



Unite response to FSA Consultation on approved persons regime – significant influence function review

This response is submitted by Unite the Union. Unite is the UK's largest trade union with 2 million members across the private and public sectors. The union's members work in a range of industries including financial services, manufacturing, print, media, construction, transport, local government, education, health and not for profit sectors.

Unite, is also the largest trade union in the finance sector representing some 180,000 workers in all grades and all occupations, not only in the major English and Scottish banks, but also in investment banks, the Bank of England, insurance companies, building societies, finance houses and business services companies.

Executive Summary

- It is vital that those deemed 'approved persons' are the right people to carry out the necessary checks and balances within a company;**
- There is a perception of an 'old boys network' perpetuating the banking system where individuals are appointed based on a 'nod and a wink';**
- Can the FSA act independently given the Board is made up of a number of ex-bankers whose remit is to regulate their previous employers?;**
- Unite is concerned that the proposals are insufficient to enable independent scrutiny free from interference and without detriment;**

- **Unite proposes independent representatives including trade union representation on the board of remuneration committees;**
- **Where significant damage to a company's financial position or reputation is concerned fines or removal from office are an inadequate outcome and criminal or civil proceedings should be considered in such circumstances;**
- **Approved persons status must apply to all of those working in the UK with significant influence over a company's decisions whether the parent company is UK based or not;**
- **Any additional costs as a result of increased levels of approved person's applications must not affect the overall costs to the business in recruitment, staffing or training.**

Introduction

1. Unite welcomes the opportunity to respond to the FSA consultation on Approved Persons. This response will focus primarily on those individuals at a very senior level with a significant influence on the company.
2. Unite has a number of concerns regarding regulatory arrangements as they presently stand and any proposals to strengthen regulatory procedures to enhance accountability are welcomed.
3. Recent turmoil in the finance sector would indicate that there have been failures in a number of areas, not least of all regulation. It is therefore imperative that changes are made in order to make the processes by which the finance sector operates more robust including the ability of individuals to carry out the role efficiently and effectively and to challenge procedures and practices where appropriate.
4. Unite further welcomes any proposals that will look at the behaviours of individuals who have a significant influence on a firm and in particular responsibility for corporate governance.
5. It could be argued that the lack of robust corporate governance is at the heart of the present financial crisis facing global financial markets.
6. It is vital that those deemed 'approved persons' are the right people to carry out the necessary checks and balances within a company.
7. Part V of the Financial Services and Markets Act 2000 provides the FSA with the power to regulate individuals exercising significant influence

on the conduct of a firm's affairs in relation to regulated activities. Individuals are assessed by the FSA on whether they are 'fit and proper' individuals; criteria includes honesty, integrity, reputation, competence and capability.

8. It was clear from evidence given at the House of Commons Treasury Committee enquiry into the banking crisis that some executives had no banking qualifications and on at least one occasion a senior executive of a major clearing bank was not interviewed by the FSA despite this being a condition of appointment at executive level. Furthermore, it also came to light that an individual appointed to the position of Senior Risk Manager had no experience of risk management or risk assessment.
9. It is not clear from these examples whether due diligence in appointing an individual to a position was thoroughly carried out. Indeed it could be argued that an 'old boys' network applies within the banking system where individuals are appointed based on a 'nod and a wink' even at very senior levels and with little regard to whether an individual has either the training or experience to carry out the role.
10. The role of the FSA in approving appointments to senior level positions within the sector is therefore under scrutiny. Is it the function of the FSA to provide independent assessment of an individual's ability, capability and experience to carry out a role? Or is it to rubber stamp a decision already made by a company?
11. While the FSA has claimed to have tightened up its scrutiny of candidates it remains unclear whether in fact the FSA can act independently given that the Board of the FSA includes a number of ex-bankers whose remit is to regulate their previous employers.

Approved Persons

12. Unite has concerns that the proposals put forward are insufficient to enable independent scrutiny by approved persons free from interference and without detriment.
13. Can it be assumed that an approved person performing the role of non-executive director (NED) is truly independent beyond doubt? While NEDs have a duty to scrutinise on behalf of the wider public and shareholders they are often provided, through the remuneration system, with access to share option schemes in the company. This may therefore compromise their independence, as any criticism of decisions made by the board, could impact on their pay package.
14. An example of this was the 7 NEDs within Northern Rock who received between them over 104,000 shares in the company. The price at the time was around £6 per share and by the end of 2006 it had risen to

£13 per share. It could therefore be argued that it would not have been in the best financial interests of NEDs within Northern Rock to jeopardise their holdings by raising concerns which could potentially affect the market and therefore the share price.

15. It is important that lessons should be learned across the whole sector from the apparently lax procedures and practices which were in place prior to the current financial crisis.
16. Experience from Northern Rock would show that there is a risk that NEDs even as approved persons, would be unlikely to divulge any information which could negatively impact on the business for fear of impinging on their financial gain.
17. One way to perhaps deal with this would be to ensure remuneration packages are subject to transparency, accountability and independent scrutiny. This could involve explicit caps on salaries and bonuses, deferred bonuses paid based on medium term corporate performance with contractual clawback and share options structures linked to agreed, independently audited, long term performance metrics. Unite would also propose independent representatives and trade unions on the board of remuneration committees.

Autonomy

18. It is vital that procedures are put in place which provide individuals with the opportunity to report concerns to an independent organisation which can fully investigate and act on the evidence without detriment to the individual for 'whistle blowing'.
19. It is imperative under any new proposals that NEDs tasked with scrutinising the performance and approach of senior management decisions, and who fail to act appropriately, must be disciplined up to and including criminal or civil proceedings where appropriate. Fines or removal from office can be suitable levels of penalty in some circumstances, however where significant damage to the company's financial position or reputation is concerned Unite would see fines or removal from office as an inadequate outcome.
20. This should insure that only those individuals seeking to act in the best interest of the firm and the public interest and who would be bound to act with complete probity, would take on the role.
21. Unite would therefore propose additional powers for the FSA to call to account those NEDs who act inappropriately and whose actions may result in severe financial or reputational damage to the business.

Parent Company outwith the UK

22. The decision by the FSA not to extend the approved persons regulatory regime to include individuals working in the UK for an organisation whose parent company is regulated in another EEA country, leaves a glaring omission in the proposals and shows that lessons have not been learned from the past by the FSA.
23. It is surely the role of a UK regulator to ensure all those individuals with a significant influence on a company and operating within the UK to ensure those individuals conform to UK standards on approved persons.
24. The FSA's proposals claim that if a governing body of an authorised firm (outwith the UK) is sufficiently robust and autonomous, then the FSA would not expect individuals in any company to which the firm is accountable to need approval.
25. While the FSA may rightly assume sufficiently robust, autonomous and rigorous standards are in place in regulators outwith the UK, Unite would wish to clarify with the FSA how they would monitor this to ensure that the governing body is and would remain robust, autonomous and rigorous?
26. The assumptions made by the FSA in these proposals are naïve. It is for this reason that Unite believes that the FSA must err on the side of caution rather than expect companies to 'do the right thing' when it comes to appointing senior executives and must apply approved persons status to all of those working in the UK with significant influence over a company's decisions whether the parent company is UK based or not.

References

27. Unite has concerns that an opportunity to implement significant improvements in obtaining references has been missed in the proposals outlined.
28. It would appear that a reference will only be sought if the new firm requests one. This apparently leaves a yawning gap in the consistent monitoring of individuals.
29. A more vigorous vetting process must be put in place which includes mandatory references which will allow an organisation to take any necessary action against another organisation if for example the reference is deemed to be inaccurate or provides false information. This would provide a paper trail which allows for complete transparency and openness.

Costs

30. The costs for honesty and integrity do not come cheap. However the costs to the business of executive failings, mismanagement and unbridled risk is higher and this must not be lost when considering cost implications.
31. While it is inevitable that costs to process increased levels of approved person applications will rise it is important that any additional costs are met through existing regulatory budgets and do not in any way impact on the overall costs to the business in recruitment, staffing or training.
32. Lessons should be learned in this process and the costs of putting the right people with the ability to carry out the job in place are immeasurable – it is when we get this part of the process wrong that the eventual costs can be insurmountable.

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