Building Societies Association

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Briefing

Bank of England Bill: Strengthening Accountability

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Introduction

With the progress of the Bank of England & Financial Services Bill in Parliament it is helpful to understand the building society view of the *strengthening accountability in banking*. This briefing outlines the views of the Building Societies Association on the main areas under discussion as part of the Bill.

Clause 18: Extension of relevant authorised persons regime to all authorised persons

The BSA welcomes the proposed extension of rules for strengthened accountability to all sectors is welcome because it will create a level playing field.

While virtually all of the serious prudential, retail conduct and market conduct problems were caused by big banks, the decision had already been made to extend *strengthening accountability in banking* regimes to other banks, building societies, credit unions, large investment firms and insurers. It would have been anti-competitive and contrary to a level playing field not to extend relevant requirements across *all* regulated financial services sectors.

To take a practical example, a mortgage adviser with a bank or building society might have been tempted to move to an introducer or intermediary in order to escape the stringent requirements of *strengthening accountability in banking*. The proposed change mitigates this risk.

Clause 21(2): Rules of conduct

The proposed application of the conduct rules to all directors is welcome because there was no corporate governance justification for 'two-tier 'NEDs.

The conduct rules generally mirror the regulators' expectations of the firms that directors are engaged with, in particular those set out in the PRA's Fundamental Rules and the FCA's Principles for Business (such as integrity, due skill and care, strong systems and controls, openness with regulators). Therefore, firms and individuals have a shared interest in getting things right.

While there are different individual responsibilities, important decisions (such as those regarding business strategy) are made by a board as a whole. Even before the Treasury's announcement in October 2015, the PRA had already moved to a position where it expected firms themselves to apply key conduct requirements to *all* directors.

Our view is that all directors are part of this overall framework of expectations and we are pleased that the 'two-tier' NED provision would have breached EU law. We now look forward to boards being able to move ahead on a collegiate basis.

Clause 21(3): Rules of Conduct

The proposed removal of the requirement on firms to report each and every conduct breach is welcome if it means that junior staff breaches will not have to be reported on an individual-named basis.

The current legislative provision appears to be the basis for the FCA's decision to require firms to report every conduct rules breach on an individual named basis. While we support such a reporting provision in respect of senior staff and the application of strong conduct rules to all relevant staff, the reporting requirement on junior staff would be counter-productive and would lead to unintended negative consequences for consumers and for firms.

Our members encourage junior staff to be open and honest about their mistakes, so that they can be remedied through support and training, so that, where relevant, customers can be apologised to or remediated. Once it had become known that a firm would have to report every junior conduct rule breach on an individual named basis, this would have risked a new culture of concealment among junior staff in financial services firms. It would have also raised serious questions about consistency of reporting across the financial services industry.

Therefore, we strongly support Clause 21(3) and believe that, once implemented, the FCA should alter its rules reporting position accordingly.

Clause 22: Misconduct

The proposed abandonment of the reversed of the burden of proof is welcome because it is contrary to the notion of fair justice.

We fully understand and support the desire to make senior individuals accountable for their failings. It is extraordinary that, among all the massive prudential, retail conduct and market conduct failings over the last decade or so, of which we are now well aware, hardly any senior people have been held to account. For instance, even since the beginning of 2013, about 91.5% of the total fines levied by the FCA/FSA have been the responsibility of ten banks, yet we could find examples of only a tiny number of, relatively junior, individuals fined for breaches.

However, the way to achieve proper accountability is to introduce simple, sensible rules (that are not constantly changing) and to ensure that they are enforced strongly, fairly, proportionately and equally. It would not be achieved by the introduction of unfair procedural devices.

In recent years, the term 'natural justice' has largely been replaced by a simple duty to act fairly - see Lord Scarman *Council of Civil Service Unions v Minister for the Civil Service* (1985) - and, as an integral part of this fairness, it has long been recognised in English law that the burden of proof rests with the prosecution or the claimant - *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* (1942), *BHP Billiton Petroleum Ltd and Others v Damine Spa* (2003).

The lack of individual accountability to date is mainly the result of a failure to allocate responsibilities in firms' corporate governance frameworks. Because this deficiency will be fully addressed by the new *strengthening accountability in banking* rules (through responsibility maps, individual statements of responsibility, handover arrangements), the reversed burden of proof is unfair and is redundant.

While, as stated, we fully support a move to proper individual accountability - clearly absent so far - we believe that, as a matter of principle, the onus should remain on the regulator to establish its case. Therefore, we support the abandonment of the reversed burden of proof.