

Response to FCA CP14/13 / PRA CP14/14

October 2014

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 FCA consultation paper CP14/13 and PRA consultation paper CP14/14¹ on "Strengthening accountability in banking: a new regulatory framework for individuals" (the **Consultation**).

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 (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA), through the Global Financial Markets Association (GFMA) to communicate the industry standpoint on issues affecting the international, European and UK capital markets.

The BBA is the leading association for banks active in the UK. It represents over 170 banking members, which are headquartered in 50 countries and have operations in 180 countries worldwide. As well as banks headquartered in the UK, BBA members include third country banks which operate in the UK either as branches or subsidiaries, or often as a combination of both.

Our members collectively welcome the aims of the Government, the Parliamentary Commission on Banking Standards (**PCBS**) and the regulators to create a new framework which increases individual accountability within banking, and in general our members welcome the proposals set out in the Consultation. The authorities are to be congratulated for producing very detailed drafts in a very short timeline, and for making considerable efforts to work cohesively and to interact with industry. We have had the benefit of several useful and constructive meetings with both regulators, and this inclusive approach to consultation is much appreciated.

We have a number of key points which we set out below in the executive summary, followed by a detailed response to the questions posed in the

¹ <http://www.bankofengland.co.uk/pr/ Documents/publications/cp/2014/cp1414.pdf>

Consultation. If our proposals are accepted there will have to be consequential amendments to the draft handbook text set out in the Consultation, the drafting of which we will be happy to assist with if so requested. Also, as the implementation of the new regime becomes clearer, we look forward to providing further comments to the extent this is seen as helpful.

1. Executive Summary

Extra-territorial Scope

We are concerned that the FCA is seeking to assert extra-territorial jurisdiction over certified individuals not based in the UK, who may have only minimal or fleeting contact with UK clients and who do not have any real likelihood of causing harm to a UK-regulated firm.

Similarly we believe that the Group Entity Senior Manager function increases the existing risk of multiple regulation; by the PRA, but also by an overseas regulator in relation to the non-UK entity by which s/he is employed.

For any individual overseas to be in scope as either a senior manager or a certified person, we suggest that there needs to be a direct nexus to the UK implementation of any decision of theirs. We also suggest that for a certified person based overseas, his/her line manager will be also in scope if that line manager is in the UK (and so on up the UK chain of management); but, if that line manager is overseas, then only that line manager, and no-one further up the management chain overseas, should be in scope.

We await the expected consultation on the applicability of the regime to foreign banks' branches in the UK. We would ask that this consultation be published as soon as possible.

Non-executive Directors

Non-executive directors (**NEDs**) perform different roles from executive director members of the board. In our view the purpose of the NED is to attend board meetings, challenge and constructively but robustly criticise the executive, contribute to the board debate, apply their expertise (often derived in a non-banking environment) to the firm's future strategy, performance and resource allocation at a high level. For this reason we believe a different supervisory approach should be developed for NEDs, and in particular for those who do not have a specific responsibility such as chairing the Risk, Audit, Remuneration or other board committees. It is not the NEDs' role to manage in the normal, dictionary meaning of the word.

The risk of imposing similar requirements on NEDs as on executive directors is that they will effectively embed themselves in the firm, losing their independence as they 'man-mark' key senior executives.

This risk could be countered by issuing guidance to the effect that NEDs should have a more limited and different set of responsibilities which are appropriately aligned with other applicable rules, such as general UK company law and the UK Corporate Governance Code.

Further there is real concern that the proposed regime could potentially undermine the current UK unitary board model and the principle of collective board responsibility long enshrined in the UK Corporate Governance Code. By allocating specific responsibilities to individual NEDs, the proposed regime could potentially alter the current nature of NED and executive director relationships, and impact the current collaborative and challenge-based board decision-making processes as individual NEDs seek to protect against their individual personal liability. We recommend the implications of the proposals in this area be explored further to avoid any unintended consequences.

Fitness and Propriety

It is essential that firms know that prospective certified persons are fit and proper and the requirement to undertake Disclosure and Barring Service (**DBS**) checks will assist this, provided that the DBS is able to deliver checks promptly. If this proves to be operationally impossible this requirement will be very problematic for our members.

However, we believe that the discontinuation of the FCA register will have a negative effect on standards across the industry, in part because of a reduction in transparency (for the industry, consumers and regulators) of many individuals' conduct history.

Under the proposed rules, firms will have to seek references from previous employers, which are limited to circumstances of dismissal or suspension, formal warning or remuneration forfeiture. Firms will have to assess fitness on the basis of very limited information. In the absence of a robust quality control process underpinning both firms' self-certification, and the provision of substantive references, inconsistencies will develop in firms' standards of fitness and propriety, and overall standards are likely to decline.

Industry needs the help of the regulators in the certification process, as the regulators will have information that the prospective employer will not have. The current proposed rules make no provision for the use of, or access to, valuable conduct history records. We would be pleased to discuss with the PRA and FCA ways in which such information could continue to be made available.

Proportionality

We note that the FCA believes its proposed approach to be proportionate, particularly in relation to credit unions. Some members are concerned however that supervisory expectations of senior managers will be the same regardless of the nature, scale and complexity of the institution. The

incremental compliance costs for small banks will be a much higher percentage of total revenue than for larger ones. Coupled with the existing funding, capital and payment access disadvantages already suffered, these new disproportionate overheads will act as a further barrier to small banks which have fewer senior executives amongst which responsibilities can be shared, reducing their ability to provide challenge and competitive alternatives in the UK retail and small business market.

It is worth noting that the competitive position of the smaller banks and building societies tend to offer a more competitively priced service than the larger banks in order to compete with them. For example the FCA Interim report entitled "Cash savings market study" (MS14/2) noted that the customers of the smaller banks typically received much higher deposit interest rates than those of the larger banks.

By their nature these smaller banks are unlikely to cause a significant threat to financial stability and, given their simple and easily resolvable business models which tend to focus on niche customers, would only pose minimal, if any, risk of customer detriment.

We would welcome further dialogue with the authorities on the issue of proportionality, particularly with the FCA, as supervisory methodologies for the proportionate oversight of senior managers are developed.

Scope of Conduct Rules

Our members have differing thoughts on these. The FCA's Conduct Rules will bring the majority of a firm's employees into scope, which may impose unnecessary burdens on firms in terms of training and competency monitoring and reporting obligations, particularly in relation to non-customer facing roles.

One option is for the scope to be appropriately narrowed by removing back office and other non-ancillary staff from the requirement to comply with Rules 4 and 5 of the Conduct Rules such that these two rules only apply to employees with customer facing roles.

A second option is for the FCA to follow the PRA and to include only certified staff within the Conduct Rules; and a third option is to apply the Conduct Rules across all staff.

Senior Management Responsibilities

The definitions of senior management responsibilities are mostly clear for the PRA, but more opaque in the case of the FCA, because of the complexity of the proposed rules and the interaction between the three tables in the FCA's draft rules. It is fundamental that an individual who is subject to civil liability with a presumption of responsibility has an absolutely clear understanding of what is expected of them. In particular, we would like further guidance to confirm that it will still be possible for the board or one of its committees to remain collectively responsible for certain matters. We do not argue against

the presumption of responsibilities; we do think it needs to be clearly delineated and fairly, proportionately and consistently enforced. More detailed guidance which covers the following key areas would contribute to achieving this:

- given the potential impact of the presumption of responsibility for senior managers and the fact that it is a significant change to the current regime, we believe it is important that more detailed guidance is provided about the types of cases where the regulators will consider using this power and the indicators that the regulators will consider relevant in deciding whether to do so (including the interplay with the concept of collective decision making);
- measures to ensure that the powers will be used fairly, proportionately and consistently, including enhanced governance around enforcement decisions; and
- an independent effectiveness review of the regulators' use of this power following a reasonable period of the regime being in place.

In view of the potentially very wide coverage of the presumption, we suggest that the regulators should amend their respective statements of policy on the imposition of penalties to make clear that, in considering whether they are satisfied that reasonable steps have been taken, they will recognise that:

- what is "reasonable" must take account of the range of the senior manager's responsibilities, and the size of the business area or areas for which s/he is responsible;
- "reasonable steps" may include the delegation of certain tasks for which the senior manager remains accountable;
- "reasonable steps" may include senior managers prioritising tasks to focus on areas of most concern to them;
- senior managers should only be expected to review and assess information which was available and material at the time;
- a senior manager would be considered to have taken reasonable steps if s/he has exercised due and reasonable care when assessing information, has reached a reasonable conclusion and has acted on it;
- a senior manager's primary role is to provide strategic leadership and effective oversight, and s/he will not have failed to take reasonable steps merely because s/he does not have detailed knowledge of matters within the relevant business area which that role does not require; and
- senior managers need to rely heavily on other people having carried out their roles properly and effectively. This includes relying on the judgment of others where appropriate, and to obtain reasonable assurance of compliance, not absolute certainty.

There are many FCA Key Functions, not all of which may be relevant to an individual firm. We seek confirmation that our reading of the requirement that a firm should identify which of the full menu of Key Functions are relevant to its business model and agree these with the FCA is the correct one.

We are also concerned that employees who run and have real day-to-day responsibility for significant businesses may not be captured (often referred to as the “missing middle”), and believe that senior managers ought not to be required to report directly into the board, so long as all the appropriate Key Functions are covered and that senior managers do not report to persons who are not themselves senior managers.

Regime Duplication

The fact that the Approved Persons Regime will stay in place for firms that are not within the new regime for banks (such as asset managers, hedge funds, broker-dealers and - at least for the time being – insurers) will mean that there will be two separate regimes and, in some cases, the same individuals will be subject to two separate regimes, with overlapping processes and differing standards, leading to unnecessary cost and lack of clarity.

Implementation Timeline

Members are committed to the full and proper implementation of the three key elements of the new regulatory framework for individuals, but think that the timelines currently proposed could result in sub-optimal execution as there is much detail still awaited, in particular guidance on Statements of Responsibilities, Responsibilities Maps, handover arrangements and clarification of the extent to which the regime will apply to foreign branches.

The timetable for transitioning to the new regime(s) must reflect the complexities of the new requirements and the significant nature of the changes needed to systems, technology, processes, and organisational culture. In addition to building new systems and amending relevant procedures, substantial work is required to properly consider the impact to key programmes (including but not limited to training, monitoring, conduct culture etc) that may need to be amended for the new regime to be effective and sustainable. We, in principle, welcome the proposed approach to a ‘phased’ rollout and recommend that the Senior Managers Regime should come into effect 12 months from the date final rules are published. This allows sufficient time for firms to work with their Supervisors in both the PRA and FCA to ensure that they have implemented the regime fully. The certification and broader application of the rules of conduct should be introduced after 18 months. Alternatively the regulators could recognise that firm and regulatory practice will evolve from a point of less complete to complete compliance over a period of a year. However we prefer a formal extension of the proposed implementation period for each key element.

Our members are already planning to operationalise this programme but its implementation should be looked at in the round, recognising that in the face

of significant regulatory change resources, particularly those requiring the creation of IT infrastructure, are constrained.

If, and as and when, it appears likely to either regulator that the final policy, handbook text or timelines will differ materially from the text in the Consultation, we would appreciate early notification of this.

2. Responses to specific questions.

Question 1 (PRA): Does the proposed list of PRA Senior Management Functions capture the appropriate set of roles? If not, (a) are there any other roles which the PRA should consider specifying as SMFs? (b) are there any proposed SMFs which the PRA should consider excluding?

Our members are concerned that the Group Entity Senior Manager function could extend the number of individuals captured within Senior Management Functions (**SMFs**) too broadly. Our understanding of this function is that it can be performed by an individual employed by any undertaking in the same group as an in scope UK regulated firm. This raises a number of concerns for our members:

- **Territorial scope.** The function as currently drafted appears to have no territorial limitation as to where the activities are performed from. This could give rise to situations where individuals are subject to dual regulation in respect of the same activity. For example, an individual located outside the UK (whether or not within the EEA) may face being regulated by the PRA but also by his/her home state regulator in respect of the performance of the same function in relation to the non-UK entity by which s/he is employed. Where this is the case, the individual would be subject to two different sets of rules, increased bureaucracy, and may be unable to resolve a conflict between his/her differing legal obligations. For any individual overseas to be in scope as either a senior manager or a certified person, we suggest that there needs to be a direct nexus to the UK implementation of any decision of theirs.
- **Sister companies.** Under the existing Approved Persons Regime it is well established that directors or employees of the parent undertaking or holding company of the UK-regulated firm can be subject to individual registration as approved persons (including where the holding company itself is unregulated). The Group Entity Senior Manager function would appear to catch that same set of holding company directors and employees but also employees in “any group company” which is much broader than the current regime. We acknowledge that this will only become relevant if an employee is able to exercise “significant influence” (as to which see below). However, the extension of the function to any member of the group potentially brings a very wide range of directors and employees into the regime who cannot exert influence over the UK regulated firm in the way that holding company staff can over their subsidiary (for example, staff in sister companies within the group in a different chain of legal ownership).

To some extent whether that is appropriate depends on the meaning of the “significant influence” test, but if that test is applied broadly or with an unclear scope then it will in practice be impossible for firms, and regulators, to monitor who might be within the scope of this function across the entire corporate group globally. Our members consider that this would be a disproportionate outcome which would ignore the fact that some of the influencers of an in scope firm may be employed by its parent, and are concerned that the Consultation does not include any discussion as to the reasoning behind this extension in scope from holding companies to all group companies. Indeed, there appears to be the suggestion at paragraphs 2.22 and 2.23 that what is proposed is a continuation of the current approach, which we do not believe it to be. Our members believe that the proposal actually extends the scope of the regime significantly, and would welcome retaining the current approach.

- **Meaning of “significant influence”.** The meaning of this term is critical. Given the wide scope proposed for the Group Entity Senior Manager function, it is the key factor in determining whether the function is appropriately being confined to directors and employees who are actually senior managers of the relevant entity. The SMF7 test² of significant influence on “the management or conduct of one or more aspects of the affairs of a firm in relation to its regulated activities....” is so broadly worded that it does not seem to provide any constraint as to the nature and type of activities that are included other than they must relate to regulated activities and without further clarification is very subjective. Under the current Approved Persons Regime, the staff of holding companies can be caught because of their management influence over the affairs of the subsidiary. However, under the new Group Entity Senior Manager function employees could be caught who exercise any type of influence that is “significant”. For example, staff could exert significant commercial, technological or operational influence over a firm, but could be relatively junior staff in comparison to the other staff comprising PRA senior managers. We do not think this is the PRA’s objective and our members consider that this would be a disproportionate outcome. We recommend that a position closer to the current Approved Persons Regime should be retained. The application of the test to NEDs in holding companies should also be clarified.

In short, our members believe the “significant influence” concept needs to be clarified considerably in a manner and within a timeframe that assists members with their design principles for implementation and its scope confined to staff that regularly exert material management influence over the regulated activities of the UK firm (i.e. the concept should only apply to parent level staff in keeping with the current application of CF1 and CF2 parent level significant influence function (**SIF**) roles).

Nor do we regard it as necessary that a senior manager should report to a board member. Firms need the flexibility as to whom they select as senior managers, so long as all the appropriate functions are covered.

² At Annex 7.2, proposed PRA Rule 5.2

Our members request that the intended scope of the Group Entity Senior Manager function is clarified by the PRA through additional guidance. Please see also our response to question 7.

Question 2 (PRA): Do you agree with the PRA's proposal that firms should not be required to have individuals approved to perform specific SMFs where these relate to committees of functions which they are not required to have and have elected not to have?

Our members agree with the PRA's proposal in this regard.

Question 3 (PRA): Do you agree with the PRA's proposed quantitative criteria to identify the Head of key business area function?

Our members are broadly supportive of the proposed proportionate approach to determining whether or not a business area is considered to be key. We would welcome confirmation that firms have the flexibility to assign any Head of key business area function to an appropriate senior manager at the highest level possible within an organisation, rather than to those further down the management chain. This would align with the intention to focus more responsibility on fewer senior leaders.

Footnote 17 of the Consultation states that "an individual will require approval as a Head of a key business area if they manage an area with gross total assets of £10bn or more which accounts for either 20% or more of the firm's gross revenue or, where the firm is part of a group, 20% or more of the group's gross revenue." This reading would limit this category of senior person to only the largest firms, which our members support, although this proportionate approach is not supported by the draft PRA rulebook at paragraph 3.6(1). Our members understand that the PRA intends the test to work cumulatively and not in the alternative, and would appreciate confirmation that this is the case.

Question 4 (PRA): Do you agree with the PRA's proposed list of Prescribed Responsibilities? and

Question 5 (PRA): Do you agree with the PRA's proposed approach to the allocation of responsibilities?

We have three general observations:

1. Our members are concerned that the Prescribed Responsibilities are in many cases too universal in their remit to be allocated to one individual. The management structures of many of our members are such that certain of the Prescribed Responsibilities would appropriately, given good corporate governance principles, span more than one individual. By way of example only (and the same principle applies to most of the Prescribed

Responsibilities), our members do not believe that it is right or practical to suggest that only one person is ultimately responsible for “embedding the firm’s culture and standards in relation to the carrying on of its business and the behaviours of its staff in the day-to-day management of the firm” (Prescribed Responsibility 11).

Our members are concerned that any attempt to make one person responsible for this is not consistent with their current efforts to ensure that all employees should be responsible for culture and ethics-related issues by taking personal responsibility to act appropriately, and that all senior management should share the responsibility of permeating an appropriate culture in their bank from the top down. Similarly, we do not think that it is right for one person with Prescribed Responsibility 8 (currently proposed by the PRA to be chair of the board) to be responsible for ensuring that every whistle-blower is protected from detrimental treatment. It would seem more appropriate for the responsibility to cover overseeing the firm’s institutional efforts to ensure that whistle-blowers are treated fairly, including through the implementation of appropriate policies and procedures.

2. Our members are concerned that certain of the Prescribed Responsibilities would directly cut across two or more senior managers and should not be allocated to one rather than another. For example, Prescribed Responsibility 17 (“if the firm carries out proprietary trading, the firm’s proprietary trading activities”) could apply to a number of business areas, each of which may be headed by a different senior manager approved under SMF6. It would be inappropriate both (i) for one individual to have responsibility for proprietary trading within a business area not under his/her control and (ii) for an individual in charge of a business area that does carry out proprietary trading not to be responsible for proprietary trading within his/her business area.
3. Our members are concerned that many of the Prescribed Responsibilities are too broadly drafted and too imprecise in their scope. This is particularly concerning given the reverse burden of proof applicable to senior managers. To use the example of Prescribed Responsibility 11 (already mentioned above), namely “embedding the firm’s culture and standards in relation to the carrying on of its business and the behaviours of its staff in the day-to-day management of the firm”, it is very unclear what steps an individual would need to take in order to fulfil this responsibility, and how such an individual could rebut a presumption of responsibility should a problem arise. All Prescribed Responsibilities should be very clearly defined, leaving as little room as possible for disagreements as to their scope – especially given that such disagreements will almost invariably arise in the context of enforcement proceedings. The PRA should also be precise in its drafting in terms of the use of the words “ensuring” and “overseeing”, as clear definitions of responsibility and accountability are needed.

Shared Senior Management Functions

Our members understand the PRA's desire to ensure that where two or more individuals perform a job share then each individual is jointly responsible for that function (see paragraph 2.20 of the Consultation). However, our members believe that a clearer distinction should be drawn between two or more individuals who perform a "true" job share (in the sense that each individual does the same job but on different days or at different times) and organisational structures such as co-heads (where two or more individuals both work full time and have responsibility for particular aspects of a job) or other instances of potentially overlapping responsibilities arising from the use of matrix management structures.

Where the responsibilities of the co-heads are clearly delineated – again, by way of example only, where departmental co-heads are responsible for different areas within the same department - perhaps one co-head covers Asia and one co-head covers EMEA - then it would be wrong for the EMEA co-head to be jointly responsible for actions taken solely in respect of Asia, and *vice versa*. However, this is clearly contemplated by paragraphs 2.14 to 2.16 of the PRA Supervisory Statement at Annex 9.1 which states that, "Where two or more individuals share an SMF, each will be individually responsible for all the responsibilities conferred by that function." The fact that the way in which the tasks or responsibilities have been divided will have a bearing on each individual's ability to avoid liability by showing that s/he took all reasonable steps does not alter the basic position and in our member's view does not go far enough. Our members understand that the policy intention was that where co-heads' roles and responsibilities are clearly delineated (in form as well as substance) and there is a failure within one co-head's area of responsibility, the clear division of responsibilities should in itself be *prima facie* evidence that the other co-head is not liable for the failure. If this is the case, our members request that this be clarified.

Additionally, joint liability may result in putting co-heads in conflict with each other (as they attempt to manage their risk of being responsible for something done by the other) rather than working in a collaborative manner, and this will have a negative impact on the overall risk management of the business. 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.

With respect to Prescribed Responsibility 17 (if the firm carries out proprietary trading, the firm's proprietary trading activities), our members request clarification as to what the PRA consider falls within "proprietary trading". At present it is unclear whether it is intended to capture discrete business lines or profit centres within a firm or whether the term also captures market making or dealing as principal where the firm trades on its own inventory.

Position of the Chairman

Our members note that there must be a senior manager responsible for the induction, training and professional development of all persons performing senior management functions on behalf of the firm and all members of the firm's management body. The Consultation allocates this to the Chairman.

Our members are concerned that this proposal extends the Chairman's current responsibilities under the UK Corporate Governance Code to include leading on the development of the firm's culture and standards, whistleblowing, plus induction and training of all approved senior managers (i.e. executive and non-executive). It serves to blur the line between the Chairman's executive and non-executive responsibilities. Our members request guidance from the PRA on whether this was the intended application of the rules. We do not believe that the Chairman should be responsible for management activity.

Overlap between Prescribed Responsibilities

In addition to the points above, there are overlaps between the various Prescribed Responsibilities, which need to be clarified. For example (and there are other such examples), Prescribed Responsibilities 3 and 9 overlap with Prescribed Responsibility 1. It would be helpful if the PRA could explain how these work together.

Question 6 (FCA): Does the proposed list of FCA SMFs capture the appropriate set of roles? If not: (a) are there any other roles which the FCA should consider specifying as SMFs?; (b) are there any proposed SMFs which the FCA should consider excluding?

NEDs

Although this is an FCA question, our points on NEDs apply equally to the PRA.

The Senior Managers Regime does not require the regulator to designate the function of acting as a NED as an SMF. NEDs do not "manage" in the normal, dictionary meaning of the word.

When a breach of rules by the firm occurs, it is unlikely to be as a direct result of an act or omission of a NED, because the role of a NED as currently understood in English law and corporate governance principles is to challenge constructively, help develop proposals on the bank's strategy and scrutinise the performance of management rather than have day to day oversight of the business.

The presumption of responsibility for a NED may in practice impose significant and otherwise unnecessary bureaucracy on the NED, as s/he will naturally want to do everything possible to demonstrate that he or she has acted properly. This will divert attention from the proper operation of the board and good governance.

The presumption of responsibility exposes a NED to greater personal liability than is the case under current law and regulation. This and the regime in general carries a risk that it will have the unintended consequence of making the role of a NED in a bank unattractive and deterring high quality, risk-averse individuals, of the type that the Government, regulators and shareholders want to be NEDs of banks, from agreeing to carry out those roles.

If NEDs are to be subject to the regime, the PRA and FCA should ensure that the Conduct Rules and related guidance are tailored appropriately to reflect the position of NEDs and provide clarity about what is expected of them. What is expected of them must relate only to functions such as oversight including, for example, Chairmanship of the Risk, Audit or Remuneration Committee. Our members are concerned that the proposed guidance on the FCA's Conduct Rules does not address the position of NEDs at all, nor the specific issues they will face.

Further there is real concern that the proposed regime could potentially undermine the current UK unitary board model and the principle of collective board responsibility long enshrined in the Companies Act and the UK Corporate Governance Code. By allocating specific responsibilities to individual NEDs the proposed regime could potentially alter the current nature of NED and executive director relationships and impact the current collaborative and challenge-based board decision-making processes as individual NEDs seek to protect their individual personal liability. We recommend the implications of the proposals in this area are explored further to avoid any unintended consequences and that the PRA and FCA should work with the industry to provide more guidance on this issue.

SMF18

Our members request clarification from the FCA as to the intended scope of SMF18 (Significant Responsibility SMF). In particular, without additional guidance, perhaps in relation to the proposed FCA tables, it is unclear which individuals this SMF should capture. Please see also our responses to questions 5 and 9.

Question 7 (FCA): Does the proposed list of Key Functions adequately cover those likely to be carried out by relevant firms? Which functions should be added or removed?

Our members question whether the 27 Key Functions are appropriate, as they impose a single set of functions which must be applied across entities with very different management structures. Our members consider that an appropriate approach (which may be what the FCA intends) would be for each entity to provide and agree with the FCA a responsibility map setting out which of the functions within its organisation it considers to be key. This would recognise that firms can have different management structures and that existing management structures can be preserved.

The Key Functions need to be more clearly defined, or what each function is intended to cover clarified with guidance. At present, and by way of example only, it is unclear what the "trading for clients" and "customer service" Key Functions cover.

Additionally, the terminology used to define certain of the functions is not consistent and potentially could result in functions having unintended differences in scope. For example, 'retail sales' is defined using the FCA term

'investment': "this means the *selling* of any *investment* to a *retail customer*. It includes savings accounts." However, 'customer services' is defined using the phrase 'dealing with clients': "this means dealing with *clients* after the point of sale, including queries and fulfilment of *client* requests." As it appears that the FCA definition of investment might not include consumer credit products, the application of the retail sales function would be narrower than that of the customer service function. In the case of the example set out above, it is suggested that the definition of retail sales be linked to dealing with retail customers, to bring it into line with the customer service function. Our members also question whether "Middle Office" is a sufficiently precise term.

Please see also our responses to questions 1, 4 and 5.

Question 8 (PRA and FCA): Do the combined PRA/FCA proposed SMFs cover the key decision-makers in relevant firms?

Yes.

Question 9 (FCA): Do you agree with the FCA's proposed approach to the allocation of responsibilities?

Our members have found it difficult to understand the FCA's draft rules relating to the allocation of responsibilities. Most of this uncertainty relates to the tables in the draft FCA rules at SYSC 4.5.16 R and SYSC 4.5.18 G.

In relation to the proposed table included at SYSC 4.5.16 R, the following concerns have been identified:

- the table fails to make any reference to Prescribed Responsibilities 9 to 18. We are unclear as to why these Prescribed Responsibilities have been omitted from the table and question why it is necessary to refer to any Prescribed Responsibilities at all (as they are prescribed by the PRA in any event);
- Part One of the table provides an explanation for the first three Prescribed Responsibilities but then no explanation for the remaining five Prescribed Responsibilities;
- sub-part (1) of Part Two of the table is described as the function of having overall responsibility for any part of the various specified risks, most of which are referred to elsewhere in the existing SYSC sourcebook. It is unclear why reference to these risks needs to be made here; and
- sub-part (3) of Part Two of the table is described as "the function of having overall responsibility for any other activities, business areas or management functions of the firm". Our members are unclear as to what is intended to be covered within this category of functions and would ask the FCA to clarify its nature and extent.

Our members' concerns with the proposed table included at SYSC 4.5.18 G are as follows:

- our members do not understand the underlying purpose of the division of senior management responsibilities into four categories; and
- there is significant overlap between the four categories in the table (which is acknowledged in Note 2 at the end of the table). For example, category (2) captures all of the responsibilities in Part Two of the table at draft SYSC 4.5.16 R (which includes the Key Functions) and category (3) also separately captures the Key Functions. Additionally, category (4) captures all of the Prescribed Responsibilities but Prescribed Responsibilities 1 to 8 are also captured in category (1).

In light of the above issues, our members would ask the FCA to revisit their responsibility framework in SYSC 4.5, with a view to simplifying it so that its focus is limited to the Key Functions specified in the proposed table in SUP 10C Annex 1R. Our members believe that this approach would lead to a clearer and more transparent responsibility framework which provided firms with sufficient flexibility when allocating senior management responsibilities. We would be happy to discuss this further with the FCA.

Question 10 (PRA and FCA): Do you agree with the PRA's and FCA's proposals on Statements of Responsibilities? and

Question 11 (PRA and FCA): Do you agree with the PRA's and FCA's proposal to require firms to produce a Responsibilities Map?

Our members think that there are insufficient rules and guidance in the PRA's and FCA's proposed rules on the required content of Statements of Responsibilities. This is likely to lead to considerable uncertainty (and, we would argue, disproportionate time and expense) in the industry trying to determine what is an appropriate nature of content and settle that with senior managers within the scope of the regime.

This lack of clear guidance may also lead to firms and senior managers taking a defensive approach, leading to overly detailed documents which are too focussed on managing risk. There is also likely to be significant divergence between firms as to the content of the documents, resulting in inconsistent approaches to these important documents. Our members would not propose a prescribed form of document, which is likely to be too inflexible to reflect genuine differences between firms, but would welcome additional guidance to set benchmarks for what content should be included.

It would also be helpful to understand how often the Responsibilities Map should be updated. Paragraph 2.67 of the Consultation notes that the regulators will require firms to "prepare, maintain and update" a Responsibilities Map, and paragraph 7.25 notes that the "PRA expects the content in these documents to remain dynamic". A requirement to keep Responsibilities Maps and Statements of Responsibilities continuously up-to-

date would be unworkable due to the frequent nature of changes, particularly in large organisations. Our members would appreciate it if the regulators clarified their expectations and would suggest that such documents should be updated at least annually and whenever there is a significant change of which the regulator would expect notice (with guidance provided as to what will be considered 'significant' for these purposes).

The proposed rules specify that an in-scope firm's Responsibilities Map must include, among other things, the names of all the *firm's approved persons*, *senior management* and *senior personnel* and details of the responsibilities which they hold. This indicates that some individuals in the top layer of the certified person population should be included in the Responsibilities Map (in addition to all senior managers) but the definitions used make it difficult to understand how far down into this population in terms of reporting lines this goes. Our members request that this is clarified by the PRA/FCA as well as the reasons for extending the scope of the Responsibilities Map beyond the population of senior managers.

Senior managers will have Statements of Responsibilities, and quite possibly be required to complete one or more attestations which may already be in place when the new regime commences. While we accept that some attestations are there to deal with short-term remediation issues, others are really part of what will become the Statements of Responsibilities of those senior managers; they should be included as such, and the relevant attestation should fall away as and when the new Statement of Responsibilities comes into force.

We would also ask for consistency across supervisors as to the required content of Statements of Responsibilities, except to the extent that differences between firms' business models necessitate differences in their Statements of Responsibilities. Please see also our response to question 4.

Question 12: Do you agree with the PRA's and FCA's proposed approach to handover arrangements?

Our members agree that some form of sensible handover is necessary, and welcome the fact that the Consultation does not propose formal handover certificates. Such documents would require legal input and would, therefore become risk mitigation or transfer tools rather than useful handover documents. In some cases, they may become part of the negotiation of a settlement agreement, which further risks impairing their usefulness. In other cases they may make settlement agreements difficult to complete.

However some of our members are concerned that outgoing senior managers may feel under pressure not to highlight areas of concern over which they have had responsibility and may lead to less than full and frank disclosure of issues defeating the purpose of the handover documents or handover arrangements.

Our members consider that the present 100 day review period should be sufficient for senior managers to understand the issues facing their product/business.

Question 13 (PRA): Do you agree with the proposals set out in the PRA's proposed Statement of Policy on the Draft statement of the PRA's policy on conditions, time-limits and variations of approval?

Our members broadly agree, but think that the detail needs clarifying.

Question 14 (FCA): Do you agree with the proposals set out in the FCA's proposed statements of policy contained in draft chapters SUPC and DEPP 8?

In addition to the responses set out in Questions 10, 11 and 12, our members have the following points:

- SUP 10C.10.9 G (handover certificate and reasonable summary of handover material to be included in the application for approval). Our members question how this will practically apply in scenarios where the firm is recruiting in advance of the departure of the previous role holder.
- SUP 10C.10.14 G. Our members need to understand the intention behind the guidance, the definition of 'function' and the extent to which the firm is expected to assess the competence and qualifications of individuals reporting to the senior manager as part of the assessment of the senior manager's fitness and propriety. It would also potentially increase the activity required at approval stage.
- SUP 10C.12.18 and 10C.12.22. Our members need to understand what is intended by the reference to 'significant change' in relation to the requirement to update Statements of Responsibilities (and by extension, the Responsibilities Map).

Question 15 (PRA): Do you agree with the PRA's proposed approach to defining certification functions?

Broadly, yes.

However, we note that the concept of unforeseen absence cover is permitted only for a period of less than two weeks in circumstances where the absence was reasonably unforeseen (paragraph 3.18 of the Consultation). Our members consider that this is not long enough for the firm to be able to determine whether a certified person is going to be unable to perform the role for an extended period and, if so, to: (i) identify a suitable person to undertake that role; (ii) assess that person's fitness and propriety; and (iii) issue that person with a certificate. Our members further believe that for the certification process to operate effectively, firms will have to perform thorough and

detailed assessments of the relevant individual. However, if vacancies must be filled within two weeks (being the amount of time the relevant role can be performed by someone who is not certified) firms will have to shorten the certification process with the clear risk of performing inadequate checks.

Our members note that the PRA's draft supervisory statement in Annex 9.3 makes clear, at paragraph 3.2 that "where a firm needs to fill a vacancy which is a certification function and which could not have reasonably been foreseen, the PRA recognises that it may not be reasonable to expect the firm to obtain references prior to issuing a certificate. In such cases, firms should take up the references as soon as reasonably practicable and, if the references obtained raise concerns about the person's fitness and propriety, the firm should revisit its decision to issue the person with a certificate." However, obtaining references will not be the only step in the certification process that could take longer than two weeks. The process will also include background checks (CRB/DBS or equivalent agencies) and other credit checks and these will be similarly time consuming (and in some cases impractical) especially where they involve another country.

Crucially, this proposed two-week period is inconsistent with both the current Approved Persons Regime and the proposed Senior Managers Regime. The Approved Persons Regime (at SUP 10B.5) currently allows a period of 12 weeks for temporary coverage of SIFs. This time period is preserved in the proposed Senior Managers Regime (at proposed SUP 10C.3.10 R (for the FCA) and at proposed Rule. 2.3(3) of the Senior Management Functions annex in Annex 7.2 (for the PRA)). Our members consider that the current system under the Approved Persons Regime works effectively and suggest that the timeframe for unforeseen absence under the Certification Regime therefore be extended to mirror the time period provided for in the current regime and in the proposed Senior Managers Regime.

Our members suggest that the PRA should provide that an individual can perform a certified function while the firm completes the certification process (and not just during the period whilst the firm is awaiting references as is currently suggested). Our members would be happy to work with the PRA to discuss suitable parameters and checks required to implement this.

Our members are also concerned that the Certification Regime, as currently proposed, may have a significant impact on their ability to use temporary contractors to perform roles. At present many of our members rely on the use of contractors to perform short term identifiable roles within the firm. These contractors come both from major consultancy practices and from small, even one-person businesses. Our members are concerned that the Certification Regime would unjustifiably impair their ability to operate this very necessary business model. Contractors are sometimes required on short notice to cover a pressing need in the business. It will often not be practicable to delay the start of the contractor's engagement whilst the certification process is conducted. Indeed, by the time the certification process is complete the circumstances that necessitated bringing in a contractor may have passed.

Therefore, our members consider that the PRA and FCA³ should propose a more practical arrangement to deal with contractors who would otherwise need to be certified. One option might be for contractors to have a “standing” annual certificate in place issued by an independent third party (approved or sanctioned by the regulators or the regulators themselves), which performs the certification review for the contractor each year. Such certification could then be used by the contractor to perform a certified role at any regulated firm (provided the certificate covers the role they are being contracted for). However, our members would not want any such solution to preclude firms from carrying out their own certification process should they wish not to rely on a certificate issued by a third party other than the regulators themselves.

Finally, our members think that if industry agreement is not achieved on which roles fall within the scope of the Certification Regime, some firms could be unfairly disadvantaged in certain role hiring due to increased checks on roles where other firms have a less stringent level of screening.

Question 16 (FCA): Do you agree with the FCA’s proposed approach to defining certification functions?

The scope of the FCA Certification Regime applies to the extent a “person performing that function is dealing with a client in the United Kingdom from an establishment overseas” under the proposed SYSC 5.2.16 R (2). Our members would value guidance from the FCA to clarify what is meant by “dealing with a client in the United Kingdom”.

For any individual overseas to be in scope as either a senior manager or a certified person, we suggest that there needs to be a direct nexus to the UK implementation of any decision of theirs. We also suggest that for a certified person based overseas, his/her line manager will be also in scope if that line manager is in the UK (and so on up the UK chain of management); but, if that line manager is overseas, then only that line manager, and no-one further up the management chain overseas, should be in scope. Some examples follow.

Whilst the concept of “dealing” is clarified in proposed SYSC 5.2.17 R as including “having contact with customers”, this would seem to lead to a result where minimal contact with a customer in the UK could result in a need to have a staff member primarily based outside the UK certified under the FCA regime. Would a French banker based in Paris have to be certified if he calls a client in London on a one-off basis and discusses a transaction? Or if that same French banker travelled to London for a week of meetings and at those meetings discussed the transaction with clients living in the UK? Our members would consider it appropriate for the contact with customers to need to involve some degree of permanence, regularity or frequency before the application of the Certification Regime is triggered, and that this should be clarified in guidance.

³ This point applies equally to both regulators

The certification test as currently proposed extends to individuals managing a certified person.

It is not clear that staff who manage certified persons subject to a qualification requirement can themselves cause a consumer significant harm and should thus also be caught by the regime. This risk has already been mitigated against by requiring the certified person to be properly qualified before providing mortgage or retail investment advice.

In respect of certified persons outside the UK, this extension potentially brings whole reporting lines within the regime that would not otherwise be caught. Taking again an example of a banker in Paris, who deals regularly with customers in the UK and therefore falls within the Certification Regime, if that banker has a manager in France, the manager and (at least) the manager's manager will also fall within the Certification Regime. Neither of these individuals will have any real nexus with the UK or with clients in the UK. In our members' view this extends the Certification Regime too broadly, as well as being in practical terms unenforceable, and our members propose that the Certification Regime with respect to individuals located outside the UK be limited to individuals that deal directly with customers in the UK only, and not include any other individuals in the local reporting line beyond a maximum of one level up the management chain. Alternatively, there would be a UK senior manager who would take responsibility for the overseas individuals.

Neither the Consultation nor the proposed FCA rules explicitly state that current CF30 approved individuals who are not senior managers will be included within the population of certified persons for a relevant firm and we would be grateful if the FCA could clarify its intentions in this regard.

Additionally, we note that the last of the specified categories of individuals covered by the FCA's Certification Regime (functions that have a material impact on risk) under proposed SYSC 5.2.20 R (7) is defined by reference to employees performing functions that: (i) have a material impact on the risk profile of the firm (which cross-refers to the 'material risk taker' definition under the EU remuneration regulation); and (ii) involve, or might involve, a risk of significant harm to the firm or any of its customers. It is unclear what the second limb of this definition is intended to add to the first limb. In particular, it is difficult to envisage circumstances where the functions performed by an individual caught under the first limb would not also involve a risk of significant harm to either the firm or its customers under the second limb. We would be grateful if the FCA could clarify its intentions as regards the scope of SYSC 5.2.20 R (7).

Our members think that the FCA should introduce the (previously proposed) CF31 mortgage advisor role for firms subject to the on-going Approved Persons Regime. If this is not done, there is a risk of creating regulatory arbitrage, creating disparity between in-scope and out of scope firms, which may also encourage mortgage advisors to leave in scope firms for employment with out of scope firms.

Question 17 (FCA): Do you agree with the FCA's proposed approach to rules and guidance on fitness and propriety?

Please see our responses to questions 18, 19 and 22.

Questions 18 (PRA): Do you agree with the PRA's proposed rules and supervisory statement on standards of fitness and propriety? and

Question 19 (PRA): Do you agree with the FCA and PRA proposed requirements on: (a) criminal record checks; and (b) the provision of references?

Some of our members are very concerned about their access to information to perform the necessary fitness and propriety checks on certified staff. Under the rules as proposed they will not have access to the full range of information currently available to the PRA/FCA when granting approvals under the Approved Persons Regime, for example records of previous disciplinary action in respect of certified individuals. This will leave our members with a possible "blind spot" when making a fitness and propriety assessment, and thereby the overall standard of scrutiny over individuals in the industry will be reduced. They are concerned that individuals with a prior track record of regulatory failings could move around the industry with a lower chance of detection than under the current regime – a concern that is acknowledged in the Consultation. This would be the wrong outcome and, we consider, contrary to the expectations of the PCBS.

Our members do not think that reliance on regulatory references from previous employers will be sufficient on its own to bridge this gap in the regime. Nor do we see any reason to restrict this to the previous five years' employment record. There is already concern over the level of disclosure in references and the risks that are run by being required to increasingly include more detailed background "colour" in references in relation to, for example, past disciplinary offences. Our members do not believe that the proposed role for references in the new regime will improve this situation. Rather, our members are concerned that it is likely further to reduce the quality and completeness of references and this will be a particular problem unless clear guidance is issued as to the level of information on conduct breaches and performance, to ensure a consistent playing field.

The obligation to file Form C de-registrations presently acts as an important benchmark for the information provided by firms to other firms in regulatory references, and this would no longer apply under the new regime. In addition, where an employee moves from a firm not subject to the new rules (for example, an insurance company or fund manager) there will be no requirement on that firm to provide a regulatory reference as it will not be subject to the new rules. More generally, our members are concerned that because the new rules will apply to some financial services firms and not others there is a risk that certain middle management roles (for example marketing and group finance) in firms that remain under the old regime will become more sought after and the positions with firms covered by the new

rules will become harder to fill with suitable candidates. We would request that the FCA implements and maintains a standard template for regulatory references that firms are obliged to use, with a view to improving the consistency of the information on individuals that is shared between firms.

The abolition of the Approved Persons Regime in relation to banks subject to the new Certification Regime is also of concern to our members in that it means that individuals will no longer be approved by the regulators. The UK regulators enjoy a high reputation internationally, and the fact that an individual has been approved by the PRA or the FCA gives transparency to customers and to prospective employers. While recognising that the Approved Persons Regime is to be abolished, it will be important to maintain standards under the new regime.

In light of the above, our members request that the PRA and FCA propose a revision to the new regime to fill this gap in the certification process (whilst noting that it would clearly be preferable to do this without the need to make any further legislative amendments).

Our members propose that the PRA and FCA continue to perform an ongoing but residual role in relation to the certification process as discussed below.

One alternative is that where the PRA or FCA currently has access to information in assessing applications under the Approved Persons Regime but that information is not available to firms performing certifications, the PRA and FCA could perform those checks in respect of information not available to firms and report the findings to the firm, whereupon the firm would be responsible for making its own assessment of the implications in terms of fitness and propriety. In order to avoid any confidentiality or data protection related issues, firms could require potential candidates to give their consent to the PRA or FCA disclosing the information about the individual held by the regulator (in much the same way individuals currently give their consent to various other background checks being run).

Alternatively, each of the PRA and FCA could continue to hold information about individuals and raise particular concerns it has about the certification of an individual with the relevant firm. This could be done by the relevant regulator notifying the firm that in light of the information available to the regulator it considers that enhanced due diligence is required before the firm makes their decision to certify, or, in exceptional circumstances, by use of a right to veto a firm's decision to certify an individual.

A separate but related point is to do with individuals seconded from overseas parent companies. It is not unusual for such individuals to have worked for many years for the parent and in a number of different jurisdictions. It would be helpful if the regulators were able to make provisions for the UK regulated firms to be able to rely on references provided by their parent company, where the UK regulated firm judges the employment practices of such parent company to be of an appropriately high standard.

Criminal checks

In relation to the Criminal Records check requirement for SMFs, the requirement to search for records against the DBS could be problematic. We note that the DBS is at present unable to provide basic disclosures, despite the previous commitment to provide them by the Criminal Record Bureau in 2012.

In addition we have concerns about the practical implementation of conducting checks outside the UK as in certain countries it is not legally possible to request the information locally. It is unclear which body is intended in the Consultation reference to checking with the 'regulatory body' and whether this will be practically or legally possible in all jurisdictions.

At paragraph 7.31 the PRA notes that the intention of the Banking Standards Review Council (**BSRC**) to support best practice. We would welcome the use of the BSRC to support the consistency of the fitness and propriety testing part of the Certification Regime and would welcome clarification from the regulators on how they envisage this working.

Question 20 (PRA): Do you agree with the proposed scope of the PRA Conduct Rules?

Our members are concerned by the failure of the PRA to replicate in its new Supervisory Statement all of its existing APER guidance for approved persons consistent with what the FCA is proposing to do in its new Code of Conduct Sourcebook. For example, it is unclear why the PRA is proposing that there be no guidance on the application of Individual Conduct Rule 1 (You must act with integrity). In paragraph 5.2 it indicates that the rules can 'act to promote more positive behaviours that actively support the regulators' statutory objectives' – it therefore is important to include examples of positive behaviours to model what 'good' looks like.

With respect to a firm's requirement to report breaches (or suspected breaches) of the Conduct Rules, our members note that the present draft rules do not apply a materiality threshold. Under the current regime firms are required to report material or significant breaches to the appropriate regulator and without this qualifier there is the potential for firms to feel compelled to report every breach (or suspected breach) however minor. In particular, when considering whether or not to report a suspected breach, our members consider that a materiality threshold is vital to ensure that firms do not feel required to report every complaint, or slightly unsatisfactory phone conversation or other event that might trigger a suspicion that there may have been, for example, a breach of Rule 2 (to act with due skill, care and diligence) or Rule 4 (to pay due regard to the interests of customers and treat them fairly) of the Conduct Rules. We note that in Annex 9, section 9.4.1 (Notification of Breaches) there is a reference to "reasonable grounds" but suggest that this needs further clarification.

In the case of senior managers the breach or suspected breach has to be reported within 7 business days. We would welcome confirmation that, in the event that the subsequent investigation (which is highly unlikely to have been completed during the 7 day period) eventually exonerates the senior manager in question, all relevant reports will be expunged from the regulators' records.

Question 21 (FCA): Is this the best possible definition of scope that fulfils the objectives set out in paragraph 5.11? Are there alternatives that would better meet these objectives?

Our members generally agree with the excluded list, subject to our response to question 22. However, our members think that the FCA should keep its list of excepted employees under periodic review and to be open to request on the part of in-scope firms to exclude other categories of employee from the scope of its Conduct Rules on a case by case basis.

Question 22 (FCA): Do you believe that rules should apply to all people in the firm who are directly involved in financial services business?

Our members have differing views about the appropriate scope of the Conduct Rules.

Some of our members propose that they be cut back to the scope of the FCA's currently proposed Certification Regime, similarly to the PRA, with the Certification Regime being scaled back accordingly. This is proposed on the basis that it would focus on the individuals who are able to cause real harm to firms and to customers and on the basis that the proposed scope would require extensive and costly compliance processes that add little real value.

There is also a view from some members that the benefits intended from across-the-board application can be achieved more simply by internal means without requiring direct regulatory oversight.

Other members understand the FCA's desire for the scope of the Conduct Rules to be broad, but would propose that their overall application should be qualified by a proportionality rule that requires the rules to apply to a staff member proportionately to their role, seniority and ability to comply with the requirements.

There is also some support for the idea of the Conduct Rules applying to all staff, for reassurance of simplicity of training and communication.

The associated procedures for applying the Conduct Rules to a wide population would certainly be operationally demanding in terms of establishing and maintaining processes; keeping meaningful, consistent and up-to-date records; monitoring, recording and reporting suspected and actual breaches of the Conduct Rules.

Some members are concerned by the application of FCA Rule 4 (You must pay due regard to the interests of customers and treat them fairly) and Rule 5 (You must observe proper standards of market conduct) to back office staff, such as HR, Technology or Operations. It is difficult to understand the extent of the obligation to “pay due regard to the interests of customers and treat them fairly”, when such staff will have limited or no contact with customers of the firm, unless it is the case that, precisely because they have limited or no contact, the notion of “due” regard becomes a much reduced obligation, proportionate to the risk. Similarly, in the case of Rule 5, the idea that such staff need to understand and be trained in proper standards of market conduct in addition to understanding and being bound by the firm’s dealing policy is quite difficult to enforce. In these cases perhaps an overriding proportionality principle should prevail, such that that certain members of staff who have no direct contact with customers should have very limited obligations to comply with Rule 4 and Rule 5 (beyond the general law on market abuse) given their limited relevance, if any, to their function.

In respect of FCA Rule 4, our members also question how this will apply to members of the firm’s legal or internal audit department. Lawyers and auditors have their own professional code of conduct which should be sufficient to ensure appropriate conduct.

In short, at a minimum, our members request that more guidance is provided in respect of the application of Rules 4 and 5 to in-scope staff that do not face customers or have contact with market participants.

Further, and in order to assist our members in training and informing junior staff to whom the FCA Conduct Rules apply, it would be helpful if the FCA were to provide more guidance as to what types of conduct might be considered to be a breach of the relevant rule by individuals who are not senior managers or certified persons. This would also be useful given the administrative burden that will be attached to the new reporting requirements. Therefore, our members would value a list of criteria or range of factors that the FCA will consider when making their assessments of compliance with the rules to assist firms establish whether an individual might be in breach (similar perhaps to the guidance provided in the existing Code of Practice in relation to the rules in APER). As it is, with the exception of one CASS example, all of the proposed FCA guidance on Rule 4 is related to direct client engagement and interaction, and it is difficult to understand how this applies to non-client facing staff.

It would also be helpful if the FCA could provide guidance as to the level of training and information it considers appropriate for a firm to provide to junior staff members, who are generally dependent on existing firm compliance policies and procedures to understand what their duties are under the regulatory system. Would it be appropriate for the Conduct Rules to include a statement that behaviour consistent with the firm’s relevant compliance policies and procedures would constitute a rebuttable presumption that the individual had complied with their obligations under the Conduct Rules (provided such policies and procedures are themselves consistent with the Conduct Rules)?

Please see also our response to question 16 in respect of the territorial scope of the FCA Certification Regime, which is equally applicable to the territorial scope of the FCA's Conduct Rules.

Question 23 (FCA): Are there any functions that you believe should be added or removed from the list at 5.13 because they are roles that are, or are not, the same as roles performed by those working in non-financial services firms?

No.

Question 24 (PRA and FCA): Do you agree that these are the right Conduct Rules for both regulators to introduce, taking into account the objectives set out in paragraph 5.16?

To some extent we agree that these are the right Conduct Rules but believe they apply too widely. Please see our responses to questions 22 and 26.

Question 25 (FCA): Do you agree that these are the right additional FCA-specific rules?

Please see our responses to questions 22, 24 and 26.

Question 26 (FCA): Does the guidance attached at Annex 6 give helpful clarity on the behaviours the FCA expects under each of the rules?

Our members are concerned as to how, in practice, the rules would apply to non-customer facing roles and what that would mean for training/learning and development solutions.

Our members are concerned that APER 4.4.4 E (which requires approved persons to report information that would be of material significance to a regulator promptly in accordance with a firm's internal escalation procedures) has not been retained in C-CON. Our members suggest retaining APER 4.4.4 E at a minimum for certified staff.

While the guidance in Annex 6 is helpful, in some rules a positive description of behaviour is given, along with the examples of activities that would breach the rule; however others (e.g. Rule 1 – Acting with integrity) is only described in terms of breaches. It is important that positive examples are given to support an understanding of compliance with the rules. Additionally there would appear to be significant overlap between the rules. For example, a number of the examples of breaches given for Rules 1 and 2 could equally fit under Rule 4 – paying due regard to the customers.

Please see also our discussion on the lack of tailoring of the code of conduct as it applies to NEDs in our response to question 6.

Question 27 (PRA and FCA): Do you agree that individuals already performing the relevant controlled functions within their existing approvals should be grandfathered to the new SMF?

Our members agree.

Question 28 (PRA and FCA): How much time do you think is necessary to implement the new SMR rules, including the preparations of Statements of Responsibilities and Responsibilities Maps? Please explain what activities would be required to prepare for implementation, and the time required for each activity.

The implementation of these rules should not be assessed in isolation. Our members are faced with significant regulatory changes and resources (including for example, staff dedicated to building IT systems and infrastructure) are limited. Notwithstanding this, our members are committed to implementing the new rules fully and effectively in order to meet the underlying objective of improved personal accountability.

Member firms have concerns about the length of time which the PRA and the FCA is suggesting be made available to relevant firms to implement the Senior Managers Regime, particularly those operating through foreign branches who have will not have a clear view of what is required of them until the relevant consultation is released next month. This reflects the fact that practical implementation is expected to be complex and to require the following activities to be completed:

- drafting and agreeing Statements of Responsibilities for every senior manager. Our members expect this task to involve extensive negotiation with individual senior managers;
- development of a Responsibilities Map for each relevant firm in a form that addresses the requirements of the PRA and the FCA;
- development and implementation of internal processes to support the annual written certificate of compliance to be provided by the Board of each relevant firm;
- consideration of whether any changes should be made to current governance or management reporting arrangements;
- agreeing and implementing a governance framework around the operation of the new regime including a mechanism to resolve disputes between employees and the firm, or between employees (for example in respect of content of statement of responsibilities and handover statements);
- regulatory approval of any senior managers who do not qualify for grandfathering under the finalised transitional arrangements;

- training of senior managers on their obligations under the new regulatory framework (including their obligations under the Conduct Rules); and
- development of internal processes to support the new handover arrangements for senior managers.

The complexity of this task will be further increased in the case of some of our members by the fact that they have a group structure which includes more than one relevant firm as well as UK branches of banks and investment firms headquartered outside the UK and UK regulated firms (such as fund managers) which do not fall within the scope of the Senior Managers Regime. This will inevitably create a spectrum of potential UK regulatory requirements applying to individuals across the group which will need to be understood in light of current arrangements.

Firms therefore expect to have considerable difficulty in completing all of the steps required to implement the Senior Managers Regime within a period of 6 months from the publication of the final regulatory rules. Accordingly we strongly recommend that the regulators provide an additional period of at least six months for practical implementation (so that our members have a minimum implementation period of 12 months following the finalisation of regulatory rules).

Our members believe that it is also important that the timeline takes account of the increased accountabilities and responsibilities for senior managers, and the preparations that senior managers may wish to make to ensure that they are satisfied that they are working in compliance with the new regime. The training suggested above will partly address this. Although we recognise that those grandfathering over to the new regime will, in substance, continue to fulfil the same role, it should be acknowledged that the presumption of responsibility in particular is a significant change to the current position. Senior managers will no doubt want to ensure that their arrangements are sufficient to ensure that they could demonstrate compliance with the new regime. Given the number of functions assigned to some senior managers and the breadth and scale of their roles, this will necessarily take some time to complete.

It is also important that both the PRA and FCA are prepared and equipped to assist firms in the implementation of the new regime. In particular, supervisory teams within both regulators must have a deep understanding of the new regime, what is required and how it is to be applied before the regime commences so that firms can work with them to ensure effective delivery.

Question 29 (PRA and FCA): How much time do you think is necessary to implement the new Certification Regime? Please explain what activities would be required to prepare for implementation, and the time required for each activity.

While we welcome that our members will have up to 12 months to issue their first certificates, the overall timetable for implementing the Certification

Regime is tight. Member firms have concerns about the length of time which the PRA and the FCA is suggesting be made available to relevant firms to implement the Certification Regime. This reflects the fact that practical implementation is expected to be complex and to require the following activities to be completed:

- the need to identify the population of certified persons;
- designing and implementing the end-to-end annual certification process including onboarding and offboarding arrangements, as well as the ongoing assessment of fitness and propriety;
- modifying the appraisal process to include systems and controls to monitor certified persons; and
- changes to candidate on-boarding processes (including references and candidate screening).

Accordingly we strongly recommend that the regulators provide an additional period of six months for effective set-up and practical implementation before the regime commences of new processes and procedures (so that our members would have to issue the first certificate of fitness and propriety to certified persons by 18 months following the finalisation of regulatory rules). For this to be completed effectively, it will need to happen in parallel to and is dependent on the outcome of SMR mapping.

Question 30 (PRA and FCA): In relation to the Conduct Rules, how much time do you think is necessary for implementation? Please explain what activities would be required to prepare for implementation, and the time required for each activity.

Member firms have concerns about the length of time which the PRA and the FCA is suggesting be made available to relevant firms to implement the Conduct Rules. This reflects the fact that practical implementation is expected to be complex and to require the following activities to be completed:

- implementing changes to appraisal systems to reflect this revised process;
- designing and producing appropriate bespoke training for the huge variety of different roles that the rules may catch in a manner which allows it to be delivered in many jurisdictions;
- delivery of training to staff on their new obligations (noting the very broad scope of the FCA Conduct Rules);
- enhancing existing systems and develop new systems to monitor and report suspected and actual breaches of the Conduct Rules; and
- building new IT systems and amending existing systems.

For the new Conduct Rules to have the impact and effect that the regulators intend, and for firms to be able to apply them to their staff fairly, they need to

be embedded into existing programmes of activity, e.g. training plans, monitoring programmes, and initiatives around conduct and culture.

Accordingly we strongly recommend that the regulators provide an additional period of at least six months for practical implementation for senior managers and certified staff.

3. Additional Points

PRA approval period

Proposed FCA Rule 10C 10.25 states that the FCA has a maximum period of three months to approve a Part 4A permission from an individual. Would the PRA confirm that it also intends to apply a maximum three months period to approve a Part 4A permission from an individual?

Overseas staff working temporarily in the UK

It may be appropriate for the PRA and FCA to follow the provisions in the current Approved Persons regime (at SUP 10A.10.8 R), which currently allows overseas staff to perform what would otherwise be the Customer Function without approval, provided they spend no more than 30 days in a 12-month period in the UK, and certain conditions are met.

Handover

SYSC 4.5.40-4.4.45 – Handover. This section is headed “Handover certificates and other Handover material”. Our members understood the reference to handover certificates had changed to handover arrangements? We would suggest this simply reads “Handover policy” or “Handover material”. There is no absolute requirement for a document called a “Handover Certificate” – this is only suggested in guidance in SYSC 4.5.44 G.

Annual Certificate of Compliance

SYSC 4.5.46-4.5.50

- SYSC 4.5.46 R (1) - requirement to certify annual compliance with rules and guidance. Guidance is not binding upon firms (as set out in the FCA’s reader’s guide) and this section should not therefore require certification of compliance with “guidance”.
- SYSC 4.5.47 G – certificate to confirm “no gaps” in allocation of responsibilities. This may be difficult for a firm as in effect it is being asked to confirm a negative.

4. 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

