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**Bank of England, Prudential Regulatory Authority and Financial Conduct Authority
Consultation on Strengthening Accountability in Banking : A new regulatory framework for
individuals**

Consultation Paper : FCA/CP14/13/PRA CP14/4

Response from the Employment Lawyers Association

27 October 2014

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INTRODUCTION

1. The Employment Lawyers Association (*ELA*) is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation, rather it is to make observations from a legal standpoint. Accordingly in this consultation we do not address such issues. ELA's Legislative and Policy Committee is made up of both barristers and solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.
2. The Legislative and Policy Committee of ELA set up a sub-committee under the co-chairmanship of Caroline Stroud of Freshfields Bruckhaus Deringer LLP and Stephen Levinson of Keystone Law to consider and comment on the consultation paper from the Bank of England, Prudential Regulatory Authority (*PRA*) and Financial Conduct Authority (*FCA*) published in July 2014 on a new regulatory framework for individuals. Its response is set out below. A list of the members of the sub-committee is in Appendix 1 to this response.
3. Our response is only addressed to those non-policy questions we considered it appropriate to address.

EXECUTIVE SUMMARY

- (a) It is likely that the introduction of the Senior Managers regime will lead to a rise in fixed salary for people in these roles as the level of risk involved in taking on such a role will be higher;
- (b) The HR implications of the introduction of the Senior Managers regime are significant, will involve significant negotiations between senior managers and their employers and will lead to a natural conflict between individual and collective responsibility;
- (c) HR systems will need to be significantly amended to incorporate the Senior Managers regime and the Certification regime e.g. appraisals, remuneration systems and disciplinary processes;
- (d) The handover arrangements will give rise to a slower recruitment process as employees will require sight of the briefing pack before taking up a role;
- (e) The implementation of the two new regimes is going to take significant time and we doubt that the regulators have allowed sufficient time to allow for adequate employee consultation, training and sufficient HR processes to be put in place.

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

4. We agree with the proposals, but observe that they may create material additional administrative obligations for the Compliance and HR functions within firms. This is particularly the case in relation to job descriptions which, in our experience, tend to be relatively generic but with a requirement for the individual to take on such additional responsibilities as the firm may specify and in relation to Responsibilities Maps. These proposals are likely to require an overhaul of the drafting and updating of job descriptions.
5. Further, although we understand that there has been a suggestion from the regulators during the consultation period that they would expect Statements of Responsibility to be short documents, we believe that senior managers will want them to be detailed and specific in order that their responsibilities be clear. We would suggest that the regulators might consider provision of a template for the Statements of Responsibility so that firms can be clear on the level of detail required; otherwise this debate between employer and employee may lead to significant delay in finalising the documentation necessary.

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

6. We agree with the proposals. However, given that Senior Managers may be prevented from undertaking their responsibilities from time to time (for example because of holiday absence or, in particular, injury or sickness), should consideration be given to requiring firms and the Senior Managers to identify a person or persons to take over their responsibilities on a temporary basis? If appropriate, those (alternate) persons can be referred to on the Map.

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

7. We agree there is merit in ensuring that a newly appointed Senior Manager is made aware of all necessary materials/information and risks of regulatory concern, however, we expect that outgoing and incoming Senior Managers will be concerned to ensure that they minimise their own liability. We expect that both outgoing and incoming Senior Managers will seek legal advice in relation to the handover arrangements (and may ask firms to pay for that advice). Should consideration be given to the firm's compliance and legal functions, in consultation with the outgoing Senior Manager, having primary responsibility for the handover arrangements? The regulator also needs to be aware of the potential for use of a handover certificate by a disgruntled employee for his or her own purposes. We see the handover arrangements slowing down the recruitment process and making it possible for an incoming employee to negotiate a higher fixed salary to account for the risk they will incur in taking on the new role given the issues raised in any handover certificate.

Question 19: Do you agree with the FCA and PRA proposed requirements on:

(a) criminal record checks?

8. We agree with the proposals.

(b) the provision of references?

9. We have concerns about the requirements in relation to the provision of references as there will be no central register for firm's to check in relation to a person's previous disciplinary record. Firms will have to rely on previous employers disclosing information to them and different firms may take different approaches to whether or not information should be disclosed. Also SYSC 5.3 only applies to breaches of the conduct rules rather than other historic disciplinary matters so that there will need to be some arrangements made for transition otherwise there will not be a five year full disclosure of previous misconduct. There is thus a danger that people will be able to move around the market more freely than they were able to do before even though they have a disciplinary record which impacts on their fitness and propriety.
10. There is a danger of a lack of consistency in firms' approach to giving references and guidance should be given on what the regulators' expectations are in different circumstances e.g. where an employee resigns or accepts a compromised exit during an investigation into regulatory conduct.

Question 20 - 23: Do you agree with the proposed scope of the PRA's Conduct Rules?

**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?**

Do you believe that rules should apply to all people in the firm who are directly involved in financial services business?

11. While ELA does not propose to express a view on the proposed categories of staff to whom the conduct rules should apply, we would observe that it is essential that firms are able to clearly identify whether individuals are in or out of scope (not least because they will want to create internal policies that clearly identify which categories of staff are caught and which are not).
12. In relation to the scope of the FCA rules, we agree that there should be a presumption that all staff other than those specified should be caught. However, we would welcome some further clarity and detail in relation to the proposed "exceptions" : for example, it is not clear who would be caught by the term "Human Resources Administrators". Many junior HR staff will have a role to play in key HR processes for a firm, including appraisals, remuneration issues, and disciplinary investigations. We imagine that the FCA intends to exclude individuals who have a limited or no advisory role and whose primary tasks are administrative in nature or involve data processing (such as pay roll). Some further guidance together with the final list of excepted roles would be welcomed.

Question 24: Do you agree that these are the right Conduct rules for both regulators to introduce, taking account the objectives set out in paragraph 5.16?

13. We would welcome clarification from the regulators that SM4 ("*You must disclose appropriately any information of which the FCA or PRA would reasonably expect notice*") does not have the effect of compelling individuals to disclose information or advice covered by legal privilege.
14. We note that a firm's General Counsel (or other senior lawyer) will not generally be caught by the Senior Managers regime, although we can envisage circumstances in which a lawyer is caught by either the certification regime or the Senior Managers regime by virtue of carrying out some other activity for a firm (for example, an individual who holds a combined Head of

Legal/Head of Risk and Compliance role or who sits on an executive committee). In those circumstances, the individual should not be compelled to disclose legal advice that he or she has given to the firm.

Q28: 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.

15. In responding to this question, ELA has not commented on the development of the actual statements of responsibility or responsibility maps but has focused on the employment and HR implications of transitioning to the Senior Managers regime. We anticipate that the following would be required prior to implementation of the new SMR rules:
- (a) Negotiating and agreeing revised employment terms with SMFs to reflect:
 - (i) any changes in responsibility as a result of the responsibility mapping exercise;
 - (ii) revised terms to reflect the nature of the new role. For example, a SMF may want a contractual commitment from the firm that the firm will provide documentation to assist with any action brought by the regulator after they have left the firm;
 - (iii) revised remuneration arrangements to reflect both the regulatory requirements around the structure of packages for SMFs but also the commercial substance of the package in light of the change to the role and responsibility being taken on by an SMF.
16. We anticipate that this may be a lengthy process as individuals will be keen to understand the risks and responsibilities associated with becoming an SMF. In particular, the proposed SMF may need sufficient time to obtain appropriate independent advice on his revised role and employment terms and may require a period of education on the new regime before being comfortable to take on the role.
- (a) Revising reporting lines – the responsibility mapping may require the reporting lines of staff other than SMFs to be revised. These would need to be agreed with the relevant individuals.
 - (b) Reviewing and, if necessary, amending committee structures, terms of reference and the policies around provision of information to those committees to support the new responsibility maps and Senior Managers regime.
 - (c) Depending on the changes to be implemented (especially to reporting lines), it may be necessary to consult with employees (either on a collective or individual basis).
 - (d) Developing protocols in respect of handover notes and recording of committee decisions.
 - (e) Developing a policy on independent advice for SMFs setting out the circumstances in which SMFs are able to obtain independent advice at the cost of the firm and clarifying the role of in-house counsel.

17. It is anticipated that the necessary implementation from an employment / HR perspective may take a considerable length of time and it may only be possible to start some of the processes at a later date in the planning process – for example, taking steps to revise reporting lines will only be practicable once the responsibility maps have been finalised.

Question 29: 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.

18. We anticipate that the following would be required prior to implementation of the new certification regime:
- (a) Reviewing and, if necessary, amending internal processes for performance appraisals to ensure that any concerns around certifying an individual are captured and addressed appropriately. Firms would also need to consider how they ensure that any performance concerns are captured and addressed on a timely basis outside the annual appraisal process.
 - (b) Developing a firm policy on conduct matters and scoping those roles to which the policy may not apply.
 - (c) Reviewing and, if necessary, revising processes for hiring external candidates in a role covered by the certification regime and also considering internal promotions.
 - (d) Preparing a policy on the drafting of references to be provided to prospective employers.
19. A period that allows all firms to accommodate their annual appraisals is to be welcomed but certifying external candidates is likely to be a more difficult issue for firms and a firm may need longer than 12 months to have a robust process in place for this. In addition, this process is likely to be placed within the Compliance function which will mean that efforts will be necessary to bring the HR and Compliance functions together to work as a team.
20. We anticipate that the following would be required prior to implementation of the new conduct rules:
- (a) Developing and implementing appropriate training to support and complement the conduct rules and, in particular, ensuring that the training is suitably specific and relevant to the roles being performed.
 - (b) This will need to cover both initial training prior to adoption of the conduct rules but also putting in place appropriate training structures to update and refresh training for the future.
21. Given the large number of individuals to whom the conduct rules will apply (including potentially to EEA branches) and the desire to make any training as relevant as possible, 12 months seems quite a tight timeframe.

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

22. One of the key issues in relation to the conduct rules is the severity of the consequence of any breach. Therefore, this is the key issue to be socialised in that it is not a “nice to have” but a real need to educate people who were not previously subject to a regulatory code of conduct about the consequences from a regulatory and employment perspective of being in breach of that code.
23. A common difficulty where an employee and firm are considering an employee’s negotiated exit is whether a regulatory notification is required. Consequently, one issue that the regulators may wish to consider is whether the guidance as to when a notification of a breach of the Conduct Rules is required is clear enough for firms to apply in practice. The “reasonable grounds for suspicion” test (SUP 15.11.9G) is relatively complex, and HR/Compliance will be likely to require specific training in its practical application. We suggest that further detailed guidance on the practical application of that test would increase consistency in the application of the test across firms, and reduce the scope for disputes between employees and employers. For example, if the test is intended to require an on-going assessment of the evidence – rather than specifically biting on the initiation of an investigation or its completion – it would be helpful for the regulators to say so.

27 October 2014

APPENDIX 1

Members of the Sub-Committee

Caroline Stroud: Freshfields Bruckhaus Deringer LLP (Co-Chair)

Stephen Levinson: Keystone Law Limited (Co-Chair)

Alice Greenwell: Freshfields Bruckhaus Deringer LLP

Jane McCafferty: 11, KBW Chambers

Julie Morris: Slater & Gordon (UK) LLP

Tom Ogg: 11, KBW Chambers

Andrew Taggart: Herbert Smith Freehills LLP

Alistair Woodland: Clifford Chance LLP