should be the immediate focus of international efforts to identify potential systemic risks and vulnerabilities. Therefore, the board believes that this review should take precedence over further work on methodologies for the identification of systemically-important asset management entities. After the review is completed, work on methodologies for the identification of such entities should be reassessed."

Deprived of its bureaucratic veil, the message of this statement was simple: as Greg Medcraft, chairman of both the Australian securities regulator and the IOSCO board, conceded in an interview with *The Wall Street Journal*, there was a need to see if there was a problem before looking for a solution.

In a press release issued on 30 July, the FSB accepted the inevitable. It had, it said, "decided to wait to finalise the assessment methodologies for [NBNIs] until the current FSB work on financial stability risks from asset management activities is completed. This will allow further analysis of potential financial stability issues associated with asset management entities and activities to inform the revised assessment methodology."

Or, as the two academics quoted earlier remarked, "instead of rushing ahead in designating asset managers as Sifis, it would be better if the next steps were to increase our understanding of how asset managers contribute to systemic risk, identify the data necessary for making an assessment and develop the necessary theoretical frameworks".

There is little doubt that this episode represents a major climb down for the FSB, which was established with much fanfare following the global financial crisis as the solution to the problems of international regulatory coordination. That one of its own members, IOSCO, could have so publicly disavowed the FSB's strategy raises profound questions about its effectiveness as a policy coordinator.

Moreover, the episode has called into question the centrepiece of the FSB's approach to its role, the designation of certain companies as G-Sifis. As the experience of designating asset managers has demonstrated, this process had developed a bureaucratic momentum of its own, without reference to such minor considerations as evidence or a solid analysis of the causes of systemic risk. As the practitioners of old would no doubt have remarked, the pursuit of theoretical neatness and tidiness for its own sake never ends well.

James Scrivener *specialises in writing about central banks and regulation*

Ruling out conduct unbecoming

Alex Carn explains the new certification and conduct regulations for the financial services sector and discusses whether they will make much of a difference

Changing Banking for Good – this is the noble and ambitious title of the government's June 2013 response to the Parliamentary Commission on Banking Standards (PCBS) report on strengthening accountability in banking. Cynics might suggest that this begs the question whether the government's intent is to make banking benevolent or to alter it irrevocably, but perhaps these are equally important aims. Whatever the goal, the Financial Services (Banking Reform) Act 2013 will take effect from 7 March, 2016, and bring to an end the authorised persons regime. It will be replaced by the new senior managers and certification regimes and conduct rules.

The act makes ostensibly significant changes to the way people are approved and appraised for work in financial services. However, this article considers a personal perspective that the changes are not as far-reaching as they appear at first blush. They may, in fact, serve to weaken the regulatory framework they are designed to bolster.

> The changes are not as far-reaching as they appear

Before the hedge fund offices of Mayfair start to convulse, I should point out that the changes will only apply to UK banks, building societies, credit unions and Prudential Regulation Authority designated investment companies (essentially the biggest ones). However, the regulatory trend is often to start with easier prey, as was the case with the remuneration codes, and it may not be long before the remit is extended.

Because of the overlapping functions of the PRA and the Financial Conduct Authority, companies and individuals can be required to be regulated by both bodies but, for simplicity, reference in this article is to the FCA alone.

The old: approved persons regime

To paraphrase John Dewey, knowing the past is the key to understanding the future. The current approved persons regime (APR) will be familiar to those who have worked or are working in financial services. In short, the APR provides that any individual performing a "controlled function" (one that "can exert significant influence over the company's regulatory conduct"), must be approved by the FCA. Companies undertake the appropriate checks and references and submit "form A" (application to perform controlled function(s) under the approved persons regime) to the FCA, which then acts as the ultimate arbiter in deciding who is "fit and proper".

For individuals also performing a significant influence function (SIF), such as chairman, CEO, CFO, chief risk officer and the like, there is a further overlay in that companies are required to specify why the individual is competent to perform the SIF function and how their appointment complements the company's strategy. In some cases, the FCA will also personally interview candidates applying for SIF roles.

Significantly, the APR covers many people in comparatively junior roles, encompassing those who have been summarily

dismissed as part of the various banking scandals of recent years, most notably around interbank-offered rates and forex. This is a stark contrast to what the landscape will look like post February 2016.

The new: senior managers and certification regimes

The senior managers regime (SMR) is effectively an enhancement and shoring up of the approval process that exists for SIF individuals. All who performed SIFs will fall within the SMR, as will some others in a limited number of functions not previously covered.

It will be mandatory for all senior managers to be approved by the FCA. As part of this, companies will be required to submit to the FCA a statement of responsibility (SOR) in respect of every senior manager. This is a personal portfolio of the areas under their ultimate control. It should be a dynamic document, developing and changing with the needs and remit of the company. So far, so straightforward. However, there is an inherent conflict between what a company and an individual may wish to see included. Companies will seek a document with broad responsibilities and individuals will want strictly defined parameters. The minds of both companies and employees have recently been concentrated on just what it is that the SOR will contain by a new criminal offence of reckless misconduct resulting in a failure of a bank, reserved only for senior managers. It can carry up to seven years' imprisonment.

Clearly, for companies and the FCA, the SMR should significantly tighten controls. However, for individuals, the SMR is not an attractive prospect. It increases the likelihood of withdrawal of FCA approval, financial penalties, criminal penalties and the possibility of being banned from holding a regulatory role in the future. Coupled with increasing regulation on bankers' pay and, more particularly, a seven-year clawback period for bonuses, the prospect of leaving the City for the wilds of the unregulated shores may never have looked so attractive.

The certification regime

The certification regime encompasses all those individuals who would have been approved persons but not in SIF roles: as the FCA puts it, "staff who could pose a risk of significant harm to the firm or any of its customers."

These people will not now require regulatory pre-approval, which will become the sole province of the company. Companies will be required to put in place procedures for assessing the fitness and propriety of staff and they will be accountable to the FCA for doing so, including annual statements that employees have been assessed and continue to be deemed "fit and proper". The existing system, which requires companies to give regulatory references under FCA Handbook SUP 10A.15, will remain. Critical, however, is that for these individuals this is not only the end of "form A" but also "form C" (notice of ceasing to perform controlled functions); the FCA will no longer wield the axe of approval as companies will be left to self-regulate in this regard.

This reopens the debate on what "fit and proper" means. From the standpoint of the FCA, decisions around "fit and proper" must be based on factual, impersonal tests: has the individual been bankrupt, disqualified as a director, been sanctioned by a regulator, and the like. When considered by a company, given that the individuals in question will be personally known to the decision-makers, there is necessarily a subjective element. Matters such as whether an employee has breached post-termination restrictions, or been accused of internal bullying, have historically not been subjects about which the FCA has been overly concerned. It may be, however, that companies now include such considerations when deciding on "fit and proper".

Many junior staff lost jobs while managers went unpunished

Whatever the intricacies, this will leave a host of people who would previously have been vetted by the FCA subject only to internal approval. This will include a number who left investment banks in the wake of the scandals of the past few years. They departed financial services employment with "dirty withdrawals" (qualified "form Cs"), which mean that they had little hope of future approval by the FCA.

Under the new regime, if a company is satisfied that an individual is, in the company's subjective view, "fit and proper", such a person will be able to work in financial services again. It may be that, in practice, companies will take a dim view of such people. However, where people have personal contacts at companies the situation may be different. It has sometimes been suggested that "who you know" can play just a little part in securing work in the City. Seen from a more positive angle, though, this may right some wrongs. There have been a number of collateral casualties over recent years, with many junior staff losing their livelihood while managers go unpunished. This change could allow those unfairly dismissed to return to the profession of their choosing.

The conduct rules

The final layer of the new regime is the introduction of the conduct rules. These set out the basic standards of behaviour that all those covered by the new regimes will be expected to meet. This essentially mimics the current APR regime (statement of principles and code of practice for approved persons). Breaches of the conduct regime must be notified to the FCA on a quarterly return and are in addition to the ongoing requirement to notify the FCA of anything of which it should reasonably be aware.

Views of the new regime may be defined by views of the old. The PCBS took a singularly damning view of the APR, saying: "The Approved Persons Regime has created a largely illusory impression of regulatory control over individuals, where meaningful responsibilities were not in practice attributed to anyone. As a result, there was little realistic prospect of effective enforcement action, even in many of the most flagrant cases of failure."

The new regime is designed to place accountability firmly with the most senior individuals in financial services organisations. It is hard to argue against a regime that seeks to make those in charge personally culpable if things go awry. However, those at the top still have the power to dictate where the buck stops, which suggest that it might not be with them. Recent years have seen a lot of blind eyes turned. It is to be hoped that the FCA will not be disappointed.

Alex Carn *is a solicitor and partner at Edwin Coe LLP, a London legal 200 firm. She specialises in employment law and has developed particular expertise in acting for both firms and high-net-worth individuals in respect of regulatory issues relating to financial services*