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# Joint administration of the Financial Accountability Regime between APRA and ASIC

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# Submissions process

## Feedback and comments

Closing date for submissions: 13 August 2021

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# Joint administration of the Financial Accountability Regime between APRA and ASIC

## Purpose of this paper

This information paper provides an overview of the joint administration of the Financial Accountability Regime (FAR) between the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) (the regulators). This paper does not form part of the explanatory materials to the FAR exposure draft nor should it be interpreted as formal guidance published on behalf of the regulators. The details outlined in this paper are subject to change depending on the finalisation of the FAR legislation and may evolve as the regulators refine their framework in jointly administering the FAR. It is expected that the regulators would publish joint regulatory guidance on aspects of the FAR and its joint administration prior to the commencement of the regime for accountable entities.

## Background

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry recommended that the Banking Executive Accountability Regime (BEAR) be extended to all entities regulated by APRA and to have the extended regime jointly administered by APRA and ASIC (recommendations 3.9, 4.12, 6.6, 6.7 and 6.8).

The FAR proposals paper released on 22 January 2020 outlined the Government's approach to extending the BEAR to all APRA-regulated entities. One of the key areas of concerns raised by industry in response to the proposals paper was the lack of details on the manner in which the regulators would administer the FAR and exercise the powers conferred under the regime. As a consequence of industry and other feedback received in response to the proposals paper, some changes have been made and are reflected in the FAR exposure draft. There have also been some changes to whether certain powers would be exercisable by the Minister or the regulators.

## Joint administration between APRA and ASIC

The Treasury and regulators consider that efficient and effective joint administration of the FAR between the regulators would need to be underpinned by robust collaboration and coordination. However, it is recognised that not all powers exercisable under the FAR warrant the same level of coordination between the regulators, that is:

- The FAR exposure draft specifies situations where the regulators would be required to form an agreement prior to certain powers being exercised; and
- There may be situations, if any, where the regulators could choose to:
  - form an agreement prior to certain powers being exercised;
  - consult with each other prior to certain powers being exercised; or
  - notify each other only after certain powers have been exercised.

Under the FAR exposure draft, the administration of the FAR over accountable entities that do not hold an Australian financial services licence (AFSL) or Australian credit licence (ACL), their significant

related entities and all associated accountable persons would generally be exercisable by APRA only, with the exception of the power to make a legislative instrument.

### Decisions that require agreement between the regulators

The FAR exposure draft requires the regulators to agree with each other before the following decisions or powers can be made or exercised:

Powers exercisable at accountable entities level by written notice	Powers exercisable at class of accountable entities level by legislative instrument	Powers exercisable at accountable entities level by written notice OR at class of accountable entities level by legislative instrument
<ul style="list-style-type: none"> <li>• exemption for inconsistency with corresponding foreign laws;</li> <li>• any directions powers including direction to reallocate responsibilities; and</li> <li>• disqualification of accountable persons.</li> </ul>	<ul style="list-style-type: none"> <li>• extension of time for notification obligations; and</li> <li>• determine content of accountability statements and maps.</li> </ul>	<ul style="list-style-type: none"> <li>• exclusion of responsibilities from the definition of an accountable person;</li> <li>• extension of time before an accountable person is required to be registered for temporary or unforeseen vacancies;</li> <li>• determination of whether a kind of remuneration is variable remuneration or the valuation of variable remuneration; and</li> <li>• circumstances in which shorter periods for deferred remuneration will be possible.</li> </ul>

### Actions that could involve agreement, consultation or notification as determined by the regulators

Other powers conferred on the regulators would generally be exercisable by either regulator independently. However, the FAR exposure draft requires the regulators to enter into an arrangement outlining the manner in which the regulators would administer the regime. This arrangement would determine, among other things, whether an agreement, a consultation or a notification is involved.

The regulators intend to publish the details of this arrangement within six months after the FAR receives Royal Assent.

It is expected that the arrangement would cover the regulators' approach to the exercise of the following powers:

- decisions relating to an application to include a person on the register of accountable persons, i.e. a decision to seek further information in relation to an application;

- decisions to request information under the general information-gathering power;
- decisions under the *Regulatory Powers (Standard Provisions) Act 2014* as it applies to the FAR, i.e. powers to enforce civil penalties and powers to accept and enforce enforceable undertakings; and
- decisions under the investigation and examination powers.

## Overview of the pre-implementation process

In implementing the FAR, accountable entities should take the opportunity to properly examine and strengthen existing governance frameworks where appropriate. As the FAR should be implemented in a way that reflects the actual organisational structure and operations of any given accountable entity, the exposure draft does not prescribe a single solution to implementing the FAR. It is anticipated that the way the FAR is implemented will vary between accountable entities. As such, it is important that accountable entities understand their obligations under the FAR and consider how they would meet these obligations in sufficient time prior to the commencement of the regime.

To facilitate a smooth transition and implementation of the FAR, the regulators intend to engage with accountable entities ahead of the formal implementation of the regime. This would allow accountable entities to understand their obligations under the FAR and better understand the regulators' expectations. For enhanced compliance entities, the regulators will request draft accountability maps and statements be provided for review and comment as part of the pre-implementation process. For core compliance entities, the regulators will seek other information such as a draft list of accountable persons that the accountable entity intends to register. For authorised deposit-taking institutions, the regulators may seek to understand how they plan to transition from the BEAR to the FAR including how they intend to meet their new and expanded obligations.

## Implementation and registration

Prior to the implementation of the FAR, the regulators are expected to release joint regulatory guidance to guide and assist accountable entities in the implementation and registration processes.

In addition, the regulators expect to support implementation and registration through:

- establishing a single portal to receive applications for registration of accountable person;
- establishing a single point of contact for accountable entities to raise any queries or requests they may have; and
- determining the appropriate form for registration.

## Ongoing administration and notification

### Single portal and single point of contact

The regulators expect to maintain a single portal for data collection and a single point of contact on an ongoing basis. At this stage, APRA Connect is expected to be used to collect information and receive notification forms on an ongoing basis.

The FAR exposure draft imposes a number of notification obligations on accountable entities. Information submitted by accountable entities through the single portal would be made available to APRA and ASIC for the purposes of administering the FAR; entities are not expected to submit the same information to each regulator individually.

While the regulators are expected to establish and maintain a single point of contact to triage any queries or requests from accountable entities or accountable persons, either regulator may contact an accountable entity or accountable person for any additional information or other requests. It



should be emphasised that the presence of a single point of contact does not preclude any accountable entities or accountable persons from contacting a specific area of either regulator where appropriate.

### Notification form

Unlike the BEAR, any notification under the FAR would be made via a prescribed form. The regulators would determine the appropriate form for notification. To minimise any administrative burden, it is expected the notification form for material changes to an accountable person's responsibilities would resemble the registration form for accountable persons.

### Enforcement

The regulators would collaborate and coordinate their administration efforts under the FAR including any enforcement actions to be undertaken. In general, the regulators would be able to exercise any enforcement powers independently. However, a regulator may only disqualify an individual from being an accountable person if there is agreement with the other regulator.

The regulators would not pursue separate enforcement actions against accountable entities and/or their accountable persons for the same breaches of any FAR obligations. However, this does not limit the enforcement actions that can be taken by either regulator if the matter that gave rise to non-compliance with a FAR obligation also results in non-compliance with any other obligations under other laws and regimes that the regulator administers. For example, a matter that gives rise to a breach of a FAR obligation by an accountable person may also result in, or contribute or relate to, a breach under the *Banking Act 1959* or the *Corporations Act 2001* which are associated with different enforcement actions and consequences of which APRA or ASIC may choose to pursue.

Where an accountable entity does not hold an AFSL or ACL, only APRA can undertake any enforcement actions against such an accountable entity, its significant related entities or any accountable persons thereof for breaches of FAR obligations. Where appropriate, APRA may choose to delegate its power to commence proceedings to ASIC.

### Joint regulatory guidance

The implementation of the FAR will require accountable entities to properly consider their existing governance frameworks and determine how best to meet the FAR obligations within their organisation. To assist with this process, the regulators intend to publish guidance to aid the implementation process as well as ongoing practices. The content of such guidance may include:

- guidance on preparation of accountability statements and maps which may involve the regulators publishing a suggested template and/or a list of key functions;
- guidance on what constitutes material changes that trigger notification obligations; and
- industry specific guidance.

Over time, the regulators may refine and update guidance materials.

It is expected that any joint regulatory guidance would be released prior to the commencement of the FAR for accountable entities. Any industry specific guidance would be released prior to the commencement of the FAR for each of the specific industries.