

Financial Services Consumer
Panel response to:
FSA Consultation Paper 26 -
*The Regulation of Approved
Persons*

The Approved Persons Regime

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Introduction

- a. This paper is the response of the Financial Services Consumer Panel ('the Panel') to the Financial Services Authority (FSA) Consultation Paper 26, '*The Regulation of Approved Persons*'. The FSA established the Panel to advise the FSA Board on the interests and concerns of consumers and to report on the FSA's effectiveness in meeting its consumer protection and public awareness statutory objectives.

Summary of recommendations

1. The Panel broadly welcomes the FSA's proposals and considers the framework described in the Consultation Paper to be an appropriate basis on which to develop the detailed policy on Approved Persons.
2. The following summarises the Panel's key comments and recommendations:
 - b. individuals in whom the public place significant trust and reliance should be held personally responsible for their own actions and those of the firm of which they are in control (para 7). We strongly recommend that the FSA to make available to the public the list of Approved Persons (para 8);
 - c. the Panel strongly supports the FSA's proposals on the inclusion of the boards and seniors managers within the Approved Persons regime, and the proposals in para 64 of identifying the roles rather than the job-titles of those to be caught by the regime (paras 9/10). In the interests of transparency, accountability and consistency, the regime should apply to all who carry on the functions which it is proposed the regime should cover. This comment applies to FSA's proposals on sole traders in particular, but also to those concerning certain senior managers in unincorporated bodies, and individuals employed by contractors (para 11);
 - d. the Panel welcomes the thrust of the Statements of Principle and Code of Practice. We have some concerns that the evidential status of the Code

and its relationship with the Principles is not made sufficiently clear (paras 22-26);

- e. The Panel considers that the regime is no more than a codification of good practice and as such the costs of compliance should not be excessively burdensome (para 28).

General Comments

3. This Response sets out our general observations on
 - the FSA's policy on Approved Persons
 - the FSA's proposals in relation to controlled functions and the criteria for approval of individuals, and
 - the Principles for Individuals and the Code of Practice for Individuals.

FSA's policy on Approved Persons

4. This section sets out our view on the general policy outlined in the Consultation Paper.

Q1 The FSA would welcome comments on the general outline of how the powers in Clauses 57 to 58 of the Bill will be exercised by the FSA and incorporated in the Authorisation Manual.

5. The Panel welcomes the FSA's proposals on the way it expects to implement the regime for the approval of individuals participating in the financial services industry.
6. The Panel agrees with the general tenor of the Consultation Paper. The regime proposed must be sufficiently robust and comprehensive to deliver effective protection to consumers. It is important that individuals in whom the public place significant trust and reliance when dealing with their financial affairs should be held personally responsible for their own actions and omissions and those of the firm of which they are in control.
7. In the interests of transparency and accountability, we think that it is important that the public should have access to a record of those individuals holding 'approved' status, and the FSA should therefore make available a public record of Approved Persons similar to that which will be provided in relation to authorised firms.

Controlled functions and Approved Persons

Senior managers

Q2 *The FSA would welcome comments on whether the functions performed by the members of the board (including bodies corporate) or the equivalent governing body, of a firm should be regulated under clause 56(5)*

Q3 *The FSA would welcome comments on its proposals for the application of clause 56(5) to managers below the governing body of a firm*

8. The Panel strongly supports the FSA's proposals on the inclusion of the boards and senior managers of a firm within the Approved Persons regime. We suggest that in this respect, the FSA should follow the strongest line available to it in specifying which classes of individual should be caught; however, the Panel endorses the FSA's approach in paragraph 64 of the Consultation Paper, of not over-specifying the particular positions to be 'caught'. It is the element of control which is important, rather than the job title.
9. However, while we understand the arguments put forward in paragraph 58 in relation to large organisations, the Panel is not fully convinced of the FSA's arguments in relation to excluding some senior managers of large unincorporated organisations. It will be difficult in practice to determine the extent to which the senior members of a firm do or do not exercise some degree of influence on key decisions taken on their behalf by management teams, or on the ethical standards and regulatory climate within the firm. The Panel will be interested to know the criteria which the FSA will apply in order to identify firms operating management arrangements which might fall within such a category.

Proprietary traders

Q4 *The FSA would welcome comments from firms, traders and consumers on whether or not proprietary traders should be within the Approved Persons regime. If outside the regime, the FSA would welcome comments on the approach to regulation described.*

10. There do not appear to be overwhelming arguments in favour of including proprietary traders. Indeed, there is a risk that including them might send the wrong message to senior management that this would reduce management responsibility for traders' activities.

Q5 The FSA would welcome comments on the application of Clause 56(5) to:

- (a) passported institutions; and**
- (b) firms whose head office or registered office are in a country outside the EEA.**

11. The Panel feels that the FSA has not explained the rationale behind its proposals in this respect. We are particularly unclear as to how the proposed regime will work in respect of non-EEA firms.

Q6 The FSA would welcome comments on:

- (a) the indicators that will be taken into account in determining the functions to be specified under Clause 56(6); and**
- (b) the functions within a firm which should be regulated under Clause 56(6).**

12. The indicators proposed by the FSA appear reasonable. However, it is difficult for the Panel to comment in more detail without knowing how the indicators will be applied in practice. For example, will 'introducers' be caught by the regime (since they deal with the public) or will there be some 'de minimis' type of cut-off? The FSA should bear in mind that in individual cases the reliance of a consumer on the introducer can be considerable (for reasons of a personal or professional relationship, for example) even though in routine cases, the role may appear less significant.

Q7 The FSA would welcome comments on its approach to the application of clause 56(7) [the approach to individuals who deal with the property of customers].

13. The Panel agrees with the approach set out in paragraph 77. The paper does not specify how other individuals involved in dealing with the property of customers will be treated under the Approved Persons regime, but the Panel seeks reassurance that such individuals will also be caught, given the levels of customer reliance and potential loss involved.

Q8 The FSA would welcome comments on this approach to the regulation of individuals based in overseas branch offices

14. The Panel understands that the rationale behind this proposal may be a matter of territorial jurisdiction. However, we would caution the FSA against being seen to accept the delivery by UK-authorized firms of lower levels of customer protection to their overseas customers.

Employees of contractors

Q9 The FSA would welcome comments on this approach to the regulation of individuals employed by contractors

15. The Panel considers that the key principle here from the point of view of consumers is that responsibility and liability should be clear in all cases.

16. We caution the FSA against excluding categories of individual on the grounds of 'duplication' and being 'unduly burdensome' without a clear analysis of the effects of such 'duplication'. The cost-benefit arguments advanced later in the consultation paper suggest that the regime is no more than a statement of good practice, compliance with which should not be unduly burdensome on any well-run firm.

17. If there is a valid message to be communicated by the regime, and disciplinary rationale behind it, then it should apply to all who carry on the functions which it is proposed the regime will cover; otherwise it is weakened by expediency.

Sole traders and their employees

Q10 The FSA would welcome comments on this approach to the regulation of sole traders and their employees

18. We have considerable concerns about these proposals. The rationale for excluding sole traders and their employees from the regime is not adequately explained or justified in the consultation paper. Why should sole traders not be required to comply with the Principles for Individuals and the Code of Practice, particularly if their employees *are* so caught? In

the Panel's opinion, this exclusion weakens the overall message of personal responsibility which the regime is intended to communicate (cf our comments on employees of contractors above in paras 16-18). We would also be extremely concerned if excluding sole traders meant that they would not appear on any register of approved persons.

The criteria for assessing fitness and properness

Q11 The FSA would welcome comments on the criteria for assessing the fitness and propriety of individuals set out in Annex A to the Consultation Paper.

19. The Panel broadly endorses the criteria proposed. However, as we have indicated above, everything will turn on the detail.

20. We would welcome some further explanation of the way in which paragraph 6(k) of the criteria will fit in with the treatment of 'whistleblowers' under the Public Interest Disclosure Act. The mere fact of dismissal should not automatically disqualify individuals who have left a company after highlighting undesirable practice.

The Principles for Individuals and Code of Practice

Q12 The FSA would welcome comments on the Statements of Principle and Code of Practice set out in Annex B to the Consultation Paper

Q13 The FSA would welcome comments on whether there should be a separate Principle dealing with relations with consumers.

21. The Panel welcomes the thrust of the FSA's proposed Statements of Principle and Code of Practice.

22. The term 'consumer' in the Code may need some definition. Preferably, it should be consistent with the term in the Financial Services and Markets Act. It should include those who may be contemplating using a product or service, as well as those who have actually bought, and it should also include third parties with rights under a product such as beneficiaries.

23. While we understand in principle the intended relationship between the Code and the Principles, it is unclear to us how the more detailed (and 'negative') evidential elements of the Code will work in practice with the high-level ('positive') elements of the Principles. If individuals do not do any of the things in bold italics (as per the text in the CP), will they be able to assume they are complying with the Principles? This tension about the way in which the Code will be used is evident in the Introduction to the Code, which is quite legalistic in its drafting and difficult to understand; it does not send a clear 'message' in this respect.
24. The lists of unacceptable behaviour further emphasise this problem of the status of the Code. We understand the wish of the industry and their legal advisers to be clear about what is acceptable and unacceptable behaviour. However, a too detailed level of prescription may impede the progress of the FSA towards principle-based regulation. If the behaviour in question is not actually listed in the Code, and can be argued to be current practice in the industry, would this allow a 'state of the art' defence to be advanced?
25. As we have indicated above, we are disappointed that the Principles will not be applied quite so widely as they could (eg sole traders). This is particularly relevant in relation to the enforcement of Training and Competence requirements; we have argued in the past that these should be firmly linked to the Principles to minimise 'gaps'. The possible exclusion of some individuals from the scope of the Principles means that the eventual design of the T&C regime will have to be further complicated to 'catch' those individuals by other means.

Costs and benefits

Q14 The FSA would welcome comments on the costs and benefits of its proposals

26. The Panel agrees with the FSA's statement in paragraph 122 that 'a well managed business will have similar requirements in place'. The Panel

considers that the regime is no more than a codification of good practice for the industry and its participants.

27. The costs of compliance with this regime should not, as the FSA surmises, be excessively burdensome. The FSA notes in paragraph 125 that the regime might discourage some firms from locating in the UK. This should not arise if, as the paper suggests, the costs of compliance will be minimal for a well-run firm.

About the Financial Services Consumer Panel

The Financial Services Consumer Panel was established by the Financial Services Authority (FSA) to advise the FSA Board on the interests and concerns of consumers and to report on the FSA's effectiveness in meeting its consumer protection and public awareness statutory objectives. There are eleven members of the Panel representing a broad range of consumer interests. The Panel is independent of the FSA – it can raise its own concerns, initiate its own research and publish its own reports.

Who is on the Panel?

Barbara Saunders (Chairman)

Barbara is a public interest member of the PIA Board. She is an independent consumer consultant and past Chairman of the Council of the Insurance Ombudsman Bureau. Among other public and professional appointments she is a Non-Executive Director of the St Albans and Hemel Hempstead NHS Trust and a member of the Architects Registration Board.

Colin Brown (Vice Chairman)

Colin is an independent consultant specialising in consumer affairs. Previously Deputy Director of Research at Consumers' Association and Senior Fellow at the Policy Studies Institute, he has over 20 years' experience of social and consumer research.

Jean Gaffin

Jean is Chairman of the Advisory Committee on Telecommunications for Disabled and Elderly People that provides advice to the telecommunications regulator, OFTEL, and a Non-Executive Director of Harrow & Hillingdon Healthcare NHS Trust. She has extensive experience of working on behalf of vulnerable consumers. Previous positions include: the Executive Director of the National Council for Hospice and Palliative Care Services and Chief Executive of Arthritis Care.

Yvonne Gallacher

Yvonne is Chief Executive of Money Advice Scotland, which was set up by the Scottish Consumer Council. She has over 10 years experience of consumer credit/money advice issues and of working with vulnerable consumers in a variety of roles, including debt counsellor, trainer and manager. She is Co-Director and Secretary of the Government funded Lead Body for Advice, Guidance, Counselling & Psychotherapy (CAMPAG). Yvonne is a member of the Scottish Consumer Council.

Joan Harbison

Joan is Chief Commissioner of the Equality Commission for Northern Ireland. She has been Chair of the Commission for Racial Equality for Northern Ireland since its inception in 1997 and is a former Chairman and member of the Executive Committee of the Northern Ireland Association of Citizens' Advice Bureaux. She has held a number of public appointments including being Vice Chairman of the Eastern Health and Social Services Board and the Northern Ireland Standing Advisory Commission on Human Rights and former member of the Human Fertilisation and Embryology Authority.

Noel Hunter

Noel is County Trading Standards Officer for Warwickshire. A National Council member of the National Consumer Council, he also chairs the Management Board of the Institute of Trading Standards Administration and is an adviser to the Local Government Association.

Gerald Lanchin

Gerry is a Vice President of the National Federation of Consumer Groups. He is a former Under Secretary of the Consumer Affairs Division of the Department of Trade and Industry and author of "Government and the Consumer". His involvement in consumer protection includes being a former Council Member of Consumers' Association and of Consumer Congress Committee. He was the first chairman of the Direct Mail Services Standards Board and a member of the Data Protection Tribunal for 10 years.

Nick Pearson

Nick is the National Money Advice Co-ordinator for the Federation of Independent Advice Centres. A career spent in advice organisations including the National Association of Citizens' Advice Bureaux where he was manager of the Money Advice Support Unit, he has particular experience of credit, debt and personal finance issues and of working with vulnerable consumers.

Richard Smethurst

Richard is Provost of Worcester College, Oxford University; he chairs the Training Standards Panel of IMRO, of which he is a non-executive Director. He has served as an economic adviser in Whitehall, and the Monopolies and Mergers Commission, where he was Deputy Chairman. Richard lectures widely on financial and economic topics to businessmen and adult education groups. He is President of the National Institute of Adult Continuing Education.

Jane Vass

Jane is an independent consumer researcher specialising in financial services. She was previously Head of the Financial and Economic Research Group at Consumers' Association and is still author and editor of a number of Consumers' Association publications in addition to other research, including work for the National Consumer Council. Her current committee memberships include: Council of the Ombudsman for Estate Agents, the Inland Revenue Tax Law Rewrite Project Consultative Committee, the PIA Training Advisory Group and the FSA Training Advisory Panel.

Dave Watts

Dave is a partner in a media business which is involved in publishing, editing and journalism - personal finance plays a large part in this. He is a former editor of "Which?" and "Money Which?" and former Assistant Director of Consumers' Association. He was also a policyholder representative on the Insurance Brokers Registration Council for nine years.

How to contact the Panel

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