

A joint response to the FCA's CP15/9: Strengthening accountability in banking: a new regulatory framework for individuals

June 2015

The British Bankers' Association (BBA) and The Association for Financial Markets in Europe (AFME) welcome the opportunity to comment on FCA's consultation paper CP 15/9 *Strengthening accountability in banking: a new regulatory framework for individuals*¹.

The BBA is the leading association for banks active in the UK. It represents over 200 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.

The BBA is registered on the EU Transparency Register, registration number 5897733662-75.

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) 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) in Asia.

AFME is registered on the EU Transparency Register, registration number 65110063986-76.

Both BBA and AFME members and their employees will be impacted by the FCA's proposals in relation to the presumption of responsibility so we are pleased to be able to respond briefly to the consultation paper.

FCA's Register and references

We note in the final report of the Fair and Effective Markets Review, published on June 10th 2015, that the FCA and the PRA are to consult on a mandatory form for regulatory references, to help firms prevent the "recycling" of individuals with poor conduct records between firms, with a view to having a template ready for the commencement of the Senior Managers and Certification Regime next March. We think this idea is helpful and goes some way towards meeting the concerns we have raised in this space, but would repay further investigation and assessment. We propose therefore respond in full to that consultation when it is published.

¹ <http://www.fca.org.uk/your-fca/documents/consultation-papers/cp15-09>

Another possible (and not mutually exclusive) option is that details of all individuals in respect of which certificates are issued by firms be notified to the FCA and their names placed by the FCA on FCA's register when the FCA receives such notification, showing the date of certification and the role for which they have been certified. Similarly, when the firm withdraws the certificate, it should notify the FCA who should amend the register accordingly. That way a public record would exist showing which individuals had been certified by which firms and when and for what role, which will simplify the process of reference checking.

Providing cover in exceptional and other circumstances

Paragraph 3.6 increases to four weeks the time period for which cover may be provided for a certified person by an uncertified person (other than where the role requires qualifications). We still think this is too short. Often firms fill short-term or unexpected gaps by taking secondees from professional firms, or hiring consultants: - the alternative, which is plainly sub-optimal, is to leave the post vacant. We would propose that this concept be acceptable for up to three months.

It would also be helpful to have clarification concerning the status of the current FCA Handbook rule SUP 10A.10.8 – concerning the customer dealing function - which outlines that:

“The customer function does not extend to an individual who is performing the functions in SUP 10A.10.7R (1) to SUP 10A.10.7R (2) or SUP 10A.10.7R (5) to (7) and who is based overseas and who, in a 12-month period, spends no more than 30 days in the United Kingdom to the extent that he is appropriately supervised by a person approved for this function.”

This is an important aspect for UK branches of foreign banks given the aforementioned situations where employees travel between locations for short periods of time and are often already subject to regulations of the home regulator where they are based.

Reporting of rules breaches

Paragraph 4.5 refers to this. We repeat our request that rules breaches reported within the short timeframe allowed, if subsequently found to have been wrongly reported (e.g. because the individual was subsequently exonerated) be deleted from FCA records.

Application of guidance steps

The FCA has provided a non-exhaustive list of considerations which they view as relevant to whether a senior manager took reasonable steps to prevent a regulatory breach on the part of the firm occurring or continuing (proposed DEPP 6.2.9-E G of the FCA's draft guidance). It is important that each consideration is treated by the FCA as indicative only. In addition, in our view, many of the considerations given refer to activities that are executive in nature which an in-scope NED would not be expected to undertake. This is particularly the case in relation to the list of considerations set out in proposed DEPP 6.2.9-E G of the FCA's draft guidance. We suggest wording is included that notes that some of the reasonable steps are more relevant to particular Senior Manager roles than others, in particular those executive positions as opposed to non-executive roles.

Distinction between executive and non-executive roles

The FCA has included a senior manager's Statement of Responsibilities in the list of considerations that may be relevant when considering whether that senior manager was responsible for management of any of the firm's activities (see proposed DEPP 6.2.9-C G (1)) and has included in that sub-paragraph the wording "including whether the SMF manager was performing an executive or non-executive role".

The recognition of the distinction between executive and non-executive roles in DEPP 6.2.9-C G (1) is welcome but we would ask the FCA to include in its draft guidance an explicit recognition of the difference in nature and scope between these roles. This is of particular importance as many of the additional considerations listed in proposed DEPP 6.2.9-E G, to which the FCA would expect to have regard in determining whether or not a senior manager had taken reasonable steps to avoid a regulatory breach occurring or continuing, are executive in nature, as we note above.

Non-complex firms

The FCA helpfully expresses its intention to mirror the approach that the PRA is planning to adopt in relation to smaller non-complex firms. In its PS3/15 (paragraphs 2.14 and 2.15) the PRA states its intention to exclude credit unions and banks with assets below £250m.

However the FCA's wording at paragraph 2.12 is somewhat different – suggesting a £25m limit (a typo perhaps) but referencing credit unions only – although the draft handbook text at SYSC 4.5.13 refers to 'firms' not credit unions.

Could the FCA confirm that its plan is to exclude small CRR firms with assets below £250m as well as credit unions?

Coherence with PRA regime

It will be important that the FCA and PRA approaches to the application of the regime are aligned with each other and where possible the guidance released by regulators is the same.

Retrospective application

In paragraph 3.20 of the draft supervisory statement set out in Appendix 2 of CP 7/15, the PRA states it is not the PRA's intention to apply standards "retrospectively" or with the benefit of hindsight. It would be helpful if the FCA made a similarly explicit statement if, as we assume it is the case, it has no intention to apply retrospection.

This is in line with FCA chief executive's public comments on the matter.²

² <http://fca.org.uk/news/debating-trust-and-confidence-in-banking->
<http://fca.org.uk/news/nothing-to-fear-from-high-standards>

Q1: Does the draft guidance in Appendix 2 provide clarity on the FCA's proposed application of the presumption of responsibility?

Yes, the Appendix provides helpful additional information on the FCA's proposed application of the presumption of responsibility.

We reiterate (in an abbreviated form) the concerns expressed in our response PRA CP 7/15³;

- It is crucial for those in Senior Manager positions to be as clear as possible as to the extent of their accountability and that there is a proportionate application of the presumption of responsibility by regulators;
- Where a firm has reached a bilateral settlement with the FCA this does not bind the individual, or the FCA, in considering whether or not there has been a regulatory contravention for the purposes of the presumption of responsibility, as the PRA has done;
- It is still somewhat unclear as to how the FCA will establish a regulatory breach by the firm in any case brought against the Senior Manager, and whether, for example, it will use findings from a previous case against the firm in the case against the Senior Manager. Further guidance on this matter would be helpful;
- In order to avoid impacting collective decision making and avoiding an unduly risk averse approach by individuals a statement that only serious or material breaches will be considered for enforcement action would be beneficial;
- We assume that any material provided in evidence by an individual to demonstrate that they have taken reasonable steps will be held confidentially and not provided to third parties without the individual's consent;
- Additional guidance on the regulator's expectations on effective delegation would be beneficial. An example would be where a contravention arises in an area that had been appropriately delegated by a Senior Manager to a subordinate and meets the regulator's guidance and expectations of effective delegation;
- It is important that the regulator's guidance on the presumption of responsibility explicitly recognises the challenge of competing priorities facing Senior Managers at any time. We suggest that the guidance acknowledges the need for Senior Managers to undertake regular risk assessments and prioritise appropriately. Similarly this risk assessment and prioritisation should also be a consideration for regulators when assessing evidence of reasonable steps and we would welcome additional guidance in this area;
- We would ask that thought is given to differentiating guidance between the Oversight and Executive Senior Managers on the reasonable steps that they should take to discharge their individual Prescribed Responsibilities.

³ <https://www.bba.org.uk/policy/financial-and-risk-policy/hr/strengthening-individual-accountability/bba-afme-joint-response-to-prafcas-joint-consultation-on-the-approach-to-non-executive-directors-in-banking/>

In addition we note that:

We suggest that in proposed DEPP 6.2.9-C G (4) the reference to interviews is specifically narrowed to regulatory interviews, to align the FCA's requirements with those of the PRA as follows:

(4) The *SMF manager's* actual role and responsibilities in the *firm*, to be determined by reference to, among other things, the minutes of meetings, emails, regulatory interviews, telephone recordings and organisational charts.

We note that in proposed DEPP 6.2.9-E G;

(4) the PRA version refers to the 'size, scale and complexity of the firm' whereas the FCA's version, which we prefer, refers to 'nature, scale and complexity of the firm';

(5) in the PRA version of this clause the qualifier relating to a person's length in role is added. We therefore suggest amending the FCA clause as follows:

the knowledge the *SMF manager* had, or should have had, of regulatory concerns, if any, relating to their role and responsibilities (taking into account, among other factors, the length of time they have been in the role and any handover arrangements in the case of those new in a role)

(14) (c) For consistencies sake we would prefer this sub clause to be aligned with the PRA's expression of this requirement, as follows:

(c) failed to obtain appropriate expert advice or assurance, whether internal or external independent, expert opinion where appropriate

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