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Consultation by the Prudential Regulation Authority and the Financial Conduct Authority on Strengthening accountability in banking and insurance (PRA CP36/15 and FCA CP15/31).

Response from the Employment Lawyers Association

07 December 2015

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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 or regulation, 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 consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

2) The Legislative and Policy Committee of ELA set up a sub-committee under the joint chairmanship of Caroline Stroud of Freshfields Bruckhaus Deringer LLP and Stephen Levinson of Keystone Law to consider and comment on the joint consultation paper from the Prudential Regulation Authority and the Financial Conduct Authority on Strengthening accountability in banking and insurance published in October 2015. Its report is set out below. A list of the members of the sub-committee is in the Appendix.

3) Our comments are only addressed to those non-policy questions we considered it appropriate to address.

Executive Summary

A. On the whole with a minor exception we believe the proposed reference period of 6 years is not unduly burdensome and the population to which the regulations are directed is correct and that the six year period for references to refer back is acceptable subject to some important changes that we propose.

B. The proposals for a mandatory template for regulatory references will require a significant cultural change in firms' approaches to providing references; and create potential unfairness, or at least lack of clarity, of which regulators will need to be to be mindful particularly where there has been no disciplinary process in which an employee has had an opportunity to comment on any allegations

C. The requirements placed on FSMA-regulated firms who are not RAPs/insurers are confusing, particularly when such firms will also be sent the mandatory form by RAPs/insurers. It may be simpler to require all regulated firms to answer the questions set out on the mandatory form

D. The proposals requiring the disclosure of reductions in remuneration should be confined to circumstances where this has resulted from disciplinary action.

E. We would suggest that the FCA does not provide an explicit direction that firms need not include reference to unfinished disciplinaries. Rather this subject could be dealt with in guidance as to what a firm might include in the last section of the mandatory form. The supplementary guidance would suggest circumstances where disclosing an unfinished disciplinary may be appropriate – for example, where the firm did have clear concerns about a lack of fitness and propriety it should say so but also explain that such concerns were never put to the individual and thus they did not have a chance to respond. In some cases a firm might decide not to disclose such information where the investigation was curtailed or inconclusive.

F. There should be guidance to the effect that firms should be required to inform individuals within a stated period of time when a firm has determined that an individual has breached a conduct rule.

Question 1: Do you agree with the proposal to require RAPs to request a reference from previous employers to the past six years for candidates of an SMF and certification functions, or notified NED, credit union NED, credit union NED roles and to require insurers to request references for candidates for a SIMF, or for becoming a key function holder?

4) We recognise that reform of the regulatory references is an imperative arising out of the FCA and PRA's new accountability regime. As such, we agree with the proposal to require RAPs to request a reference from previous employers for candidates of a SMF and certification function, or notified NED, credit union NED, credit union NED roles and to require insurers to request references for a SIMF, or for becoming a key function holder.

5) The new regime is in some ways a logical continuation of the current regulatory reference regime in SUP 10A.15R which already obliges "a firm (B), to provide another firm (A), with all relevant information of which it is aware as soon as possible." The general common law rule that there is no legal obligation to provide a reference *(Lawton* v *BOC Transhield Ltd* [1987] IRLR 404) has not applied to the financial services sector since the advent of the approved persons' regime. We agree that it is important, against the backdrop of the new accountability regime, that firms have a clear and robust system for substantiating fitness and propriety of new employees. The new reference regime will be integral to this.

6) Subject to the points set out below, we have no objection to the look-back period of six years, which seems sensible. The period recognises the fact that it may take several years for misconduct issues to be identified – as has been the case in recent years – whilst at the same time balancing the practical, financial and administrative burdens which will be incumbent on RAPs and insurers in light of the new regulatory reference regime (which would only increase if a longer look-back period had been chosen). The look-back period will assist both firms and regulators in maintaining conduct standards in RAPs and insurers.

7) In the case of *McKie* v *Swindon College* [2011] EWHC 469 the High Court held that a former employer owed a duty of care to its former employee even though six years had passed since their relationship ended: as it was purporting to communicate information arising from its employment relationship with the employee, there was sufficient proximity between the parties for the duty of care to arise. By extension, we see the six year time period as a proportionate response by the PRA and FCA to the requirements of the new accountability

regime. However, we have identified a few potential issues with this period in paragraphs 12 and 13 below.

8) SYSC 22.2.1R(1) requires a full scope regulatory reference firm (A) which is considering permitting or appointing someone (P) to perform a controlled function or issuing a certificate under the certification regime to take reasonable steps to obtain appropriate references from P's current or previous employers covering the past six years. A must take reasonable steps to obtain the references before any application for approval is made to the FCA or PRA and before the certificate is issued (as applicable).

9) It is our view that the process for obtaining references from P's current or previous employers covering the past six years where P's current or previous employers are other RAPs and insurers should not be unduly onerous because the process is contained within SYSC 22.2.7G(1). However, where P's current or previous employers are not other RAPs and insurers, this process may be significantly more complicated and time-consuming. It is our experience that it is the practice of many employers outside the financial services sector not to retain records relating to former employees for periods as long as six years and to refuse to provide references which give more information than the dates on which former employees started employment and ended employment. There are various reasons for such practices, including compliance with data protection legislation and risk management in connection with employment reference related litigation (claims by the former employee or new employer against the former employer).

10) Given the importance of the timing of obtaining references, we consider that it would be worth the FCA/PRA issuing guidance as to what will constitute reasonable steps by RAPs and insurers to obtain appropriate references, in particular from current or previous employers which are not other RAPs and insurers. For example, in the case of obtaining references from current or previous employers which are not other RAPs and insurers, will making a written request in accordance with SYSC 22.2.8G specifying what information the RAP or insurer would like followed up by a further written request if that information has not been provided within (say) two weeks from the date of the original request be treated as constituting "all reasonable steps" (see SYSC 22.4.2G (2)) or is more required?

11) On the assumption that the RAP or insurer has already been keeping employment records for a minimum of six years following termination of employment, it is our view that, in response to the question asked in section 2.13 of the Consultation Paper, moving from five years to six years should not represent a significant burden. However, where this is not the case, this change may represent a greater burden.

12) Connected to our observation above, we note that there is no allowance for RAPs and insurers providing references not having kept the relevant information required for the new regulatory reference in the period prior to 7 March 2016. In this regard, we suggest that the PRA and FCA consider whether it would be appropriate to either phase in the six year reference period or provide some latitude to RAPs and insurers who are not able to provide a reference for the required period for the first (say) two or three years of the regime.

13) As a preliminary issue, we anticipate that many RAPs and insurers may struggle with the breadth of information which is required to be included in the new references. Further we comment on the standard template below. We anticipate that the requirement on RAPs and insurers to provide details of responsibilities as well as roles for the period of employment

will be very challenging. The suggestion that RAPs should be keeping up to date records not only of its employees' roles (which should be straightforward and is in any event good practice) but also of employees' responsibilities, which will doubtless evolve over time even during the course of carrying out the same role, might well be problematic in practice. This point is exacerbated by the updating requirements of the new regime, more comments on which are set out below.

14) We note the inclusion of adjustments or reductions in remuneration within the definition of "disciplinary action". We welcome the regulators' confirmation that it would be inappropriate for regulators to compel the disclosure of these adjustments where they have not resulted from concluded misconduct investigations. However, we would query the benefit of including the adjustment or reduction of remuneration within the definition of "disciplinary action". In our experience, the adjustment or reduction in remuneration as a result of concluded misconduct investigations occur almost exclusively when the individual has received a disciplinary sanction such as a written warning or dismissal.

15) To the extent that the regulators do think that there is a separately discernible benefit in disclosing clawback/ malus actions in addition to disciplinary actions, these points should be uncoupled. The adjustment or reduction of remuneration should not sit within the definition of "disciplinary action". RAPs and insurers should only be required to disclose an adjustment or reduction of remuneration where it is made as a consequence of disciplinary action, and we would welcome a clarification to this effect in the final rules. Further, we anticipate that the inclusion remuneration adjustment in the definition of disciplinary action may create practical difficulties for firms as to how to describe the extent of the clawback/ malus applied. It would therefore be helpful for the final rules to confirm that references need not disclose the actual quantum of any adjustment or reduction of remuneration, but rather the percentage reduction of such remuneration, as a percentage of total compensation. This should avoid discrepancies in disclosures of such information which could be misleading.

16) This response is not the place for wider commentary on the new accountability regime, but we note that the new regulatory reference requirements proposed throw into sharp relief issues that arise as a result of the transfer of responsibility for fitness and propriety to RAPs and insurers. For example, it is not clear how RAPs and insurers are to obtain references for periods of time worked at firms which have subsequently been subject to insolvency proceedings. Whilst we note that SYSC 22.2.1R (2) only requires RAPs and insurers to take "reasonable steps" to obtain a reference, this does not address the practical risks which may arise in this context. We would suggest that a mechanism should be developed to plug the gap here, since misconduct issues may be particularly widespread in distressed businesses and/or greater clarity provided by the regulators as to what would constitute "reasonable steps" in this instance (for which see further paragraph **Error! Reference source not found.** above).

17) In our view, in this scenario, there may be a role for the regulators to assist RAPs and insurers, to prevent them inadvertently engaging individuals whose misconduct history would otherwise have been concealed by virtue of their previous employer's fate. Whilst we recognise that the regulators will not always have the information to enable them to fill this gap, they may hold information relevant to a future employer (e.g. where regulatory enforcement or investigation actions have been undertaken in connection with the insolvency event). RAPs and insurers should be able to make enquiries of the regulators to try to mitigate the risks inherent here.

18) The practical effects of the regulatory reference regime will have a significant impact on RAPs and insurers and will require considerable resourcing. We cannot comment in detail on the Cost Benefit Analyses set out in CP15/31 and PRA 36/15. Other respondents will be better placed to react to these. However, the following practical points occur to us as employment lawyers who count RAPs and insurers and employees of RAPs and insurers amongst our clients:

    a) The requirements for regulatory references to identify whether (a) an individual has breached a conduct rule (and if so, identify the relevant conduct rule); and (b) there is a reason to doubt an individual's fitness and propriety will enhance the role of Compliance departments in all but the most straightforward disciplinary proceedings operated by RAPs and insurers. A member of RAPs' and insurers' Compliance function will need to be engaged in order to advise on items (a) and (b) in the vast majority of disciplinary matters.

    b) In our view, the guidance that RAPs insurers are not required to disclose unfinished disciplinary proceedings (at 22.3.12 G) may be unhelpful and may cut across the regulators' aims for the new regulatory reference regime. For example, 22.3.12 G seems to cut across the obligations on RAPs and insurers to provide "any other information of which you are aware that is relevant to the requesting firm's assessment of whether the individual is fit and proper" in the mandatory form. We think it possible in some cases that the lack of a requirement to disclose unfinished disciplinary proceedings may:

        i. encourage sharp practices by employees undergoing disciplinary proceedings to resign prior to the conclusion of such proceedings; and

        ii. lead to a divergence in referee's disclosure practices.

    Both i and ii would be undesirable consequences which the regulators are advised to consider taking into account both the leading cases on disclosure of uncompleted disciplinary proceedings (see *Bartholomew* v *London Borough of Hackney* [1999] IRLR 246 and *Jackson* v *Liverpool City Council* [2011] IRLR 1009) and the fact that mandatory disclosure could be misused by some employers to the inappropriate detriment of employees.

Question 2. Do you agree with mandating the proposed specific disclosure requirements for RAPs and insurers?

19) We recognise that the mandating the proposed specific disclosure requirements for RAPs and insurers will help to create consistency of practice and greater transparency about employee misconduct issues. Both of these points will assist the regulators in effectively implementing the accountability regime. As such, we agree with mandating the proposed specific disclosure requirements for RAPs and insurers.

20) We note in section 2.13 of the Consultation Paper that FEMR respondents suggested that any mandated disclosure period go back significantly beyond five or six years, in some cases to over ten, but that the regulators concluded that a mandatory period of six year is sufficient to meet their policy aims. We also note the regulators' view that the proposed approach ensures that there is no discrimination against individuals who have been employed by the same RAP or insurer for a long time.

21) SYSC 22.2.2R(1) specifies that B (the firm which has received a reference request) must, as soon as reasonably practicable, provide a reference and disclose to A in the reference all information of which B is aware that is relevant to A's assessment of whether P is fit and proper. Further, if B is a full scope regulatory reference firm, B must (save where SYSC 22.2.2R (4) applies, in particular disclose the information in Part One of the table in SYSC 22.2.5R. Section (C)(2) of Part One specifies that (in the case of a controlled function) information must be included in the reference by B about whether the approval was at any time subject to a condition, suspension, limitation restriction or time limit and if so, details about it.

22) Section (C)(2) appears to impose a requirement that goes beyond the six year time period, whereas the information which must be included under sections (D), (E), (F) and (G) of Part One appear not to impose a requirement that goes beyond that time period (subject to the additional rules and guidance, in particular in SYSC 22.3.7G to 22.3.11G). We ask whether this apparent inconsistency is intended and whether it risks individuals being subject to the discrimination referred to in section 2.13 of the Consultation Paper. In any case, a clarification in respect of this apparent inconsistency would be helpful for RAPs and insurers.

Question 3. Do you agree with the proposal to require RAPs and insurers to provide a reference in a standard template (as appended in Appendix 4 of this consultation)?

23) In our view, the FCA's proposals for a mandatory template for regulatory references will:

a) entail a significant cultural change in firms' approaches to providing references; and
b) create some potential for unfairness, or at least lack of clarity, of which we encourage the regulators to be mindful.

24) In particular, Question (E) on the mandatory form requires firms to disclose determined breaches of the conduct requirements. However, no guidance is given on the circumstances in which such a determination may be made, nor is it limited to determinations which have been communicated to the individual at the time. In contrast:

a) question (F) requires firms to disclose when it has concluded that an individual is not a fit and proper person to perform a function in the course of assessments under section 63 (2A) or section 63F of the Act (when read with Note (4) to the Rules); and
b) question (G) requires disclosure of disciplinary action that has arisen from breaches of conduct requirements.

25) In the circumstances envisaged by questions (F) and (G), the individual will have been aware of the assessment or disciplinary action at the time the conclusion was reached. At least in respect of the latter, the individual is also likely to have had the benefit of procedural protections before the disciplinary action was imposed.

26) The unfair dismissal legislation requires firms to follow a fair procedure before dismissing for misconduct. This requires employers to carry out a reasonable investigation (which

normally entails providing employees with an opportunity to respond to allegations) and to have reasonable grounds for disciplinary action. Generally, firms adopt those procedural requirements for all disciplinary sanctions.

27) However, we note that breaches of some conduct rules may not engage any disciplinary procedure as such – in particular, conduct rule 2 ("*You must act with due skill, care and diligence*"). Such breaches may have been treated as performance issues at the time, may not have engaged any procedural protection, and may not even have been notified to the individual, at least not as a breach of a conduct rule as distinct from a general concern about performance or lack of experience. We are concerned, therefore, that there may be potential for significant unfairness for individuals if determined conduct rule breaches are included in regulatory references where an employee has not enjoyed the procedural protections outlined above, or where they have not been made aware that the firm has determined that there has been a breach of a conduct rule.

28) As regulatory references relate to an individual's conduct over a number of years, this creates the potential for firms to retrospectively 'relabel' matters as a breach of a conduct rule. For example, a previous performance issue that was considered to be a 'learning experience' might later be re-labelled as a breach of conduct rule 2. This could create significant unfairness for individuals.

29) We do not believe that the FCA's guidance in SYSC 22.3.4 G offers individuals any practical comfort in respect of these difficulties because:

    a) it does not identify the circumstances in which a determination envisaged by question (E) may be made, or require that such determination be notified to the individual, and
    b) the 'guidance' provides employees with no recourse under section 138D FSMA.

30) To prevent such unfair retrospective relabeling, we propose that firms should be required to inform individuals within a stated period of time when a firm has determined that an individual has breached a conduct rule. This would encourage firms to focus on the procedural protections afforded to individuals. It would also fit into the normal employment law framework that currently applies to the disciplinary sanctions available to employers, and the internal avenues of redress of grievances available to employees. Such internal redress is unavailable if the employee does not know that the employer has determined that a breach of a conduct rule has occurred, and an employee's only recourse is then through costly civil litigation long after the fact.

31) We also propose that the regulators should amend their guidance to more expressly reflect the procedural protections required by the common law. In *Cox* v *Sun Alliance Limited* [2001] EWCA Civ. 649 at paragraph 100 *et seq*, the Court of Appeal found that, in effect, the procedural requirements required by the unfair dismissal legislation, should apply to what is included in a reference; holding that employers will not be liable for negligent misstatement if they have undertaken a reasonable investigation, and have reasonable grounds for what is put in the reference. We recommend that the regulators to refer to this common law guidance explicitly, so as to encourage firms to in practice offer procedural protections to individuals in respect of matters that may be put into regulatory references. It is not sufficient, in our view, to emphasise compliance with the common law. Small firms, in particular, are likely to require more explicit guidance from the regulators.

32) We also comment on two matters relating to undetermined allegations.

33) First, the fact that firms are not required, but may, include undetermined allegations in regulatory references is likely to be a point of difficulty for many firms, and there may be significant variation in practice between firms on this point. (See paragraph 18 above).To the extent that the regulators are able to provide further guidance, ELA believes that would assist both employers and employees.

34) Secondly, we also comment on the regulators' guidance at SYSC 22.3.12 G relating to resignations where there are undermined allegations. We believe that this guidance is helpful for employers and employees, and provides a welcome degree of certainty for firms. We acknowledge the risk that it may mean that employees will be more likely to resign prior to the investigation or determination of misconduct, and that consequently such allegations are less likely to be investigated or determined and therefore less likely to be reported to subsequent employers through regulatory references.

35) As for the prohibition on agreements to limit the disclosure of information in SYSC 22.3.14, we would remind the regulator that there will be existing settlement agreements which provide for an 'agreed' reference, from which the employer will not deviate, and employers and employees will have accrued rights under such agreements. We suggest that the regulators consider whether they should make any provision in their guidance as to this point or otherwise take action to address the issue.

36) Finally, we comment on two matters relating to the drafting of the mandatory template itself.

37) First, we note that question (C) (3) requires "summary details of the role and the individual's responsibilities in performing that role" for each position held. This is likely to place a significant burden on firms, many of whom are unlikely to record this information systematically at present. We also note that question (D) requires "details of the other role(s) or responsibilities" in relation to roles undertaken more than six years ago or subsequent to the request for a reference. It is not clear why question (C) (3) request summary details, whereas question (D) requires "details" as such. We expect that summary details of roles and summary details of responsibilities is all that is required in respect of all the questions, and suggest that this is clarified.

38) Secondly, we understand that RAPs and insurers will be required to send the mandatory form to all firms, not merely other RAPs and insurers. However, the mandatory form, on its face, does not make clear that different obligations apply to RAPs/insurers and all other financial services firms (or indeed non-FSMA regulated firms). We suggest that the obligations applicable to each type of entity should be explained on the mandatory form. We also consider that FSMA firms that are not RAPs/insurers will face significant difficulties in deciding how to complete the mandatory form, as such firms will remain subject to the obligation in SUP 10A.15.1R to provide all information relevant to fitness and propriety. We suggest that it may be simpler for all regulated firms, including non-RAP/insurers, to be required to answer the questions on the mandatory form.

Question 4. Do you agree with the proposal to require RAPs and insurers to, where appropriate, issue an updated reference to RAPs and insurers to whom it has sent a reference in the past six years?

39) We understand the sentiment behind the requirement to update regulated references, however, as drafted it is onerous on the RAP or insurer who have provided the reference to make such updates and it is unclear what the recipient firm should do with the reference and the information it receives.

40) A period of six years is a considerable period of time to continue to monitor and review whether a reference needs updating, it is also likely that a sophisticated system will need to be put in place to monitor and record where references have been sent.

41) In paragraph 22.3.12(4) of the FCA Draft Handbook text, it states that "*This chapter does not require B to disclose information that has not been properly verified*." This is in relation to it being unlikely to have to disclose if someone has left part way through an investigation / disciplinary. Following this logic, in order for a RAP or insurer to update a reference, it will need to verify the information it is providing as it would have done if the individual had still been an employee. In order to do this, it is highly likely that the employee who the reference refers to will need to be asked for their representations. This is likely to cause issues with not only tracking the individual down but getting them to participate in the process.

42) Further, even without the reference in paragraph 22.3.12(4) mentioned above, to update a reference in a negative way, may result in the individual's current employment terminating (or at least cause issues between the individual and their current employer). Therefore, to update the reference without asking the individual for their representations is likely to result in the individual complaining about the updated reference and potentially bringing a claim against the RAP or insurer. Even where the individual makes representations, it may still result in the individual bringing claims against the former employer if the individual does not agree with the content of the updated reference. The threat of legal action may put a RAP or insurer off from updating a reference.

43) As drafted the RAP or insurer is required to provide an updated reference to all firms to which a reference has been provided, this is regardless of whether the individual is (or ever was) an employee of the firm. Therefore, a RAP or insurer may be sending an updated reference that references sensitive information about the individual and/or the RAP or insurer to firms that never even employed the individual. Further, there is no guidance on what the firm who receive an updated reference is meant to do with it. If the individual is employed by the firm then it is assumed that a judgement of the individual's fitness and propriety will need to be considered. This in itself leads to issues for the recipient firm, as the amount of information contained in the updated reference is unlikely to be sufficient for the recipient firm to take appropriate action against the individual. Even if there was sufficient information, the recipient may be reluctant to take action (e.g. disciplinary action) because of the legal risk involved. Where the individual is not employed by the recipient firm, what is the recipient firm meant to do with the updated reference? Forward it to the firm that they had given the reference to? Would the recipient firm have to make a judgement as to whether it would have impacted its reference? Further guidance in this regard is needed.

44) The requirement is for the RAP or insurer to update the reference up to 6 years after the reference has been given. In a scenario where a reference is given 6 years after the individual's employment has terminated, the RAP or insurer is required to update the reference for a further 6 years. Therefore, a RAP or insurer may be required to update a reference 12 years after the individual has left its employment. This obligation on the RAP or insurer is onerous and also does not appear to accord with the 6 year document retention requirement. Another issue with the requirement to update the reference 6 years after it was provided is that the reference provided last may be to a firm that chose not to hire the individual. Therefore, depending on timings, a RAP or insurer may be required to update a reference to a firm where the individual did not join, but not a reference to the firm where the individual remains. If the updating of reference requirement is to remain, it is suggested that it is for a period of 6 years from the individual's termination date rather than the date a reference was provided.

45) A further area that may lead to some inconsistency is where a decision is be made post-termination of employment that an individual has breached a Conduct Rule. This could lead to a scenario where the RAP or insurer does not believe that the breach hits the threshold required to update a reference already provided but will be required to be included on a future regulatory reference requested as it will be a concluded Conduct Rule breach. Again, an issue with concluding a breach of a conduct rule after an individual's employment has terminated is that the individual will not be present to make representations about the breach. A RAP or insurer will need to consider whether it should be asking the individual to make such representations before determining whether a breach has occurred or not.

46) Updating references places a significant responsibility on the RAP or insurer and potentially puts them at risk of legal action from both the individual and the recipient of the reference. In addition, it causes issues for the recipient firm as outlined in paragraph 43 above. As a result, there is a risk that there may be a reluctance to update references; and where it was updated, there may be a reluctance to take action against the individual. Further, it becomes a scattergun approach to try and get updated information about an individual to the current employer. A more efficient and less onerous approach would be to inform the PRA and/or FCA of the concerns relating to the individual. It would then be for the PRA and/or FCA to inform the individual's current employer about the new issues that impact on the previous reference.

07 December 2015

APPENDIX

Members of the Sub-Committee

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