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Financial Regulation Briefing

EDITORS
Tom Ogg
Jonathan Swift QC

This issue: the new PRA/FCA regime for individual remuneration and conduct

Articles


Jonathan Swift QC


Tom Ogg

E Jonathan.Swift@11kbw.com E Tom.Ogg@11kbw.com

Editors' introduction: ten reasons to respond to the PRA/FCA consultation

Introduction

This issue is devoted to the PRA and FCA's proposals for the regulation of individuals in the banking industry. The proposals were set out in two consultation papers published on 30 July 2014, on *Accountability* and *Remuneration* respectively. They closely reflect the proposals of the Parliamentary Commission on Banking Standards (PCBS). The framework for the proposals was enacted in the Financial Services (Banking Reform) Act 2013.

The PCBS has made it clear that the impetus for these proposals is, without doubt, the fact that banking crisis of 2008 did not result in any disciplinary action by the regulator against any prominent senior individual, and the LIBOR and PPI scandals that subsequently emerged. As the PCBS put it, the proposals intend to "make individual responsibility a reality in banking". The remainder of this issue considers the substance of the proposals. There is a glossary at the rear of the briefing.

This article sets out ten reasons why banks, and other interested parties, and their lawyers should respond to the consultation. The consultation closes on 31 October 2014.

(1) The regulators listen to consultation responses (!)

Some readers may be used to responding to government consultations full in the expectation that they will be completely ignored. Yet the FCA and PRA have a track record of listening to the responses to their consultations, and making changes to their original proposals. As Richard Leiper sets out in his article ('*Remuneration*'), the PRA's original proposals for clawback included provision that the grounds for clawing back remuneration would be the same as those for malus. In other words, clawback for an individual would apply where the *firm* suffered a material downturn in financial performance – an extraordinary proposition. Clearly, the City's response, was that this (and other aspects that were changed) went too far. The PRA accepted this. A second example is the changes the FCA made to its proposals on the publication of Warning Notice Statements. Responding to the consultation is not a waste of time.

(2) When is a regulatory contravention established?

It is unclear when the regulators will regard a contravention of the regulatory requirement as having been established for the purposes of the Presumption of Responsibility (see Julian Wilson and Tom Ogg's article, '*The Senior Managers Regime*').

This is important because the great majority of cases brought by the FCA area dealt with by way of settlement. Many firms regard settlement as a commercial matter. They may not agree with all the criticisms set out in the final notice; they may even believe disciplinary action is not justified at all; but they prefer settlement to expensive, drawn-out litigation. The problem is whether such 'commercial' settlements with the regulators will be sufficient to constitute a contravention for the purposes of the reverse burden of proof? Moreover would that approach be compatible with the individual's Convention rights (see Julian and Tom's article)? What is required is some clarity on the process the regulators will adopt.

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(3) How long will it take to implement the new regime?

The proposals are radical. Questions 28 to 30 of the *Accountability CP* concern the time it will take to implement the new regime. Banks and their advisers are best placed to identify whether summer 2015 (as is currently proposed) is a realistic time-frame for the implementation of the senior managers regime. It is possible that the regulators may be grateful for good reasons to take more time to allow them to design the new regime as carefully as possible, notwithstanding political pressure to act quickly.

(4) What does 'dealing with a UK customer' mean?

The FCA's proposed rules (C-CON 1.1.9R and 1.1.10R) state that the conduct rules will apply to individuals based outside the UK who undertake 'dealing' activities with UK customers, and that dealing with includes 'having contact with customers' (see Jane McCafferty and Amy Rogers' article '*the Certification Regime*'). We suggest that firms would be grateful for more detail on what this means.

(5) Overlap between the PRA and FCA in enforcement matters.

This is perhaps the first time that the new, dual regulatory regime in which both the FCA and PRA have responsibility for enforcement matters, will cause trouble for firms. It is more difficult for firms to deal with more than one regulator. Banks may wish to consider whether, for example, the scope of the PRA's Certification Regime really does further the PRA's statutory objectives, or will merely cause administrative problems for banks (see question 20 of the *Accountability CP*).

(6) Handover certificates.

It is likely that handover certificates will cause difficulties for firms (see Julian Wilson and Tom Ogg's article, '*the Senior Managers Regime*'). There is no provision in the Banking Reform Act for handover certificates, and for that reason the regulators have a wide discretion as to how this will work. The regulators might well be grateful for suggestions from firms in this regard.

(7) Employee references and the Financial Services Register.

As Jane McCafferty and Amy Rogers explain in their article ('*the Certification Regime*'), it is quite unclear how the process of providing references will satisfactorily substitute for the current approval process for individuals in the financial services industry. What will the regulators do to fill this gap? And how will the regulators ensure that there is a common approach amongst firms to the (now) mandatory references?

(8) Buy-outs.

Richard Leiper's article ('*Remuneration*') explains how the regulators intend to control buy-outs. This issue is extremely important for the status of London as the world's leading centre for financial services. Yet it difficult to see how any of the proposals are practical, save for reliance on clawback. If banks agree, they should make this clear to the regulators.

(9) Exempt employees and the conduct rules.

The regulators have chosen an 'exhaustive list' approach to those workers in banks to whom the conduct rules do not apply: see Tom Ogg's article, '*the Conduct Rules*'. Is this really helpful? It is inevitable that there will be difficult boundary issues and omissions from the list. Unless another approach is adopted (such as an 'indicative list' approach), the list needs considerable amendment. For example, the list currently includes 'vending machine staff' (presumably not the tiny people who live inside vending machines).

(10) Credit Unions.

The Cost-Benefit Analysis by Europe Economics that accompanies the *Accountability CP* states that credit unions will be disproportionately affected by the one-off costs of implementing the new regime (at nearly 3% of income); that setting out individual responsibilities may contravene the principle of consensus decision-making that is common amongst credit unions, and may in fact not be feasible at all; and that volunteers, particularly, may be deterred from taking up places on the board as a result of the new regime. Credit Unions, ought then to have great cause for concern about the proposals, and these concerns should be made clear.

Richard Leiper

11KBW

E Richard Leiper@11kbw.com

Remuneration

Introduction

On 30 July 2014 the PRA published its Policy Statement on Clawback (PS7/14), including the new rules, amendments to the Senior Management Arrangements, Systems and Control sourcebook (SYSC 19A: the Remuneration Code). On the same day, the PRA and the FCA published a consultation paper on new remuneration rules, the *Remuneration CP* (PRA CP15/14; FCA CP14/14).

As the title of the consultation paper indicates, it is key to the provisions on remuneration that risk and reward should be aligned. It is an existing principle of the Remuneration Code that any variable remuneration must be paid or vest only if it is justified on the basis of the performance of the firm, business unit and the individual concerned; total variable remuneration must be subject to malus **or** clawback arrangements. The new rules will ensure that **both** malus and clawback arrangements must be applied. A malus arrangement imposes conditions on vesting to an unvested award; a clawback arrangement applies to an award which has been delivered to the individual (cash paid; award vested) and allows the firm to claw back the award from the individual.

Scope

The Remuneration Code applies to all material risk-takers (MRTs) working within a bank, building society or investment firm. MRTs are identified by qualitative or quantitative criteria, i.e. their status/function or level of remuneration mean that their professional activities have a material impact on a firm's risk profile.

Deferral and malus

The Remuneration Code contains rules which control the extent to which variable remuneration must be deferred:

- all MRTs must have at least 40% of awards deferred;
- those who are directors and other high-earners (those earning total variable remuneration of £500,000 or more) must have at least 60% of awards deferred;
- deferrals must be for a minimum of 3-5 years, with awards vesting no faster than on a pro rata basis;
- at least 50% of awards must be paid in the form of shares (or other instruments, the value of which reflects the firm's performance).

Part of the consultation concerns this period of deferral:

- awards for Senior Managers (those performing a Senior Management Function under FSMA) would need to be deferred for no less than 7 years, with the first vesting no earlier than the third anniversary of the award;
- awards for all other Senior Managers would need to be deferred for no less than 5 years, with the first vesting no earlier than the first anniversary of the award.

The Code requires firms to implement malus arrangements such that an unvested award should not vest where, as a minimum:

- there is reasonable evidence of employee misbehaviour or material error; or
- the firm or the relevant business unit suffers a material downturn in its financial performance; or
- the firm or the relevant business unit suffers a material failure of risk management.

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Clawback

Firms will be required to impose clawback arrangements on awards made on or after 1 January 2015. These will allow a firm to recover from an individual any award which the individual has received.

The PRA originally proposed that the grounds for clawback should be the same as those for malus. Following consultation, the PRA decided that clawback should be required where the individual:

- participated or was responsible for conduct which resulted in significant losses to the firm; or
- failed to meet appropriate standards of fitness and propriety.

Further a firm must also make all reasonable efforts to recover some or all vested remuneration where, during the clawback period:

- there is reasonable evidence of employee misbehaviour or material error (apparently a lesser standard than a finding of participation in or responsibility for certain conduct); or
- the firm or relevant business unit suffers a material failure of risk management.

In these cases, the firm must take into account all relevant factors in deciding whether and to what extent it is reasonable to seek recovery. Those factors include the individual's level of responsibility and his proximity to the material failure of risk management.

The period for clawback must be at least 7 years, but this is 7 years from the date of the award. In the proposal, it had been 6 years from the date of vesting, allowing a sequence of malus then clawback. The rule as now made gives firms more flexibility in engaging malus or clawback or a combination of the two.

Buy-outs

The PRA and FCA are now also consulting on the issue of buy-outs: the situation where a new employer grants an individual an award on sign up to buy them out of their unvested awards with the old employer. Noting the difficulties created, in particular where employment is very frequently trans-national, four different possible approaches have been put out for comment:

- banning buy-outs altogether;
- maintaining unvested awards;
- applying malus to bought-out awards; or
- reliance on clawback.

The conclusion on this issue will be of significant importance in determining the flexibility of labour within this sector and the attractiveness of London as a place to work.


Julian Wilson

Tom Ogg


E Julian.Wilson@11kbw.com E Tom.Ogg@11kbw.com

The Senior Managers Regime

Introduction

The Senior Managers Regime (SMR) will effect radical changes to the regulation of senior individuals in banks. The *Accountability CP* states that the aim is to apply the new regime to a narrower range of individuals than the current Approved Persons Regime: only the 'Board plus Executive Committee' will be caught. Non-executive directors, and certain directors of parent undertakings will now also be within scope.

The SMR has two key elements: new requirements for the allocation of responsibilities, and a 'Presumption of Responsibility'.

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Allocation of responsibilities

Under the SMR, twenty 'Prescribed Responsibilities' must each be allocated to an individual senior manager, with each senior manager then holding a 'Statement of Responsibilities' that sets out his or her regulatory responsibilities (see s.60A(2A) FSMA). The firm will then be required to set out how all regulatory responsibilities are allocated by the firm within a 'Responsibilities Map'.

The Prescribed Responsibilities include 'the Compliance Function', 'the Risk Function', 'Capital, Funding and Liquidity', and 'responsibility for the operation of the Senior Managers Regime within the bank'. The intention is that a regulatory failure within an area of responsibility allocated to a senior manager will lead to enforcement action by the regulators (and consequently, that senior managers will pay closer attention to their areas of responsibility than at present).

Clearly, the allocation of Prescribed Responsibilities will be the subject of heavy negotiation between senior managers. There are also difficult issues concerning:

- the extent to which contracts of employment should reflect Statements of Responsibility; and
- the conflict of interest between the bank and individual senior manager as to the level of detail set out in the Statement of Responsibility. Individuals will be concerned to have their responsibilities set out in detail, for the sake of clarity, whereas banks will be likely to prefer vaguer (and so broader) responsibilities.

Finally, when senior managers leave post, firms are required to make sure that successors are made aware of all issues of regulatory concern, so as to enable those successors to perform their responsibilities effectively. One aspect of this is likely to be a 'handover certificate' written by the former senior manager. It may well be in the interests of the departing senior manager to write a handover certificate, so as to justify his or her decisions taken up to point of departure. However, handover certificates will cause firms significant headaches, because they are likely to be both disclosable and a protected disclosure for whistleblowing purposes.

Presumption of Responsibility

The Presumption of Responsibility is a reverse burden of proof. Regulatory failings within the area of responsibility of a senior manager have the result that the senior manager is guilty of misconduct *unless* he satisfies the regulator that he:

"*had taken such steps as a person in [the senior manager's] position could reasonably be expected to take to avoid the contravention occurring (or continuing)*" (see s.66A(5) FSMA).

The *Accountability CP* sets out factors the FCA would expect to take into account in judging the reasonableness of the senior manager's conduct. They are heavily objective in character: it appears that little account will be taken of the subjective state of mind of the senior manager.

The Presumption of Responsibility also raises real human rights issues. Sheldrake v DPP [2005] 1 AC 264 is the leading authority on reverse burdens of proof. Sheldrake provides that reverse burdens are not in principle incompatible with Article 6(2) ECHR, but must be justified as reasonable and proportionate in each case.

Another issue is the process by which liability as against the senior manager will be established. The proposed amendments to the FCA's Enforcement Guide state that the FCA may discipline senior managers "*instead of*" the firm. Currently, the approach is that the FCA may discipline senior managers "*as well as*" the firm. But if a contravention within a firm must be established to discipline a senior manager under the reverse burden of proof, why not also discipline the firm?

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The likely consequence of the SMR is that senior managers will exercise much greater caution when taking decisions. The temptation for senior managers to bring in external consultancy and other advisory firms to justify their decisions (being a 'reasonable step') will be great, and is likely to lead to a bonanza for such firms. Finally, senior bankers have already begun arguing publicly that the SMR will discourage talented bankers from joining the senior management of banks: as to that, we shall see.

Jane McCafferty

Amy Rogers

E Jane.McCafferty@11kbw.com E Amy.Rogers@11kbw.com

Introduction

The proposed 'Certification Regime' is novel in two important respects. First, it will materially extend the group of people who are required to be certified as 'fit and proper' before carrying out a specified function. Secondly, it will put primary responsibility on the *employer* rather than the regulator to determine whether an individual within the scope of the certification regime is fit and proper (and to issue an annual certificate to that effect). As the *Accountability CP* explains, ss63E and 63F of FSMA, under which the 'Certification Regime' is to operate, *"originated from the PCBS's recommendation that a 'licensing regime' be introduced to address concerns that the existing Approved Persons Regime brought too narrow a set of individuals within the scope of regulation, and that firms took insufficient responsibility for the fitness and propriety of their staff."*

If rules are implemented in the form presently proposed, then a bank must take reasonable care to ensure that none of its employees perform a certification function unless already certified as 'fit and proper' to perform the function in question, having regard (amongst other things) to the guidance in the FIT section of the FCA Handbook or, if a PRA-specified certification function, the 'Fitness and Propriety' section of the PRA Rulebook. Each such certificate will need to be reviewed and re-issued at least once a year. A senior manager within each firm will be required to assume responsibility for the internal assessment and certification process.

The scope of the regime

The certification regime will extend to those employees performing "significant harm functions". The precise scope of that definition differs slightly between the FCA and the PRA, although both regulators draw upon the definition of "material risk takers" in the Capital Requirements Directive. So far as the FCA is concerned, at least those individuals who supervise or manage other certified persons, any individuals in SIF roles (significant influence functions) under the current regime but who will not become 'Senior Managers', and certain customer-facing roles that require minimum qualifications will also require certification. There remains something of a grey area as to how far certification will be required in relation to those working overseas, as the *Accountability CP* indicates that regime will extend not only to those performing their controlled function from an establishment in the UK but also to those who "*are dealing with a client in the UK*".

The obligations on employers

Section 63E of FSMA provides (in summary) that banks must take reasonable care to ensure that no employee of theirs performs a controlled function unless it has issued that employee with a valid certificate of fitness and propriety. (The *Accountability CP* also proposes specific rules in relation to 'emergency appointments' of up to two weeks.)

Banks will have to conduct criminal record checks, and seek regulatory references for the previous five years of a candidate's employment history. In practice,

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they will also need to give careful consideration to the employee's recent performance. Firms asked to provide a regulatory reference will have to disclose certain prescribed information in relation to past breaches of the Conduct Rules. The *Accountability CP* says: *"Any firm that is the subject of a reference request will continue to be subject to existing legal obligations, including the need to ensure the reference is true, accurate and fair."*

Some unanswered questions

In addition to questions as to the intended scope of the regime (not least, for example, as to precisely those categories of employees who will require certification), the proposals in the *Accountability CP* give rise to two sets of related questions.

First, how effective can 'in-house' regulation ever be? Even with the benefit of regulatory references, individual firms will not have access to the wealth of information presently available to the FCA in considering whether to approve an individual to carry on a controlled function. They may take a far more 'light touch' approach than might an external regulator, and may regard existing employees, in particular, more benevolently than might the FCA. There is obviously a risk, moreover, that different firms will apply different standards in practice when determining what information they require to assess fitness and propriety, and when a certificate should be granted.

Secondly, how will these regulatory and statutory obligations relate to firms' contractual and statutory duties to their employees (including, potentially, those employed under forward contracts)? Meticulous record-keeping and clear internal policies will be wise to guard against claims of victimisation, discrimination, whistle-blowing and breach of contract. Some firms will wish to consider making specific provision in relation to certification in contracts of employment. Further, of course, the question whether employees may claim damages from their employer (or even injunctive relief) if refused certification on the basis of allegations they consider unfounded, may provide fertile ground for claimant lawyers in the months and years to come.

Tom Ogg

11KBW

E Tom.Ogg@11kbw.com

The Conduct Rules

Introduction

The regulators have proposed, for banks only, replacing the Statements of Principle for Approved Persons ('SoP') with a new set of Conduct Rules. Both the SoP and Conduct Rules are a set of requirements that apply to individuals, and in relation to which the regulators often take or will take enforcement action against individuals.

The Conduct Rules are, by and large, much the same as the SoP, although the language is clearer. The key differences with the SoP are addressed below.

Technically, there are two sets of Conduct Rules: those of the PRA and those of the FCA. The same applies today: there are two sets of SoP. However, the differences between the PRA and FCA Conduct Rules under the new regime are likely to become more important as the PRA takes on an enforcement role.

Application

The first important difference between the SoP and the Conduct Rules is that the Conduct Rules have a far wider field of application. The FCA's conduct rules **apply to all bank employees**, save for a list of 'excepted employees'.

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The list of excepted employees is exhaustive: those not listed will have the Conduct Rules applied to them. The principle upon which the list has been drawn up is that if a role would be the same in a non-bank, the conduct rules should not apply (and so only persons performing 'banking' roles are caught by the rules). Consequently, the list includes receptionists, drivers, cleaners, and so on. It is, however, questionable whether this is the right approach: there will inevitably be omissions and boundary problems with an exhaustive list.

The Conduct Rules also now apply to unregulated activities. Previously, the SoP in effect only applied to regulated activities. This, and the application to nearly all bank employees, is a reaction to the difficulties faced by the regulators in the LIBOR scandal.

Notification and training requirements

The notification requirements under the new regime are much broader than under the SoP. They include, for example, that a bank 'suspects' that any conduct rule has been broken, although the regulators have stated that a bank must have 'reasonable grounds' for such a suspicion before making a notification.

There are now also training requirements associated with the Conduct Rules. All emplyoees to whom the Conduct Rules apply should be trained in their application, and certain employees should receive further training (*e.g.* traders in market conduct requirements). The one-off cost for that training is likely to be significant. For example, the Europe Economics cost benefit analysis that accompanies the *Accountability CP* states that the overall one-off costs for implementing the new regime (including the SMR, *etc.*) are some £237m across the industry.

The new rules

As under the SoP, some rules apply only to senior managers (SIFs, under the current regime). It is significant, therefore, that the old 'statement of principle 4' (which was not confined to SIFs in its application) has been divided into two rules, one which applies to senior managers only (SM4), and one which applies to everyone else (CR3).

CR3, which applies to most bank employees, requires individuals to be open and cooperative with regulators. SM4, however, is a positive obligation: it requires senior managers to 'disclose appropriately any information of which the FCA or PRA would reasonably expect notice'. This is a signal that the regulators expect senior managers to quickly, and routinely, inform the regulators of relevant information; and that the FCA and PRA will be more robust in enforcing that obligation.

There are two new rules.

First, Conduct Rule 4 provides that 'you must pay due regard to the interests of customers and treat them fairly'. This an FCA-only rule. Its introduction was recommended by the PCBS as a response to the PPI scandal. What is new about this rule is that is places an obligation on *individuals* to treat customers fairly; up to now, that obligation has been placed only on firms (see *PRIN*). It would seem likely, once employees have been trained in this new obligation, that there will be an increase in whistleblowing relating to what is generally referred to in the industry as 'TCF' (treating customers fairly) as a result of this new rule.

Second, SM3, which applies only to senior managers, concerns delegation by those senior managers. The rule requires that delegation is to 'an appropriate person', and that the senior manager 'oversee the discharge of the delegated responsibility effectively'.

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SM3 does not expand particularly on the obligations set out in the guidance associated with the current SoP, but it certainly shows that the regulators intend to focus much more sharply on the means by which senior managers delegate issues to more junior employees. Senior managers will, no doubt, consider keeping records where a delegation appears not to be going well so as to protect themselves should enforcement action by the regulator be in prospect.

Glossary

Accountability CP – the joint PRA/FCA consultation paper entitled 'Strengthening accountability in banking: a new regulatory framework for individuals', published on 30 July 2014.

Banking Reform Act – the Financial Services (Banking Reform) Act 2013.

FCA – Financial Conduct Authority.

FSMA – the Financial Services and Markets Act 2000.

LIBOR – the London Inter-Bank Offered Rate. It is an interest rate benchmark in relation to which trillions of dollars of financial instruments are referenced, and which was manipulated by bankers in the UK for their own purposes (see the FCA enforcement outcomes against those firms).

PRA – Prudential Regulation Authority.

Presumption of Responsibility – a reverse burden of proof provision in relation to senior managers of banks. See Julian Wilson and Tom Ogg's article '*the Senior Managers Regime*'.

PCBS – the Parliamentary Commission on Banking Standards, which reported in 2013.

PRIN – the Principles for Business section of the FCA Handbook. PRIN sets out high-level principles that firms are required to comply with (e.g. 'a firm must conduct its business with integrity').

PPI – payment protection insurance. The PPI scandal entailed the misselling of PPI, often when another financial product was being purchased at the same time.

Remuneration CP - the joint PRA/FCA consultation paper entitled 'Strengthening the alignment of risk and reward: the new remuneration rules', published on 30 July 2014.

SMR – Senior Managers Regime. See Julian Wilson and Tom Ogg's article '*the Senior Managers Regime*'.

SIFs – significant influence functions. SIFs are the most senior individuals in a firm, such as the directors.

SoP – the Statements of Principle for Approved Persons (to be replaced by the Conduct Rules). See the *APER* section of the FCA Handbook.

TCF – treating customers fairly. The FCA has repeatedly required firms to improve their TCF standards.

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We have been instructed in the most high-profile, systemically important matters, including government support for failed banks, LIBOR misconduct, market abuse and prohibition orders, in a regulatory or employment context. We also regularly act in relation to pensions matters and the regulatory perimeter.

Our expertise in financial regulation dovetails with our unrivalled employment law practice. This enables 11KBW to offer the full range of advice and representation in relation to both disciplinary and remuneration matters concerning individuals. Our members also have experience in relation to the regulators' supervisory and disciplinary toolkits for firms.

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Daniel Stilitz QC
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