

Financial Services (Banking Reform) Bill

Government annotated amendments: Senior Managers Regime and Conduct

Clause 5

LORD DEIGHTON

- 1 Page 21, line 36, leave out “In”

Clause 5

LORD DEIGHTON

- 2 Page 21, line 36, leave out “after” and insert “is amended as follows.”

Clause 5

LORD DEIGHTON

- 3 Page 21, leave out from beginning of line 37 to end of line 3 on page 22 and insert—

“() After subsection (6) insert—

“(6A) In relation to the carrying on of a regulated activity by an authorised person which is a ring-fenced body, the function of acting as a director of the body must be specified as a controlled function in rules made—ju

(a) in a case where the body is a PRA-authorised person, by the PRA, or

(b) in any other case, by the FCA.”

() After subsection (10) insert.

“(10A) In relation to a body which does not have a board of directors, “director” means a member of its equivalent management body.”

Under section 59 FSMA, the appointments of all individuals who are to perform certain roles in a bank or other financial services firm require the prior approval of the regulator (the Prudential Regulation Authority (PRA) or the Financial Conduct Authority (FCA)) which specified that role as a “controlled function” (for example, roles such as chief executive or and money laundering reporting officer) in its rules.

Currently clause 5 of the Bill requires the regulators to ensure that being the director of a ring-fenced body is always a ‘controlled function.’ This creates a statutory ‘lock’, so that directors of a ring-fenced bank must always be approved by the regulators.

The first three amendments in this set of amendments make technical changes to clause 5 to ensure it is consistent with the other changes now being introduced to the approved persons regime.

After Clause 12

LORD DEIGHTON

- 4 Insert the following new Clause –

“PART 4

CONDUCT OF PERSONS WORKING IN FINANCIAL SERVICES SECTOR

“Functions for which approval is required

- (1) Section 59 of FSMA 2000 (approval for particular arrangements) is amended as follows.
- (2) Omit subsection (5).
- (3) For subsection (6) substitute –

“(6) The PRA may specify a description of function under subsection (3)(a) only if, in relation to the carrying on of a regulated activity by a PRA-authorised person, it is satisfied that the function is a senior management function as defined in section 59ZA.

The PRA currently has a power to specify functions that are controlled functions. This provision amends FSMA so that the PRA can only specify functions as controlled functions if it is satisfied that they are ‘senior management functions’.

So all controlled functions specified by the PRA will be senior management functions (whereas for the FCA only a subset of the controlled functions it specifies will be senior management functions, as to which see below).

- (4) After subsection (6A) (inserted by section 5 above) insert –

“(6B) If –

(a) a function of a description specified in rules made by the FCA under subsection (3)(a) or (b) is a controlled function in relation to the carrying on of a regulated activity by a bank, and

(b) the FCA is satisfied that, in relation to the carrying on of a regulated activity by a bank, the function is a senior management function as defined in section 59ZA,

the FCA must designate the function in the rules as a senior management function.”

The FCA at present has a power to specify functions which are 'controlled functions'. This means that an individual intending to perform such functions must be approved by the FCA as fit and proper to perform them. This provision imposes an obligation on the FCA to specifically say in its rules that a controlled function which it has specified is a 'senior management function' if it is satisfied that the function falls into the definition of 'senior management function' (see section 59ZA(2) below) and relates to a bank.

(6C) If a function of a description specified in rules made by the PRA under subsection (3)(a) is a controlled function in relation to the carrying on of a regulated activity by a bank, the PRA must designate the function in the rules as a senior management function."

(5) Omit subsections (7) to (7B) and (11).

This provision creates an obligation for the PRA to specify any controlled functions which it specifies as 'senior management functions' if they relate to a bank.

Although all controlled functions specified by the PRA must be senior management functions, this obligation ensures that this is made explicit in the PRA's rules.

After Clause 12

LORD DEIGHTON

5 Insert the following new Clause —

"Senior management functions

After section 59 of FSMA 2000 insert —

"59ZA Senior management functions

(1) This section has effect for determining whether a function is for the purposes of section 59(6) and (6B) a senior management function.

(2) A function is a "senior management function", in relation to the carrying on of a regulated activity by an authorised person, if —

(a) the function will require the person performing it to be responsible for managing one or more aspects of the authorised person's affairs, so far as relating to the activity, and

(b) those aspects involve, or might involve, a risk of serious consequences —

(i) for the authorised person, or

(ii) for business or other interests in the United Kingdom.

These provisions define ‘senior management function’. A function is a senior management function if it involves managing an aspect of the affairs of a firm, and those aspects could involve serious consequences for the firm or for wider business or other interests in the UK. This puts the stress on managing. The definition also requires regulators to consider whether a person has responsibility for aspects of the firm’s business that give rise to key risks.

The definition of senior management function reflects the view of the Parliamentary Commission on Banking Standards that the senior persons regime which they proposed, should focus on those who ‘really’ manage banks, and who have responsibility for key risks: not just to the bank, but also to wider interests in the UK.

Although the definition is of general application, it is only when someone is a designated senior manager in relation to a bank that other aspects of the new regime for senior managers and banking standards will apply (i.e. reversed burden of proof, statements of responsibility, and special register entries for senior managers).

(3) In subsection (2)(a) the reference to managing one or more aspects of an authorised person’s affairs includes a reference to taking decisions, or participating in the taking of decisions, about how one or more aspects of those affairs should be carried on.”

This provision makes it clear that the term ‘managing’ must be understood widely, to involve anyone who participates in decision making. Hence the concept of a ‘senior manager’ will include non-executive directors of the firm itself. It may also cover, in relation to a firm, persons who are employed outside the firm, for example, directors of its parent undertaking, if they are involved in decisions that affect the business of the firm.

After Clause 12

LORD DEIGHTON

6 Insert the following new Clause—

“Statements of responsibilities

(1) Section 60 of FSMA 2000 (applications for approval) is amended as follows.

Section 60 sets out the process for making applications for approval to perform a controlled function. The firm concerned (not the individual) must apply to the appropriate regulator for its approval of the individual (the “candidate”) to perform the controlled function which is the subject of the application. A new application is required not only when somebody joins a firm from outside to perform a controlled function but also when an individual takes up a controlled function in a firm through promotion or other job changes.

(2) After subsection (2) insert –

“(2A) If –

(a) the application is for the approval of a person to perform a designated senior management function, and

(b) the authorised person concerned is a bank,

the appropriate regulator must require the application to contain, or be accompanied by, a statement setting out the aspects of the affairs of the authorised person concerned which it is intended that the person will be responsible for managing in performing the function.

(2B) A statement provided under subsection (2A) is known as a ‘statement of responsibilities’.

(2C) In subsection (2A) “designated senior management function” means a function designated as a senior management function under section 59(6B) or (6C)”.

(3) After subsection (6) insert –

“(6A) Subsection (6) applies to references to a bank as it applies to references to the authorised person concerned.”

If an application is made for someone to perform a senior management function in relation to a bank it must be accompanied by a statement of responsibilities for that person, which sets out the areas within the firm for which that person will be responsible.

After Clause 12

LORD DEIGHTON

7 Insert the following new Clause –

“Power to give approval subject to conditions or for limited period

(1) Section 61 of FSMA 2000 (determination of applications) is amended as follows.

Section 61 provides that a regulator may accept or reject an application for approval made under section 60, and provides that the firm or the candidate may appeal under standard FSMA procedures if an application is rejected.

(2) For subsection (1) substitute –

“(1) The regulator to which an application for approval is made under section 60 may grant the application only if –

(a) it is satisfied that the person in respect of whom the application is made (“the candidate”) is a fit and proper person to perform the function to which the application relates, or

(b) in a case where the application is for approval to perform a designated senior management function in relation to the carrying on of a regulated activity by a bank (a “bank-related senior management application”), it is satisfied that the condition in paragraph (a) will be met if the application is granted subject to one or more conditions (as to which, see subsection (2B))”.

(3) In subsection (2), for “deciding that question” substitute “determining the application”.

If a regulator receives an application for an individual to perform a designated senior management function (i.e. a senior management function which either regulator has specified as such in its rules), and that application relates to a bank, the regulator can now grant the approval in two cases. First, the regulator can grant approval if it is satisfied the individual is fit and proper. This is the existing FSMA test which applies to all applications. The new second test is that the regulator can grant approval if it is satisfied that the candidate will be fit and proper if the application is granted subject to conditions. This test only applies in relation to applications to perform senior management functions in banks.

(4) After subsection (2A) insert –

“(2B) The regulator to which a bank-related senior management application is made under section 60 may in particular –

(a) grant the application subject to any conditions that the regulator considers appropriate, and

(b) grant the application so as to give approval only for a limited period.

For a bank-related senior manager application, the regulators may grant approval conditionally or subject to time limits. This is the place where the regulator is given the new power to grant conditional approvals (in relation to applications relating to banks).

(2C) A regulator may exercise the power under paragraph (a) or (b) of subsection (2B) only if –

(a) where the regulator is the FCA, it appears to the FCA that it is desirable to do so in order to advance one or more of its operational objectives, and

(b) where the regulator is the PRA, it appears to the PRA that it is desirable to do so in order to advance any of its objectives.

The regulators may only grant conditional or time-limited approval if desirable to advance their objectives.

(2D) Consent given by the FCA for the granting of the application may be conditional on the manner in which the PRA exercises its power under subsection (2B).

The FCA currently has to consent to the PRA granting an application for approval. This provision allows the FCA to consent to the PRA giving an approval provided the PRA gives the approval subject to certain conditions.

(5) After subsection (3) insert –

“(3ZA) In the case of a bank-related senior management application, the reference in subsection (3)(a) to granting the application is a reference to granting it without imposing conditions or limiting the period for which the approval has effect.”

(6) After subsection (5) insert –

“(6) In this section -

(a) “designated senior management function” means a function designated as a senior management function under section 59(6B) or (6C);

(b) any reference to a bank includes a reference to a person who has applied for permission under Part 4A and will be a bank if permission is given.”

(7) In section 62 of FSMA 2000 (applications for approval: procedure and right to refer to Tribunal).

(a) in subsection (2), after “the application” insert “, or to grant the application subject to conditions or for a limited period (or both)”;

(b) in subsection (3), after “the application” insert “, or to grant the application subject to conditions or for a limited period (or both)”;

(c) in subsection (4), after “the application” insert “, or to grant the application subject to conditions or for a limited period (or both)”.

Section 62 sets out standard procedures relating to determining applications for approval. This provision applies those to the case where a regulator proposes only to grant conditional approval. If a regulator proposes to grant conditional or time-limited approval it must give a warning notice. If it decides to grant the application subject to conditions or time-limits it must give a decision notice. In that case it must notify the parties of their right to refer the decision to the Tribunal.

After Clause 12

LORD DEIGHTON

8 Insert the following new Clause –

“Changes in responsibilities of senior managers

After section 62 of FSMA 2000 insert –

“62A Changes in responsibilities of senior managers

(1) This section applies where –

- (a) an authorised person has made an application to the appropriate regulator for approval under section 59 for a person to perform a designated senior management function,
- (b) the application contained, or was accompanied by, a statement of responsibilities under section 60(2A), and
- (c) the application has been granted.

(2) If, since the granting of the application, there have been any significant changes in the aspects of the authorised person's affairs which the person is responsible for managing in performing the function, the authorised person must provide the appropriate regulator with a revised statement of responsibilities.

If a person has been approved to perform a designated senior management function, and their initial application contained a statement of responsibilities, then the firm in relation to which they perform the senior management function must provide the regulators with an updated statement of responsibilities when there is a significant change in their responsibilities.

(Where the senior manager is taking up a new role performing a different controlled function, the firm will need to submit an application for approval to perform the new controlled function. If this function is a designated senior manager function in a bank, a new statement of responsibilities will be required under section 60(2A) – see above.)

(3) The appropriate regulator may require the authorised person –

- (a) to provide information which the person is required to give under this section in such form as the appropriate regulator may direct, or
- (b) to verify such information in such a way as the appropriate regulator may direct.

The regulators can require the firm to provide information in a form which the regulator directs, and to verify that information in a way which the regulator directs.

(4) In this section –

“the appropriate regulator” has the same meaning as in section 60;

“designated senior management function” means a function designated as a senior management function under section 59(6B) or (6C).”

After Clause 12

LORD DEIGHTON

9 Insert the following new Clause –

“Variation of approval

After section 63 of FSMA 2000 insert –

“63ZA Variation of senior manager’s approval at request of bank

(1) Where an application for approval under section 59 is granted subject to conditions, the authorised person concerned may apply to the appropriate regulator to vary the approval by –

- (a) varying a condition,
- (b) removing a condition, or
- (c) imposing a new condition.

If an approval to perform a designated senior management function in relation to a bank has been granted subject to conditions, the firm that made the application may apply for the permission to be varied by adding, removing or varying the conditions.

(2) “The appropriate regulator” –

- (a) in the case of an application for variation of an approval in a way described in subsection (1)(a) or (b), means whichever of the FCA or the PRA imposed the condition concerned;
- (b) in the case of an application for variation of an approval in the way described in subsection (1)(c), means the regulator who gave the approval.

(3) The PRA must consult the FCA before determining an application under this section, unless the application relates to the variation or removal of a condition which was imposed by the PRA in exercise of its power under section 63ZB.

(4) The regulator to which an application is made under this section must, before the end of the period for consideration, determine whether –

- (a) to grant the application; or
- (b) to give a warning notice under section 62(2).

The regulators have a fixed period within which to grant the application or, if they propose to refuse it, to give a warning notice.

(5) “The period for consideration” means the period of 3 months beginning with the date on which the regulator receives the application.

The fixed period is three months.

(6) The FCA may refuse an application under this section if it appears to the FCA that it is desirable to do so in order to advance one or more of its operational objectives.

(7) The PRA may refuse an application under this section if it appears to the PRA that it is desirable to do so in order to advance any of its objectives.

The regulators may refuse such an application if desirable to advance their objectives.

(8) The following provisions apply to an application made under this section for variation of an approval as they apply to an application for approval made under section 60 –

section 60(2) to (8),

section 61(4) and (5),

section 62.

This provision applies certain procedural and other provisions to an application by a firm for a conditional permission to be varied. These include provisions about the application, about how the regulators must determine the application and about the giving of warning and decision notices.

63ZB Variation of senior manager's approval on initiative of regulator

(1) The FCA may vary an approval under section 59 given by the FCA or the PRA for the performance of a designated senior management function in relation to the carrying on of a regulated activity by a bank if the FCA considers that it is desirable to do so in order to advance one or more of its operational objectives.

This provision allows the regulator to vary an approval (whether originally given conditionally or unconditionally). The FCA may vary an approval it, or the PRA, has given in relation to a designated senior management function being performed in relation to a bank. It may do so if it considers it is desirable in order to advance its objectives.

(2) The PRA may vary an approval under section 59 for the performance of a designated senior management function in relation to the carrying on of a regulated activity by a bank if –

(a) either –

(i) the PRA gave the approval, or

(ii) the FCA gave the approval and the bank is a PRA-
authorised person, and

(b) the PRA considers that it is desirable to do so in order to advance any of its objectives.

The PRA may also vary an approval (whether originally given conditionally or unconditionally). The PRA may vary an approval it gave itself, or an approval given by the FCA in relation to a PRA-authorised person.

(3) A regulator may vary an approval by –

- (a) imposing a condition,
- (b) varying a condition,
- (c) removing a condition, or
- (d) limiting the period for which the approval is to have effect.

Either regulator may vary an approval by imposing, varying or removing a condition. They may also impose time limits on an approval.

(4) Before one regulator varies an approval given by the other regulator, it must consult the other regulator.

(5) In this section .designated senior management function. means a function designated as a senior management function under section 59(6B) or (6C).

63ZC Exercise of power under section 63ZB: procedure

This section sets out the procedure a regulator must follow when varying an approval.

(1) This section applies to an exercise, by either regulator, of the power to vary an approval under section 63ZB.

(2) A variation takes effect –

- (a) immediately, if the notice given under subsection (4) states that that is the case,
- (b) on such date as is specified in the notice, or
- (c) if no date is specified in the notice, when the matter to which the notice relates is no longer open to review.

(3) A variation may be expressed to take effect immediately (or on a specified date) only if the regulator concerned, having regard to the ground on which it is exercising the power to vary, reasonably considers that it is necessary for the variation to take effect immediately (or on that date).

Generally speaking a proposed variation will take effect on the date specified in the first notice sent by the regulator to the interested parties. However, if a regulator reasonably considers it is necessary, the variation may take immediate effect.

(4) If either regulator proposes to vary an approval or varies an approval with immediate effect, it must give each of the interested parties written notice.

(5) The notice must –

- (a) give details of the variation,
- (b) state the regulator's reasons for the variation,
- (c) inform the interested parties that each of them may make representations to the regulator within such period as may be

specified in the notice (whether or not any of the interested parties has referred the matter to the Tribunal),

(d) inform the interested parties of when the variation takes effect, and

(e) inform the interested parties of the right of each of them to refer the matter to the Tribunal.

A regulator proposing to vary an approval must give written notice to the interested parties, setting out the prescribed information.

(6) “The interested parties”, in relation to an approval, are –

(a) the person on whose application it was given (“A”),

(b) the person in respect of whom it was given (“B”), and

(c) the person by whom B’s services are retained, if not A.

The interested parties are the firm which originally applied for the approval, the person who is approved to perform functions and the firm to which the person provides that function.

(7) The regulator giving the notice may extend the period allowed under the notice for making representations.

(8) If having considered the representations made by the interested parties, the regulator decides –

(a) to vary the approval, or

(b) if the variation has taken effect, not to rescind it,

it must give each of the interested parties written notice.

A regulator must consider any representation made by the interested parties. If it then decides to go ahead with a variation (or, if the variation took place immediately, not to rescind it) it must give written notice of this to the parties.

(9) If having considered the representations made by the interested parties, the regulator decides –

(a) not to vary the approval,

(b) to vary the approval in a different way, or

(c) if the variation has taken effect, to rescind it,

it must give each of the interested parties written notice.

Similarly, if the regulator considers the representations and decides not to vary the approval (or to vary it differently, or to rescind a variation that had taken effect immediately) it must also give written notice to the interested parties.

(10) A notice under subsection (8) must inform the interested parties of the right of each of them to refer the matter to the Tribunal.

A notice confirming that a variation will be made, or maintained, must let the interested parties know about their right to refer the matter to the Tribunal.

(11) A notice under subsection (9)(b) must comply with subsection (5).

A notice explaining that a regulator, having considered representations, is still going to vary the approval but in a different way, must set out the information required to be set out for the initial proposal to vary (so the process of entertaining representations is repeated, but for the new proposal to vary).

(12) If a notice informs the interested parties of the right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference.

(13) For the purposes of subsection (2)(c), whether a matter is open to review is to be determined in accordance with section 391(8).

If the regulator's first notice about a proposal to vary a permission says nothing at all about when the variation will take effect, the default position is that the variation will take effect when the matter is no longer 'open to review'. Under FSMA a matter remain open to review until either (i) it is too late to refer it to the tribunal, or (ii) it has been referred to the Tribunal and dealt with, and the period for an appeal against the Tribunal's decision has elapsed.

(14) "Approval" means an approval under section 59."

After Clause 12

LORD DEIGHTON

10 Insert the following new Clause –

"Statement of policy

After section 63ZC of FSMA 2000 (inserted by section (Variation of approval) above) insert –

"63ZD Statement of policy relating to conditional approval and variation

(1) Each regulator must prepare and issue a statement of its policy with respect to –

(a) its giving of approval under section 59 subject to conditions or for a limited period only, and

(b) its variation under section 63ZA or 63ZB of an approval given under section 59.

Both regulators must prepare and issue a policy about how they will use the power to give conditional approval for performance of a

designated senior management function in relation to a bank, and how they will vary such approvals after they have been given (whether on application by a firm or on their own initiative).

(2) A regulator may at any time alter or replace a statement issued by it under this section.

(3) If a statement issued under this section is altered or replaced by a regulator, the regulator must issue the altered or replacement statement.

The regulators are free to update their policy at any time, but they must always ensure the most recent policy has been issued (so that it is accessible to those who it may affect).

(4) A statement issued under this section must be published by the regulator concerned in the way appearing to the regulator to be best calculated to bring it to the attention of the public.

(5) A regulator may charge a reasonable fee for providing a person with a copy of a statement published under this section.

(6) A regulator must, without delay, give the Treasury a copy of any statement which it publishes under this section.

63ZE Statement of policy: procedure

(1) Before issuing a statement of policy under section 63ZD, a regulator ("the issuing regulator") must—

(a) consult the other regulator, and

(b) publish a draft of the proposed statement in the way appearing to the issuing regulator to be best calculated to bring it to the attention of the public.

(2) The duty of the FCA to consult the PRA under subsection (1)(a) applies only in so far as the statement of policy applies to persons whose approval under section 59 relates to the performance of a function designated by the FCA as a senior management function under section 59(6B) in relation to the carrying on by PRA-authorised persons of regulated activities.

The regulators must consult with each other before publishing a policy about their use of the power to give conditional or time-limited approval, or to vary an approval. However, the FCA only has to consult the PRA in relation to the performance of designated senior management functions (that is, designated by the FCA), which are performed in relation to PRA-authorised persons.

The regulator must also publish a draft of the policy.

(3) The draft must be accompanied by notice that representations about the proposal may be made to the issuing regulator within a specified time.

(4) Before issuing the proposed statement, the issuing regulator must have regard to any representations made to it in accordance with subsection (3).

(5) If the issuing regulator issues the proposed statement it must publish an account, in general terms, of –

(a) the representations made to it in accordance with subsection (3), and

(b) its response to them.

The regulator must have regard to any representation made to it about a draft policy. If it goes ahead and issues the policy it must publish a general account of the representations made to it and its response to them. The account may be in general terms, so does not have to identify particular people who made representations (for example).

(6) If the statement differs from the draft published under subsection (1) in a way which is in the opinion of the issuing regulator significant, the issuing regulator –

(a) must before issuing it carry out any consultation required by subsection (1)(a), and

(b) must (in addition to complying with subsection (5)) publish details of the difference.

If the regulator decides to issue a policy which the regulator considers is significantly different from the policy initially published in draft, the regulator must consult on the new policy and publish details of the difference.

(7) The issuing regulator may charge a reasonable fee for providing a person with a draft published under subsection (1)(b).

(8) This section also applies to a proposal to alter or replace a statement.""

This last subsection 9(8)) simply puts beyond doubt that the procedural provisions of this amendment also apply if a policy is being slightly altered, or if an existing policy is being replaced with an altered version.

After Clause 12

LORD DEIGHTON

11 Insert the following new Clause –

“Extension of limitation periods for imposing sanctions

(1) Section 63A of FSMA 2000 (power to impose penalties) is amended as follows –

Section 63A allows the regulators to impose penalties (after following standard FSMA procedures for enforcement action) on persons who perform a controlled function without the appropriate regulator’s approval.

(2) In subsection (4), for “period of three years” substitute “relevant period”.

(3) After subsection (5A) insert –

“(5B) “The relevant period” is –

(a) in relation to the performance of a controlled function without approval before the day on which this subsection comes into force, the period of 3 years, and

(b) in relation to the performance of a controlled function without approval on or after that day, the period of 6 years”.

This provision extends the limitation period within which the regulator may impose civil sanctions (for example by imposing a fine or publishing a notice of censure) on an individual for performing a ‘controlled function’ without approval. The limitation period is extended from three to six years. This extension applies to all controlled functions, and is not limited to controlled functions being performed in relation to banks.

(4) Section 66 of FSMA 2000 (disciplinary powers) is amended as follows.

Section 66 provides for the regulators to impose penalties, suspensions or restrictions on an approved person, or to publicly censure that person (after following standard FSMA procedures for enforcement action) when the approved person is guilty of misconduct.

(5) In subsection (4), for .period of three years. substitute “relevant period.”

(6) After subsection (5) insert –

“(5ZA) “The relevant period” is –

(a) in relation to misconduct which occurs before the day on which this subsection comes into force, the period of 3 years, and

(b) in relation to misconduct which occurs on or after that day, the period of 6 years.””

This provision also extends the limitation period from three years to six years, but this time for imposing civil penalties (such as a fines and notices of censure) on approved persons who are guilty of misconduct (see section 66A and section 66B below for the definitions of misconduct). This extension also applies to all controlled functions, and is not limited to controlled functions being performed in relation to banks. The 6 year limitation period will also apply for enforcement action against employees in banks.

After Clause 12

LORD DEIGHTON

12 Insert the following new Clause –

“Rules of conduct

(1) Part 5 of FSMA 2000 (performance of regulated activities) is amended as follows.

(2) Omit sections 64 and 65 (and the italic cross-heading preceding them).

Sections 64 and 65 provide for the regulators to issue statements of principle and codes of practice applying to approved persons. The statements of principle are binding on approved persons. The codes of practice provide guidance on ways in which approved persons can comply with the statements of principle. They are being replaced by section 64A.

(3) Before section 66 insert –

“Conduct of approved persons and others

64A Rules of conduct

(1) If it appears to the FCA to be necessary or expedient for the purpose of advancing one or more of its operational objectives, the FCA may make rules about the conduct of the following persons –

(a) persons in relation to whom either regulator has given its approval under section 59;

(b) persons who are employees of banks.

This provision gives the FCA, if it considers it necessary or expedient to advance one or more of its operational objectives,

power to make rules about the conduct of individuals. It may make rules about the conduct of persons it has approved to perform a controlled function (whether a designated senior management function in a bank, or another controlled function in any kind of firm).

It may also make rules about people who do not have approval to perform controlled functions, but are simply employees of a bank. This is a new power. It is limited to banks, but extends to anyone employed in the bank, at whatever level.

(2) If it appears to the PRA to be necessary or expedient for the purpose of advancing any of its objectives, the PRA may make rules about the conduct of the following persons.

(a) persons in relation to whom it has given its approval under section 59;

(b) persons in relation to whom the FCA has given its approval under section 59 in respect of the performance by them of a relevant senior management function in relation to the carrying on by a PRA-authorized person of a regulated activity;

(c) persons who are employees of PRA-authorized banks.

(3) In subsection (2) –

“PRA-authorized bank” means a bank that is a PRA-authorized person, and

“relevant senior management function” means a function which the PRA is satisfied is a senior management function as defined in section 59ZA (whether or not the function has been designated as such by the FCA).

Subsections (2) and (3) give the PRA a power to make rules about the conduct of individuals. The PRA may make such rules for people it has approved to perform senior management functions in PRA-authorized firms.

Note that the FCA can approve people to perform controlled functions in relation to PRA-authorized firms. This provision therefore also allows the PRA to make conduct rules binding on such people, if they are performing a senior management function (whether or not the function has been designated by the FCA as a ‘designated senior management function’).

Finally, the PRA can make conduct rules for employees in a PRA-authorized bank. Again, this is a new power. It is,

however, limited to banks that are PRA-authorised persons. It extends to all employees of such PRA-authorised banks.

(4) Rules made under this section must relate to the conduct of persons in relation to the performance by them of qualifying functions.

The rules about individuals must relate to their conduct when performing certain functions relating to a firm.

(5) In subsection (4) “qualifying function”, in relation to a person, means a function relating to the carrying on of activities (whether or not regulated activities) by.

(a) in the case of an approved person, the person on whose application approval was given, and

(b) in any other case, the person’s employer.

This provision simply clarifies the functions (performed by individuals) which the rules can be about.

(6) In this section any reference to an employee of a person (“P”) includes a reference to a person who –

(a) personally provides, or is under an obligation personally to provide, services to P under an arrangement made between P and the person providing the services or another person, and

(b) is subject to (or to the right of) supervision, direction or control by P as to the manner in which those services are provided,

and “employer” is to be read accordingly.””

This provision ensures that the definition of employee will be broad enough to capture someone who, although they are formally self-employed or providing services under a contract for services, are in practice in a position equivalent to an employee. This might in some circumstances include sub-contractors, employees of sub-contractors or employees of a company in the same group as the firm, which is responsible for employing the staff who work for group companies.

After Clause 12

LORD DEIGHTON

13 Insert the following new Clause –

“Definition of “misconduct”

(1) In section 66 of FSMA 2000 (disciplinary powers) –

Section 66 gives the regulators powers to impose penalties, suspensions or restrictions on an approved person, or to publicly censure that person (after following standard FSMA procedures for enforcement action) when the approved person is guilty of misconduct i.e. a breach of one or more of the statements of principles for approved persons or being knowingly concerned in a breach by the firm of the regulatory requirements that apply to it.

(a) after subsection (1) insert –

“(1A) For provision about when a person is guilty of misconduct for the purposes of action by a regulator –

(a) see section 66A, in the case of action by the FCA, and

(b) see section 66B, in the case of action by the PRA.”;

(b) omit subsections (2), (2A), (6) and (7).

These provisions amend FSMA to introduce a new definition of misconduct, which will set out when the regulators can impose civil sanctions on individuals for misconduct. New section 66A sets out cases when the FCA may do this, while new section 66B sets out when the PRA may do so.

(2) After that section insert –

“66A Misconduct: action by the FCA

(1) For the purposes of action by the FCA under section 66, a person is guilty of misconduct if any of conditions A to C is met in relation to the person.

The FCA may take enforcement action (following standard FSMA procedures) against an individual if any of conditions A-C (below) apply.

(2) Condition A is that –

(a) the person has at any time failed to comply with rules made by the FCA under section 64A, and

(b) at that time the person was –

(i) an approved person, or

(ii) an employee of a bank.

The FCA may bring take enforcement action (following standard FSMA procedures) against an approved person who has failed to comply with applicable conduct rules made by the FCA.

It may also take enforcement action (following standard FSMA procedures) against an employee of a bank who has failed to comply with applicable conduct rules made by the FCA (whether or not that employee was an approved person).

(3) Condition B is that –

(a) the person has at any time been knowingly concerned in a contravention of a relevant requirement by an authorised person, and

(b) at that time the person was –

(i) an approved person in relation to the authorised person, or

(ii) in the case of an authorised person that is a bank, an employee of the bank.

The FCA may also take enforcement action (following standard FSMA procedures) against an approved person if they were knowingly concerned in a breach of regulatory requirements by an authorised person and they were an approved person in relation to that authorised person.

Further, the FCA may take enforcement action (following standard FSMA procedures) against employees of banks if they were knowingly concerned in a breach by the bank of regulatory requirements.

(4) In this section .relevant requirement. means a requirement –

(a) imposed by or under this Act, or

(b) imposed by any qualifying EU provision specified, or of a description specified, for the purposes of this subsection by the Treasury by order.

(5) Condition C is that –

(a) the person has at any time been a senior manager in relation to an authorised person that is a bank,

(b) there has at that time been (or continued to be) a contravention of a relevant requirement by the bank, and

(c) the senior manager was at that time responsible for the management of any of the bank's activities in relation to which the contravention occurred.

(6) But a person ("P") is not guilty of misconduct by virtue of subsection (5) if P satisfies the FCA that P had taken such steps as a person in P's position could reasonably be expected to take to avoid the contravention occurring (or continuing).

Finally, under condition C, the FCA may take enforcement action (following standard FSMA procedures) against senior managers in banks if a regulatory contravention occurs in a part of the business for which they were responsible. Here, 'senior managers' means only

people with approval to perform a designated senior management function in a bank (that is, a controlled function which the regulators have said in their rules is a senior management function, in a case where the firm is a bank).

This condition imposes the ‘reversed burden of proof’ on senior managers. That is, if the contravention occurs in a part of the business for which a senior manager is responsible that senior manager will be guilty of misconduct unless he or she can show they took such steps to prevent the contravention as could reasonably be expected of a person in their position.

(7) For the purposes of subsection (5) –

“senior manager”, in relation to an authorised person that is a bank, means a person who has approval under section 59 to perform a designated senior management function in relation to the carrying on by the bank of a regulated activity;

“designated senior management function” means a function designated as a senior management function under section 59(6B) or (6C).

(8) In this section –

“approved person” –

(a) means a person in relation to whom an approval is given under section 59, and

(b) in relation to an authorised person, means a person in relation to whom such approval is given on the application of the authorised person;

“employee”, in relation to a person, has the same meaning as in section 64A.

Note that in these provisions employee also has the wide meaning given to it in new section 64A, so that it will capture people who are in an equivalent position to an employee.

66B Misconduct: action by the PRA

(1) For the purposes of action by the PRA under section 66, a person is guilty of misconduct if any of conditions A to C is met in relation to the person.

The PRA may take enforcement action (following standard FSMA procedures) against an individual if any of conditions A-C (below) apply.

(2) Condition A is that –

- (a) the person has at any time failed to comply with rules made by the PRA under section 64A, and
- (b) at that time the person was –
 - (i) an approved person, or
 - (ii) an employee of a PRA-authorised bank.

The PRA may take enforcement action (following standard FSMA procedures) against an approved person who has failed to comply with applicable conduct rules made by the PRA.

It may also take enforcement action (following standard FSMA procedures) against an employee of a PRA-authorised bank who has failed to comply with applicable conduct rules made by the PRA (whether or not that employee was a an approved person).

(3) Condition B is that –

- (a) the person has at any time been knowingly concerned in a contravention of a relevant requirement by a PRA-authorised person, and
- (b) at that time the person was –
 - (i) an approved person in respect of the performance of a relevant senior management function in relation to the carrying on by the PRA-authorised person of a regulated activity, or
 - (ii) in the case of an authorised person that is a bank, an employee of the bank.

The PRA may also take enforcement action (following standard FSMA procedures) against an approved person if they were knowingly concerned in a breach of regulatory requirements by a PRA-authorised person and they were an approved person in relation to that PRA-authorised person. However, in the case of the PRA, this power is limited to approved persons who are performing senior management functions (whether or not they are designated senior management functions).

Further, the PRA may take enforcement action (following standard FSMA procedures) against employees of PRA-authorised banks if they were knowingly concerned in a breach by the bank of regulatory requirements.

(4) In this section “relevant requirement” means a requirement –

- (a) imposed by or under this Act, or

(b) imposed by any qualifying EU provision specified, or of a description specified, for the purposes of this subsection by the Treasury by order.

(5) Condition C is that –

(a) the person has at any time been a senior manager in relation to a PRA-authorized bank,

(b) there has at that time been (or continued to be) a contravention of a relevant requirement by the bank, and

(c) the senior manager was at that time responsible for the management of any of the bank's activities in relation to which the contravention occurred.

(6) But a person ("P") is not guilty of misconduct by virtue of subsection (5) if P satisfies the PRA that P had taken such steps as a person in P's position could reasonably be expected to take to avoid the contravention occurring (or continuing).

Finally, under condition C, the PRA may take enforcement action (following standard FSMA procedures) against senior managers in PRA-authorized banks if a regulatory contravention occurs in a part of the business for which they were responsible. Here, 'senior managers' means only people with approval to perform a designated senior management function in a bank (that is, a controlled function which the regulators have said in their rules is a senior management function, in a case where the firm is a bank).

This condition imposes the 'reversed burden of proof' on senior managers. That is, if the contravention occurs in a part of the business for which a senior manager is responsible that senior manager will be guilty of misconduct unless he or she can show they took such steps to prevent the contravention as could reasonably be expected of a person in their position.

(7) For the purposes of subsection (5) –

"senior manager", in relation to an authorised person that is a bank, means a person who has approval under section 59 to perform a designated senior management function in relation to the carrying on by the bank of a regulated activity;

"designated senior management function" means a function designated as a senior management function under section 59(6B) or (6C).

(8) In this section –

"approved person" –

(a) means a person in relation to whom –

(i) the PRA has given its approval under section 59, or

(ii) the FCA has given its approval under section 59 in respect of the performance by the person of a relevant senior management function in relation to the carrying on by a PRA-
authorised person of a regulated activity, and

(b) in relation to an authorised person, means a person in relation to whom approval under section 59 is given on the application of the authorised person;

“employee”, in relation to a person, has the same meaning as in section 64A;

“PRA-
authorised bank” means a bank that is a PRA-
authorised person;

“relevant senior management function” means a function which the PRA is satisfied is a senior management function as defined in section 59ZA (whether or not the function has been designated as such by the FCA).

Here again employee has the wide meaning given to it in new section 64A, so that it will capture people who are in an equivalent position to an employee.

Note also that whether the PRA can take enforcement action against an approved person in a PRA-
authorised firm, whom the PRA did not themselves approve, will depend on the PRA’s opinion of whether that person is approved to perform a function that is a ‘senior management function.’

After Clause 12

LORD DEIGHTON

14 Insert the following new Clause –

““Bank”

“Meaning of “bank”

In Part 5 of FSMA 2000 (performance of regulated activities), after section 71 insert –

“71A Meaning of “bank”

(1) In this Part “bank” means a UK institution which has permission under Part 4A to carry on the regulated activity of accepting deposits.

(2) But “bank” does not include an insurer.

This provision sets out the meaning of bank that will apply for the whole of this part of FSMA. 'Bank' includes all deposit-takers but does not include an insurer. This means it does include building societies and credit unions (note that the new criminal offence proposed in government amendments [[46-48] extends to building societies, but not to credit unions).

(3) In this section –

(a) "UK institution" means an institution which is incorporated in, or formed under the law of any part of, the United Kingdom;

(b) "insurer" means an institution which is authorised under this Act to carry on the regulated activity of effecting or carrying out contracts of insurance as principal.

The term 'bank' refers only to institutions that are incorporated in the UK (in the case of incorporated entities such as companies), or formed under the law of the UK (in the case of other classes of institution such as a partnership).

(4) Subsections (1) and (3)(b) are to be read in accordance with section 22, taken with Schedule 2 and any order under section 22."

After Clause 12

LORD DEIGHTON

15 Insert the following new Clause.

"Recording information about senior managers

(1) Section 347 of FSMA 2000 (the record of authorised persons etc.) is amended as follows.

Section 347 requires the FCA to maintain a publicly available record of financial services firms and approved persons and sets out the information that must be included in the record.

(2) In subsection (2) –

(a) in paragraph (g), after sub-paragraph (iii) insert –

"(iv) in a case where the relevant authorised person is a bank, whether or not the person is a senior manager;"

The FCA must record whether an approved person in relation to a bank is a senior manager.

(b) after that paragraph insert –

"(h) in the case of an approved person who is a senior manager in relation to an authorised person that is a bank –

(i) whether a final notice has been given to the person under section 390; and

(ii) if so, any information about the matter to which the notice relates which has been published under section 391(4)."

The FCA must also say whether or not any senior managers in banks have been sent any 'final notice', and include any information about the matter to which the final notice relates (so long as the information has already been published – this is to avoid requiring unlawful use of personal data or confidential information).

A 'final notice' is a final notice of actions that a regulator can take, and can include such things as a final notice that the regulator is going to impose civil sanctions (e.g. a fine) against a senior manager. So this provision ensures, so far as legally possible, public availability of information about enforcement action against senior managers in banks.

(3) After subsection (8) insert –

“(8A) In this section –

“senior manager”, in relation to an authorised person that is a bank, means a person who has approval under section 59 to perform a designated senior management function in relation to the carrying on by the bank of a regulated activity,

“bank” has the same meaning as in Part 5 (see section 71A), and

“designated senior management function” means a function designated as a senior management function under section 59(6B) or (6C).”

These definitions make clear that in relation to information that the FCA must put on the register, the requirements relating to senior managers only relate to people performing designated senior manager functions (i.e. functions which either of the regulators have specified in rules are 'senior management functions').

After Clause 12

LORD DEIGHTON

16 Insert the following new Clause –

“Consequential amendments relating to Part 4

Schedule (Consequential amendments relating to Part 4) (which contains further amendments relating to the provisions of this Part) has effect.

This new clause gives effect to a new schedule which makes various minor and consequential amendments to FSMA and the Financial Services Act 2012 which are necessary to give effect to this suite of amendments.

After Schedule 1

LORD DEIGHTON

17 Insert the following new Schedule –

“CONSEQUENTIAL AMENDMENTS RELATING TO PART 4

Financial Services and Markets Act 2000

1(1) Section 59 of FSMA 2000 (approval for particular arrangements) is amended as follows.

(2) In subsection (1), for the words from “the appropriate regulator” to the end substitute “that person is acting in accordance with an approval given by the appropriate regulator under this section.”

(3) In subsection (2), for the words from “the appropriate regulator” to the end substitute “that person is acting in accordance with an approval given by the appropriate regulator under this section.”

2(1) Section 59A of FSMA 2000 (specifying functions as controlled functions: supplementary) is amended as follows.

(2) In subsection (1)(a) and (b), for “significant-influence” substitute “senior management”.

(3) After subsection (3) insert –

“(3A) “Senior management function” has the meaning given by section 59ZA.””

3(1) Section 63 of FSMA 2000 (withdrawal of approval) is amended as follows.

(2) In subsection (1A)(a), for “significant-influence function” substitute “relevant senior management function”.

(3) For subsection (1B) substitute –

“(1B) In subsection (1A) “relevant senior management function” means a function which the PRA is satisfied is a senior management function as defined in section 59ZA (whether or not the function has been designated as such by the FCA).”⁴ In section 63A of FSMA 2000 (power to impose penalties), in subsection (2), for paragraph (b) substitute –

“(b) P, when performing the function, is not acting in accordance with an approval given under section 59.”

5(1) Section 66 of FSMA 2000 (disciplinary powers) is amended as follows.

(2) In subsection (3), for paragraph (ab) (and the “or” following it) substitute—

“ (ab) impose, for such period as it considers appropriate, any conditions in relation to any such approval which it considers appropriate;

(ac) limit the period for which any such approval is to have effect;”.

(3) In subsection (3A), for “restriction” substitute “condition”.

(4) In subsection (3B), for “or restriction” substitute “, condition or limitation”.

(5) In subsection (3C), for “restriction” substitute “condition”.

(6) In subsection (3D)—

(a) in paragraph (a), for “or restriction” substitute “, condition or limitation”,

(b) omit the “or” at the end of paragraph (a),

(c) in paragraph (b), for “restriction” substitute “condition”, and

(d) after that paragraph insert—

“ (c) vary a limitation so as to increase the period for which the approval is to have effect.”

(7) In subsection (9), for “restriction” substitute “condition”.

6(1) Section 67 of FSMA 2000 (disciplinary measures: procedure and right to refer to Tribunal) is amended as follows.

(2) In subsection (1), for “or (ab)” substitute “, (ab) or (ac)”.

(3) In subsection (2A), for “restriction” (in both places) substitute “condition”.

(4) After subsection (2A) insert—

“ (2B) A warning notice about a proposal to limit the period for which an approval is to have effect must state the length of that period.”

(5) In subsection (4), for “or (ab)” substitute “, (ab) or (ac)”.

(6) In subsection (5A), for “restriction” (in both places) substitute “condition”.

(7) After subsection (5A) insert—

“ (5B) A decision notice about limiting the period for which an approval is to have effect must state the length of that period.”

- (8) In subsection (7), for “or (ab)” substitute “, (ab) or (ac)”.
- 7 In section 69 of FSMA 2000 (statement of policy), in subsection (1) –
- (a) in paragraph (a), for “or restrictions” substitute “, conditions or limitations”;
 - (b) omit the “and” at the end of paragraph (b);
 - (c) in paragraph (c), for “restrictions” substitute “conditions”;
 - (d) at the end of paragraph (c) insert “; and
- (d) the period for which approvals under section 59 are to have effect as a result of a limitation under section 66.”
- 8 In section 138A of FSMA 2000 (modification or waiver of rules), in subsection (2), before paragraph (a) insert –
- “ (za) rules made by either regulator under section 64A (rules of conduct);”.
- 9 In section 138D of FSMA 2000 (actions for damages), in subsection (5), before paragraph (a) insert –
- “ (za) rules under section 64A (rules of conduct);”.
- 10 In section 140A of FSMA 2000 (interpretation), in the definition of “regulating provisions” –
- (a) in paragraph (a) –
 - (i) omit sub-paragraph (iii), and
 - (ii) in sub-paragraph (iv), omit “64 or”;
 - (b) in paragraph (b), omit sub-paragraphs (ii) and (iii).
- 11 In section 347 of FSMA 2000 (the record of authorised persons etc), for subsection (9) substitute –
- “ (9) “Relevant authorised person”, in relation to an approved person, means the person on whose application approval was given.”
- 12 In section 387 of FSMA 2000 (warning notices), in subsection (1A), for “or 55I(8)” substitute “, 55I(8) or 61(2D)”.
- 13 In section 388 of FSMA 2000 (decision notices), in subsection (1A), for “or 55I(8)” substitute “, 55I(8) or 61(2D)”.
- 14 In section 395 of FSMA 2000 (supervisory notices), in subsection (13), after paragraph (a) insert –
- “ (aa) 63ZC(4), (8) or (9)(b);”.

15(1) Section 415B of FSMA 2000 (consultation in relation to taking certain enforcement action) is amended as follows.

(2) In subsection (4) –

(a) in paragraph (b), for “significant-influence” substitute “relevant senior management”, and

(b) omit the definitions appearing after that paragraph.

(3) After subsection (4) insert –

“ (5) In subsection (4) –

“arrangement” has the same meaning as in section 59;

“relevant senior management function” means a function which the FCA is satisfied is a senior management function as defined in section 59ZA (whether or not it has been designated as such under section 59(6B) or (6C)).”

16 In Schedule 1ZA to FSMA 2000 (the Financial Conduct Authority), in paragraph 8(3) –

(a) in paragraph (b), omit “64 or”;

(b) in paragraph (c)(i) –

(i) after “section” insert “63ZD,”, and

(ii) omit “64,”.

17 In Schedule 1ZB to FSMA 2000 (the Prudential Regulation Authority), in paragraph 16(3) –

(a) omit paragraph (b);

(b) in paragraph (c)(i) –

(i) after “section” insert “63ZD,”, and

(ii) omit “64,”.

Financial Services Act 2012

18 In section 14 of the Financial Services Act 2012, omit subsection (4).

19 (1) Section 85 of the Financial Services Act 2012 (relevant functions in relation to complaints scheme) is amended as follows.

(2) In subsection (4) –

(a) in paragraph (b), omit “64 or”;

(b) in paragraph (c)(i) –

(i) after “section” insert “63ZD,”, and

- (ii) omit "64,".
- (3) In subsection (5) —
 - (a) omit paragraph (b);
 - (b) in paragraph (c)(i) —
 - (i) after "section" insert "63ZD," and
 - (ii) omit "64,"."