



17 August 2023

By email

Dear Sir/Madam

Re: Regulator rules, Transitional rules and ADI key functions

AFMA welcomes the opportunity to comment on the consultation on the FAR Regulator rules, Transitional rules, and ADI key functions.

ADI Key functions

The Consultation Letter notes that each key function that is applicable to the ADI must be assigned to at least one accountable person and recorded in the FAR register.

Typically, there will be many key functions that are not applicable for any given ADI.

Where firms identify that a key function is not present in the way that might flow from section 10 of the Bill and the Minister Rules, AFMA seeks reassurance that firms will retain the option not to assign the key function to an accountable person. For example, a foreign ADI might determine that, from the listed key functions, capital management and hardship processes (and potentially many other functions including but not limited to Product design and distribution obligations and Product origination) might not be relevant given its wholesale focus and offshore capital structure.

Reflecting existing practice in BEAR, Accountable Persons (APs) of foreign ADIs, given the local branch structure, should be able to document exclusions for key functions where the foreign ADI has a reliance on global frameworks and processes. We seek confirmation on this continuity.

AFMA also seeks to understand whether key functions list has applicability to core compliance entities given they are not subject to the same notification requirements.

We understand that the Minister Rules for this round are yet to be released for consultation, however, going by the draft FAR Minister Rules 2022 we note that there appears to be overlap with the 'Accountable persons—prescribed responsibilities and positions' regime therein particularly for non-foreign ADIs. If a similar approach is to be maintained in the 2023 Minister Rules then the 'key functions' in the Regulator Rules creates a complex overlay for an already complex regime for non-foreign ADIs. With the reduced alignment of the key functions for foreign ADIs (if this continues with

the updated Minister Rules) then further guidance on how assignment of these functions might look might also be beneficial.

As under BEAR, there are some foreign ADIs that expect given the scale and complexity of their operations they will include only the Senior Officer Outside of Australia (SOOA) and the Head of Branch as the Accountable Persons. In such circumstances these two roles may (or may not) have the same sets of ADI key functions assigned to them. We seek assurance and guidance that the changed nature of the Key Functions under FAR compared to BEAR is compatible with this approach.

Reporting lines

For certain jurisdictions the information about the SOOA's reporting line will not be within the knowledge of the branch and may be to a group-level committee with many members. This could create issues for the branch in meeting the expectations of the Rules particularly as changes to the person(s) to which the SOOA reports must also be reported under s 32 (e) in a timely manner.

There may be limited public benefit in APRA receiving reports of SOOA reporting lines and it would appear to go beyond the information required under BEAR.

AFMA also notes that, for core compliance entities, the inclusion of reporting line information as a core notification obligation effectively recreates a significant part of the requirement of enhanced notification entities to report material changes to the Accountability Map.

We understand that one of the intentions of the Regulators in requiring firms to use the key functions list is to "address the potential information gap created by the fact that accountable entities that do not meet the relevant enhance notification threshold do not have to prepare and submit accountability statements and maps to the Regulators".

In our understanding, the reporting burden has been designed by the legislation to be lighter for core compliance entities. If there is a view that this should not be the case, the better option might be to amend the legislation that is currently before the Senate. It would appear sub-optimal for the Regulator Rules to create a requirement for core compliance entities to effectively meet the enhanced threshold requirement when this is at odds with the currently drafted intention of the Bill.

We note that s32(e) of the current FAR Bill states that only material changes to information in the accountability register must be notified to the regulator. We seek clarity on how this interacts with the requirement in the FAR Rules to report any changes to reporting lines (which are likely to be reshuffled periodically in large organisations and are arguably not material).

Privacy

In relation to privacy, we understand that the Regulators have advised that the only information from the register that would be made public would be disqualification information. We would welcome the

Regulators' confirmation of this commitment to balance considerations of privacy and increase AP comfort.

Overlap with existing programs

AFMA notes the non-optimal level of duplication and overlap between the FAR scheme and existing individual accountability and requirements regimes, in particular the Responsible Manager (RM) and Fit and Proper Persons (FPP) regimes. AFMA is keen to support the FAR regulators in working to reduce this duplication through adjustments to the RM and FPP regimes.

Significant Related Entities (SREs) for foreign ADIs

Members have previously engaged with APRA on the question of Significant Related Entities (SREs) as they relate to foreign ADIs. The Bank Executive Accountability Regime (BEAR) does not apply to "a foreign ADI, except to the extent that it operates a branch of the foreign ADI in Australia." [Schedule 1, item 1, paragraph 37(2)(b)]. According to the BEAR Explanatory Memorandum this means that "A foreign ADI is not subject to the BEAR for its offshore operations or for any locally incorporated non-ADI subsidiaries. However, its Australian branch operations are obliged to comply with the BEAR to the extent required by their operations and presence in Australia."

AFMA requests confirmation in the guidance that FAR will operate in a similar way to exclude SREs of foreign ADIs.

Guidance specific to foreign ADIs

We look forward to receiving further guidance from the regulators on the FAR scheme, its related rule sets, reasonable steps expectations, and implementation time frames (noting the Bill's commencement delay). We respectfully request that where it might add more clarity that guidance be provided that is specific for different entity types including foreign ADIs.

Examples of some of the questions for which foreign ADIs would welcome guidance include on the key functions:

(b) collections and enforcement (default, debt collections, and recovery); more information would be welcomed on the intended scope and specifically if this is, at it would appear, relevant to retail clients only?

(f) financial and regulatory reporting; is this limited to financial regulatory reporting or does it include all regulatory reporting? What overlap (if any) is there with (g) financial services regulatory engagement?

(h) hardship processes; AFMA would welcome confirmation this is applicable only for retail customers.

(k) monitoring representatives and staff—financial or credit products/ services; We would welcome more information on the context of this function – whether it is referring to a first or second line function, or aimed at retail.

(m) product design and distribution obligations and (n) product origination – AFMA would like confirmation this is intended to target retail business as it was for BEAR.

(o) recovery and exit planning and resolution planning; We seek confirmation that foreign ADIs do not need to consider this function for FAR given they have been excluded from the relevant Prudential Standard (and/or rely on home regulator frameworks).

(q) scam management; We seek confirmation this is intended to target retail customers. While foreign ADIs will have programs to avoid and manage brand misuse by bad actors this is typically a smaller function than for a retail business.

(s) training of relevant staff and representatives—financial products/ services/credit activities; We seek to understand whether this refers to compliance or business training or both?

We thank you for considering our views and would be pleased to assist with any questions.

Yours sincerely

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Senior Director of Policy