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CP08/25: THE APPROVED PERSONS REGIME
“Significant influence function review”

A response by

The British Bankers Association (the “BBA”)
London Investment Banking Association (“LIBA”)

March 2009

Introduction

We welcome the opportunity to respond to FSA CP 08/25: The approved persons regime - significant influence function review. The British Bankers Association (the "BBA") and the London Investment Banking Association ("LIBA") have worked alongside the Futures and Options Association (the "FOA") in preparing this response, and fully endorse the response the FOA has submitted to the FSA. We are particularly grateful to the FSA for meeting with us and a number of our member representatives to discuss the CP and our concerns so that we could prepare a more informed response and make what we believe to be constructive recommendations with a view to meeting FSA's expectations and desired outcomes. We would be happy to provide more detailed input to the FSA should this assist.

The British Bankers' Association is the leading association for the UK banking and financial services sector, speaking for over 200 banking members from 50 countries on a full range of UK and international banking issues. All the major players in the UK are members of our Association as are the large international EU banks, the US banks operating in the UK, as well as financial entities from around the world. The integrated nature of banking means that our members engage in activities ranging widely across the financial spectrum encompassing services and products as diverse as primary and secondary securities trading, insurance, investment bank and wealth management as well as conventional forms of banking.

The London Investment Banking Association ("LIBA") is the principal trade association in the United Kingdom for firms which are active in the investment banking and securities industry. The Association represents its members on both domestic and international aspects of this business and promotes their views to the authorities in the United Kingdom, the European Union and elsewhere.

General Comments

We accept that the proposals set out in CP08/25 reflect FSA's focus on senior management responsibilities, governance and themes arising from FSA's internal audit report post-Northern Rock as well as pronouncements in the Turner Review concerning unregulated parent/holding companies. The FSA has sought to highlight its concerns that whilst the governance structures of many firms have developed and evolved over time, the FSA approved persons regime has not been considered in any significant detail (other than the significant influence functions) since N2. We appreciate that change is required and that the FSA's proposals are seeking to redress the imbalance. Where it is possible we have proposed solutions that have been informed by the discussion we have had with the FSA. Where we have differing views from those expressed in the CP we have made suggestions that we believe arrive at a similar outcome.

Chapter 3 – Extending the Scope and Application of CF1 and CF2

Q1: Do you agree with our proposal to extend controlled functions CF1 (director) and CF2 (non-executive director) to those individuals exercising significant influence?

Background

Since the introduction of APER at N2, firms' structures, management organisation and reporting lines have evolved. These changes have created fractures in the scope of Control Functions 1 and 2. The consultation's proposals are designed to reconcile APER with UK authorised firms' current governance structures. The FSA has informed us (Appendix 1) that this will be done by increasing the scope of APER to include the parent/holding company (i.e. 'up one level') so that it becomes applicable to those individuals who possess the authority to exert significant influence over the regulated firm's decision making processes. For many companies this may be a straightforward assessment process. However many of our members' businesses are global in nature and have complex structures involving matrix management processes rather than being organised on a legal entity basis. For these firms it would be helpful if the FSA could include some guidance to indicate recognition and acceptance for such approaches, where perhaps the parent/holding company may not always be an appropriate base for APER registrations.

Nature of Extension

Our members are not clear as to the new scope of the FSA's proposals and therefore what individuals they should be capturing within APER. There are a raft of individuals within parent/holding companies of FSA authorised firms whose decisions/ opinions/ actions may be "regularly taken into account" by the firm's governing body or senior management. It would be inefficient and ineffectual if firms were required to register as CF1/2s, all such individuals. We accept that FSA has drafted the new requirements so as not to take a too prescriptive rules-based approach and to permit some flexibility, thereby avoiding a one-size fits all approach. FSA expects firms to (1) address whether individuals outside the legal entity in the UK are genuinely exerting significant influence and (2) meet with their supervisors to map out their governance structures and identify the appropriate individuals to bring into APER. It would be helpful if the FSA could provide guidance in SUP to clarify that:

- * Only those individuals that, as a matter of fact, exercise a significant influence will be within scope;
- * There is no intention to dilute the responsibility of existing CF1 and 2s by including individuals at the parent/holding company, but rather to identify where significant influence rests – who can overrule whom; and
- * Where a firm can demonstrate that its governing body makes the final decisions there will be no requirement to make changes to their approved persons.

In addition, as the requirements are drafted broadly so as to stimulate discussions between firms and their supervisors it is essential that FSA ensure a consistent application of the policy by its supervisory teams.

During informal discussions with us, the FSA indicated that the proposed extension to the current CF1/2 Control Functions is more confined than perhaps the consultation

document seems to suggest. By way of illustration, FSA indicated that Global Heads of Business and Chairs of Committees such as audit, remuneration and risk within the parent/holding companies may be required to obtain CF1/2 approval (this is also set out as an example in the CP). FSA also noted that in the course of carrying out its supervisory duties it had encountered situations whereby senior managers within UK authorised firms - who are registered as CF1s - have had to seek explicit approval from certain individuals within their holding/parent companies who do not currently have approved persons status. We understand FSA's rationale for wishing to register individuals within parent/holding companies that possess veto powers to over-ride certain decisions made by CF1/2 approved individuals within UK authorised entities.

We consider that the provision of some guidance as proposed above will assist with overcoming any ambiguity of interpretation. In addition it would be helpful if the FSA could include reference to the materiality of the "decisions, opinions or actions" which are "regularly taken into account by the governing body of the firm". As previously stated FSA expect that it will be necessary for individual firms to discuss how to best comply with the new requirements during bilateral discussions with their FSA supervisory teams (for example, during ARROW visits). This implies there will be a degree of interpretation by FSA supervisors with regard to what individuals within the parent/holding company should seek CF1/2 approval. This emphasises the importance of ensuring a clear understanding between the FSA's policy making and supervisory teams, so as to avoid unintended interpretations and undesired outcomes.

We note that there is already an expectation on firms to be able to demonstrate clear and distinct reporting lines. In addition to this, a number of our members consider they will need to make no changes in order to remain compliant, should the FSA proposals regarding Control Functions 1 and 2 come into force. That is, they consider themselves able to demonstrate a true and genuine autonomy in the decision-making processes that impact on the UK authorised entity. This has been acknowledged by FSA, both in the consultation document and at our recent meeting. The onus is on firms to demonstrate this autonomy during the course of FSA supervision, which again highlights the need for FSA to provide sufficient clarity in its proposals. Without this, FSA could potentially see inconsistencies arise across firms.

Dilution of Responsibility

In terms of accountability, the UK firm's most senior individuals (CEO / executive/non-executive director level) are already registered as CF1/CF2's under the FSA approved persons regime. These individuals are responsible for strategic decisions. By including all global heads of business, FSA's proposals would bring about a relatively large expansion to the number of individuals registered as CF1's. This has the clear potential to dilute the accountability of those senior decision makers already registered. As a result, genuine accountability within UK authorised firms would become muddled, making it more difficult to determine those responsible for poor practices within firms upon detection. This is clearly not in the interests of the FSA or the Industry.

Position of Third Country Firms from Equivalent Jurisdictions

The FSA's proposals are discriminatory against: firms whose parent/holding firms are operating solely in the UK; UK firms with regulated and unregulated third country parent/holding companies; and UK firms with EEA unregulated parent/holding companies. Firms of this nature constitute a significant proportion of the UK financial services industry. These proposals will create an un-level playing field between the aforementioned firms on one side and firms with EEA regulated parent/holding companies on the other, where it is not proposed these new arrangements will apply.

Moreover, these proposals fail to take into account the equivalence of existing governance arrangements in other non-EEA jurisdictions, including the United States, Switzerland and Japan. While we understand that FSA is limited in its ability to apply these proposals to EEA countries as they are a matter for the home state supervisory authority, we would urge FSA to consider recognising non-EEA jurisdictions where such equivalent governance measures are already in place. This would maintain the existing level playing field.

If the FSA is willing, in principle, to allow for the recognition of equivalent jurisdictions in the new rules, we would be happy to explore with the FSA how firms could help facilitate the 'exemption' of individuals on a case by case basis.

Jurisdiction

It is unclear what jurisdiction FSA would have to act in instances where an individual registered as a CF1/CF2 but employed by the parent/holding company outside of the UK, was found to have failed to act in accordance with the APER. We consider that in most instances FSA would already have the mechanisms in place to enable it to make contact with such an individual through the regulator of the parent/holding company. For example, the FSA has Multilateral Memorandums of Understanding (MMOUs) in place with various foreign regulators such as the SEC. It is therefore not clear what incremental value these proposals provide to FSA in terms of a deterrent for senior managers.

Q2: Do you agree that a transitional period of 6 months is sufficient for implementation?

FSA intend to publish a policy statement in the second quarter of 2009, after which firms will have a 6-month transition period with which to identify and arrange for the approval of any new CF1/2 candidates. However, to guarantee timely approval by FSA, firms will be required to submit their applications 3 months prior to the end of the transposition period. FSA have outlined that those individuals who do not receive confirmation that their application has been successful within the 6-month period will have to cease in the specific aspects of their role that prompted the initial CF1/2 application. Therefore, the transposition period for firms is effectively reduced to 3 months, despite the FSA's commitment to complete 85% of applications within seven working days of receipt.

As we have already highlighted, many of our members' structures are complex. Furthermore, owing to the fact that there is a lack of clarity around the types of individuals the FSA intends to capture as CF1 or 2s, firms will likely have to engage in a full review of their reporting lines, both within their legal entity, and that of their holding/parent company. Indeed, the fact that these proposals will prompt firms to carry out such a review forms a fundamental part of the FSA's rationale. FSA also expect firms to discuss how best to comply with the proposals during bilateral meetings with their supervisory teams. This is a significant amount of work for firms that FSA needs to take into full account.

We do not consider a period of 3 months for firms to identify and arrange for approval as sufficient time for full transposition. A more workable solution would be one in which FSA require firms to submit their applications for additional CF1/CF2 labels within 6 months of the expected policy statement's publication. Applicants would be granted provisional approval until FSA fully complete the application process (at which stage the application will either be: successful - in which case the individual can carry on in their

role; or unsuccessful - in which case the individual will have no choice but to cease in the particular aspect/s of their role that prompted the application).

Alternatively, we suggest that firms should be able to apply, after discussion with their supervisors, for an extension to the transitional period in cases where their structures are particularly complex or issues are encountered with completing applications for approval, for example, obtaining information from overseas individuals. The proposals are a categorisation exercise, as opposed to one in which firms' actual reporting lines are likely to change. Therefore, FSA should not exert unnecessary pressure on firms to transpose in a hurried fashion as this will not serve to achieve the desired outcomes of both the FSA and authorised UK firms.

Chapter 4 – Non-Executive Directors

Q3: Do you agree with our proposed guidance to the Handbook that clarifies the role of non-executive directors?

We note that the FSA is intending to draw existing industry codes on the role and responsibilities of non-executive directors (NEDs) into the Code of Practice in APER, to clarify the FSA's expectations. As such, we note that the FSA does not expect the proposals to represent a significant change for the industry: *“Our aim is to clarify rather than impose any new requirements on non-executive directors that don't already exist in the various industry codes.”*

Firms are, in principle, supportive of the FSA's proposals but would caution the need to co-ordinate with any outcomes from the Walker review in Q4 2009. We also have the following observations:

- * We believe it to be crucial that firms continue to have the flexibility to determine their own arrangements in respect of the appointment and roles of NEDs as a 'one-size fits all approach' may not be a sensible fit with an individual firm's structure e.g. a matrix managed global firm may not feel it appropriate to include NEDs on some of its internal Boards. We welcomed the FSA statements at the recent meeting with members, to the effect that firms' arrangements for, and the roles of NEDs will vary and that the proposals are not intended to limit firms' flexibility. We believe, however, that the FSA should include guidance to this effect;
- * Currently firms make their own decisions regarding whom to appoint and that in order to bring independence and challenge, a firm may wish to appoint a professional with non-financial services experience. We note that - as confirmed by FSA during an informal meeting - the proposals are not intended to require financial services experience above independence;
- * As the FSA is aware, the Listing Rules require UK incorporated companies listed on the Main Market of the Stock Exchange, to detail in their annual report/ accounts, how they have applied the Combined Code of Corporate Governance. Compliance with the Code is not mandatory but there is a 'comply or explain' reporting requirement. Non-UK incorporated companies listed on the Main market must disclose any significant difference in corporate governance. Including aspects of the Code as guidance in APER would, therefore, increase the personal responsibilities of NEDs of private companies - to whom the Code

does not apply – and, given the disapplication to EEA firms, to non-EEA public companies.

- * We note that draft APER 4.6.15 G states that: "*An approved person performing the role of a non-executive director should seek to establish and continually maintain his confidence in the: (a) conduct of the firm...*" We are concerned that this does seem to impose a rather high test on NEDs, given that the "conduct of the firm", could, absent qualification, be taken to include just about anything the firm does (or does not do).

Although we recognise that the FSA's intention is to clarify rather than impose new requirements on NEDs, we are concerned that the FSA's proposals, as they currently stand, have the potential to create various unintended consequences that would render the NED role both less effective and less desirable. One of our concerns is that the FSA's draft provisions appear to be blurring the distinction between executive and non-executive roles (as evident from the definitions of the two controlled functions). As the FSA is aware, the value of NEDs is their role in monitoring the firm's strategy, providing an independent perspective, and scrutinising the role of executive management, etc. If NEDs are to operate more in line with executives (c.f. our comment above on APER 4.6.15G) arguably they will be less able to fulfil the independent NED role as they will become too close to, and personally involved with, management issues and decisions in general.

We are also concerned over what we see as some key implementation challenges. Whilst it seems difficult to argue, in principle, that NEDs should not be disciplined if: "*they should have intervened where executives are making sustained poor decisions*", individuals may be deterred from becoming NEDs if they feel that they might be subject to disciplinary action where they have demonstrably "acted in accordance with their roles and responsibilities" but "things go wrong". It also raises questions as to what constitutes "intervening", "sustained poor decisions" etc. The risk of this approach is that it may result in closer executive involvement by those NEDs who are not deterred, which may detract from their independence from decision-making where that is required.

It is also important to recognise that reinforcing and arguably increasing the personal responsibilities of NEDs may, in time, reduce the pool of candidates willing to perform such roles. Many firms feel that the FSA is changing its attitude to NEDs but while the proposal is designed to "reinforce standards that already exist", an unintended consequence might be to deter high quality, experienced NEDs from joining Boards and/or reduce the effectiveness of those NEDs who were undeterred. We believe that the FSA should review and amend the draft provisions (possibly adding additional guidance) to clarify its expectations and the outcomes it is seeking.

Finally, we believe that it would be helpful for the FSA to set out, in additional guidance, its overarching expectations of NEDs and, in doing so, emphasise capability rather than training *per se*. In our opinion, the key questions should include:

- * Do NEDs understand the nature, scale and complexity of - and risks inherent in – the firm's business, and the management information being received?
- * Can NEDs act as guardians of the Board and provide an independent, informed (but not necessarily expert) and suitably robust challenge at a strategic level?

Chapter 5 – Proprietary Traders

Q4: Do you agree with our proposal to extend the description of CF29 to include more proprietary traders?

Q5: Do you agree with our judgement that the proposed guidance in the draft handbook text (Appendix 1) supports the expectation that all proprietary traders will be approved persons?

Our members do not agree that all proprietary traders should be brought into the scope of CF29. Our comments below are in response to both Questions 4 and 5 of the consultation document.

Background

As the FSA consultation correctly points out, industry views - set out in responses to FSA CP26 - were mixed with regard to the original question of whether all proprietary traders should be included within APER. On one hand, it was argued that making traders subject to the regime would be a useful additional control for firms and that excluding them might send a negative message. On the other hand, some market participants felt that the management/supervision and control of such traders was a matter for their firm and that it would not be appropriate to bring proprietary traders within the approved persons regime, particularly where they are employees of institutions which are undertaking solely inter-professional business. It is worth noting that the FSA would still be able to bring proceedings in the event of breaches of its rules, for market abuse and/or other “financial” criminal offences which fall within its statutory responsibilities.

FSA’s final policy – set out in CP 53 – reflected, what is, the current practice of today. Namely, that only proprietary traders who are able to, potentially, exert significant influence and put their firm at significant risk should seek approval as a CF29. FSA outlined that ‘significant influence’ had the potential to exist when proprietary traders were either the head of a trading desk, and/or in possession of a trading limit that could potentially expose their firm to an extensive risk. This was a sensible compromise to the conflicting industry views on the issue of whether or not to include such traders, and also consistent with the overall approach of the approved persons regime.

Notwithstanding the above, we believe it is important that the FSA provides additional clarity regarding the scope and definition of proprietary trading. For example: whether trading on a firm’s own book for client facilitation falls within the definition; and how direct market and sponsored access will be treated?

Legitimacy stems from FSMA

In the strictest sense, the legitimacy of any regulatory tool, whether it be enforcement, policy making or supervision, rests on whether there is a provision for that tool in the relevant codified text, e.g., legislation or, in the case of some self-regulatory regimes, the mandate agreed with the regulated population. In the case of FSA, the relevant codified text is, in the main, the Financial Services and Markets Act 2000 (FSMA).

We note that under section 59 of the Financial Services and Markets Act, a controlled function is one that either includes significant influence, dealing with customers or dealing with the property of customers. Legal opinions indicate that proprietary traders dealing only for a firm – and not its customers – cannot be brought within the approved persons regime (specifically Control Function 29), unless they are acting in relation to an authorised firm’s regulated activity and the function they perform is “likely” to enable

them to exercise “significant influence” on the firm’s affairs, so far as relating to the regulated activity.

We strongly disagree with the FSA’s statement that: “By virtue of this role, all proprietary traders have potential to be able to exercise significant influence on the firm for the purposes of section 59(4) and (5) of FSMA” (draft SUP 10.9.2A G) and question whether this guidance would be supportable in law. We also disagree with the FSA using guidance to “extend the definition of the CF29 controlled function”, when it is unlikely that FSMA gives them the power to do so via the FSA Handbook.

Our members fully acknowledge that there are instances where a proprietary trader has the potential to exert ‘significant influence’ over his or her firm (for example, if they are a head of a trading desk or have a particularly high trading limit). Indeed, individuals of this nature should already be listed as approved persons. However, it is fairly certain to conclude that the initial drafting process of FSMA (2000) did not envisage the use of the ‘significant influence’ test to incorporate all, or even the majority of proprietary traders into Control Function 29 purely on the basis that they may have the ability to commit - and potentially lose – capital on their firm’s trading book.

It is unreasonable to consider that the individual actions of all, or even the majority of proprietary traders, are likely to enable the individual to exert a significant influence on their firm (in the absence of the undetected systems and control breach). For example, a junior trader with a relatively low risk profile, low commitment of capital and low contribution to a firm’s profit would prima facie seem very unlikely to exercise a significant influence on the conduct of his or her firm. It is essential the FSA is able to document a robust rationale that underpins its proposal, and demonstrates its legal legitimacy. Our members do not consider this to be present, and as such do not view the proposals as either appropriate or proportionate.

Furthermore, our members would view the activities of proprietary traders as primarily a matter for the concern of their senior management (where the senior management would encompass those proprietary traders already registered as CF29s) and the effective operation of the systems and controls they already have in place. Indeed, by asking authorised firms to include all proprietary traders within Control Function 29, FSA will risk the dilution of the responsibilities and accountability of those individuals already approved in this category. CF29 is a high impact Control Function, which currently houses individuals who hold a genuine significant influence over their firm – not just with regard to trading activities, but also client facilitation and governance, etc. By including all proprietary traders, FSA will create a situation whereby personal responsibilities do not equate to actual responsibilities, which will consequently degrade Control Function 29, and the approved persons regime as a whole.

Other Possible Alternatives

It appears that FSA is proposing to bring all proprietary traders into the scope of Control Function 29 (“significant influence”) because it is perhaps the least unsuitable function available. We would therefore urge the FSA, as a medium to long-term matter, to press for an amendment to FSMA section 59 instead of attempting to stretch its boundaries - particularly given that the cost benefit analysis does not support its case. We envisage that such an amendment would potentially result in a new control function within APER that could be utilised for proprietary traders, whereby the associated responsibilities of the Control Function are better equated to the role actually being undertaken by the individual in question. It is also imperative that FSA follow due process and consult on any proposed changes to SUP10.

Until FSA achieves such an extension to APER our members consider that FSA should concentrate on utilising its panoply of other regulatory options. FSA could:

- * Confirm that firms may, if they consider it appropriate, approve proprietary traders within CF30. This would, of course, require a review of the fee arrangements and an adjustment to the A10 fee block, so as not to penalise firms that choose to do so;
- * Focus on the role and importance of supervisors of proprietary trading desks. Set out its expectations that firms have appropriate and effective supervisory/oversight arrangements for proprietary trading, possibly within SYSC and APER (c.f. Market Watch 25); and
- * Use SYSC and other regulatory tools to mitigate the risks identified. For example, firms' risk management functions should limit the number of proprietary traders who, in practice, are able to wield significant influence through their dealing decisions and ensure that those who can are approved persons.

Position of third country firms from equivalent jurisdictions

The FSA's proposals with regard to proprietary traders are discriminatory against firms operating solely in the UK and those regulated outside of the EEA with branches passporting into the UK. FSA CP 53¹ notes that the FSA "*could not require the pre-approval of proprietary traders working for passported branches [from EEA countries]*". Despite FSA not explicitly mentioning this issue within CP 08/25, we continue to believe it to be the case that regardless of whether FSA decides to apply the approved persons regime to all proprietary trading of UK firms and UK branches of non-EEA firms, it could not do so for UK branches of EEA passported firms (then under 2BCD, and now MiFID), as the FSA regards approval of proprietary traders as a home state responsibility. This raises questions with regard to firms operating on a level playing field in the UK.

Q6: What are your views on the outcome of the cost benefit analysis compared to other reasons why we might implement this proposal?

We note the FSA's statement in CP08/25: "*We appreciate that our proposal is not strongly supported by the cost benefit analysis...but we consider that there are other reasons, beyond economic ones, why we should consult.*" It is unclear to us what the "other reasons" for implementing the proposal might be, that are not captured by the CBA.

We also note the FSA's view that: "*The approval of proprietary traders on its own may not deter or stop rogue traders but when combined with effective supervision, it may assist to detect and mitigate issues before they crystallise.*" The FSA has also recognised, in the CBA that: "*Existing approved persons regimes for certain proprietary traders do not seem to have been effective in deterring some traders from taking on excessive risks...*" Perhaps not surprisingly, we do not consider that the CBA supports the proposal or that the case for the proposal, as drafted currently, has been proved. As discussed above, we consider that the so called "rogue trader risk" could be mitigated using other regulatory tools.

¹ FSA CP53 - The Regulation of Approved Persons: Controlled Functions, 2000

Our view is that the FSA, in expecting “a *minimum of 2,000 initial new approved persons applications*” may have significantly underestimated the number of proprietary traders who would need to be approved persons and hence the costs to the industry. Our members also believe that the CBA may have under-estimated the cost to the industry of approving all proprietary traders in their firms.

Q7 Do you agree that a transitional period of six months is sufficient for implementation?

Please see our response to question 2.

Remaining Questions

Q8: Do you agree that we should remove the limited application of the approved persons regime to UK branches of third country firms?

Members, on the whole, are content with the FSA’s proposals to remove the limited application of the approved persons regime to UK branches of third country firms.

That said, the proposals to extend the definitions of CF1 and CF2 may, in addition to the issues discussed in response to Q1, create other practical issues for branches such as resistance from non-UK resident senior officials to providing information for applications for approval. We understand that for US persons, such resistance may stem from concerns regarding the privacy of personal information in the UK (due to the Freedom of Information Act). We would encourage the FSA to provide guidance for branches on such issues and, as proposed during the informal meeting with members, permit corporate rather than personal addresses to be given.

Whilst we note that the proposals in CP08/25 cannot apply to branches of EEA firms, given a number of requests for greater clarity on this point, we believe that the FSA should provide guidance to this effect in SUP 10.1.

Q9: Do you agree that we should extend the reference requirement in SUP 10.13.12R so it applies to all controlled functions?

Members are supportive, in principle, of the extension of the reference requirement in SUP10.13.12R to all controlled functions. However, in practice, due to the method of appointment of senior individuals and legal and data protection concerns regarding information that, although factual, is not in the public domain. We question how much value the references would add and whether FSA’s expectations would be met.

If a firm is recruiting for a significant influence function, the candidate is likely to have been employed within the firm/group for a number of years or, if they are an external candidate, will usually be subject to extensive background checks during the interview process which are above and beyond FSA-style references. In addition, as the FSA notes in the CBA, “*there will be costs to the firms associated with the (unavoidable) delay in obtaining the references*”.

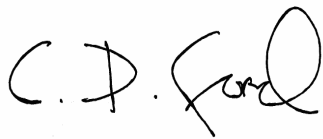
More importantly, many firms completing references currently feel constrained by employment law and data protection concerns (for example, some lawyers may advocate

“he came, he worked, he left” references to mitigate legal risk). Clearly, these legal risks create a tension with an FSA’s requirement that mandates a former employer to give, if requested by an approved person’s new employer: “*all relevant information of which it is aware*”.

We would, therefore, urge the FSA to work with stakeholders to ascertain whether gateways could be created and guidance given to facilitate an appropriate exchange of information, thus enhancing the utility of the reference process. We would, of course, be happy to work with the FSA in this regard.

Finally, we note that the FSA recognises, in the CBA that “...*the incremental benefits of this proposal will depend on how effective those references are in shedding light on candidates’ suitability for the proposed controlled function*”. Given the issues outlined above, we believe that the costs may well outweigh the benefits.

If you would like to discuss any of the points raised in this paper in further detail, please contact either Christopher Ford, or Paul Martin.



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