationalised and simplified?

As before, we may have further points as our members continue to assess the impact of the new regime; and as before, we would be happy to continue to meet the regulators to talk through the issues. We regard the debate to date to have been useful and constructive.

Responsible Executives

BBA: Simon Hills
E: simon.hills@bba.org.uk
T: 020 7216 8861

AFME: Will Dennis
E: will.dennis@afme.eu
T: 020 7743 9341