

Recovering the costs of the Office for Professional Body Anti-Money Laundering Supervision (OPBAS): proposed fee rates for 2018/19

Consultation paper CP18/32 Published by the Financial Conduct Authority (FCA)

Comments from ACCA
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GENERAL COMMENTS

1. ACCA welcomes the opportunity to respond to this consultation. The focus of the consultation is the proposed variable fee rate. However, we do not consider that the responses to the previous consultation have been appropriately considered. In addition, we are concerned by the incorrect assumptions and facts within the consultation paper, and we consider that the overall consultation process has lacked the level of transparency necessary to support good regulation. For example, despite requests by the professional bodies, neither OPBAS nor the FCA has published a breakdown of the costs of setting up OPBAS, a budget for the future running costs, or a strategic plan. With this in mind, we do not have adequate assurance that the costs of OPBAS are being appropriately ring-fenced and contained, given that OPBAS sits within the wider FCA structure.
2. The tariff base is 'intended to be an objective, transparent and simple measure that can be consistently applied across the fee-block to ensure a fair distribution of cost recovery'.¹ Of these five criteria (objectivity, transparency, simplicity, consistency and fairness), fairness is paramount. We acknowledge that what constitutes fairness may be difficult to articulate in the context of this consultation. But this serves to further underline the need for transparency.
3. As stated in our response to the earlier consultation, we would expect to see consistency between the way in which OPBAS's costs are recovered and the way in which the FCA recovers costs in respect of its oversight of the Designated Professional Bodies (DPBs). Many of the professional body supervisors (PBSs) are also DPBs, including the larger bodies such as the Law Society of England & Wales, the Institute of Chartered Accountants in England and Wales, and ACCA. Therefore, given the similarities between the populations supervised by the PBSs and those regulated by the DPBs, if the OPBAS fees borne by these bodies were to be much higher than the fees incurred as DPBs, the FCA should explain why.
4. The costs of AML supervision incurred by the PBSs must be passed on to the firms (including sole practitioners) on whose behalf those costs are incurred, and ultimately borne by consumers. Therefore, we strive to uphold the regulatory principle of proportionality. In support of the principle of fairness, we resist the proposal, implicit in this consultation paper, that the members of the larger

¹ CP17/35, page 6



professional bodies should subsidise the members of the smaller ones. The FCA has stated its concern that the OPBAS fee must not be perceived as a barrier to entry for any profession.² However, if the cost of AML supervision was to be a barrier to entry into the accountancy profession, it could only be due to the cost of supervision by the default regulator (HMRC). The apportionment of OPBAS's costs must be fair. These costs will be passed on (directly or indirectly) to practitioners, and the wide range of costs per Beneficial Owner, Officer or Manager (BOOM) distorts competition and is contrary to the stated objectives of the FCA.³ This is illustrated in Appendix 1 to this paper.

5. In its policy statement PS18/9, the FCA claimed that there is 'broad, though not universal, support for the principle of a minimum fee'.⁴ We request that the FCA explain the basis of this statement. We assume it is on the basis of the number of responses received, of which the majority would have been from PBSs. On this basis, the support received cannot be viewed as objective, as most of the PBSs would directly benefit financially from this proposal. Closer analysis (see Appendix 1) would suggest that respondents to the consultation supervising the majority of professionals do not support the proposal, and so we consider the FCA assertion to be misleading.
6. The Annual Funding Requirement for 2018/19 is £1.65 million, including £0.25 million of set-up costs (being recovered over two years). It is anticipated that this is to be spread between PBSs supervising 81,216 'supervised individuals'. In order to form a clearer opinion on the reasonableness of the proposals, including their impact, we asked the FCA to provide a breakdown of the number of BOOMS reported by the PBSs (81,216) analysed between the professional bodies. The FCA responded, on 1 November 2018, claiming that they were 'not able to publish the figures for individual PBSs', and that they 'regard tariff data from fee-payers as commercially sensitive'. This significantly undermines transparency, and we do not consider the population of each PBS's supervised population to fall within a fair definition of commercially sensitive information. The table in Appendix 1 to this paper has been compiled by 18 of the 22 PBSs, who were willing to share their data.

² Policy Statement PS18/9 – feedback to CP17/35, page 12

³ As set out in CP18/32, on page 10

⁴ Policy Statement PS18/9 – feedback to CP17/35, page 12



7. In April 2018, the FCA said:

*'We remain inclined to set the minimum fee at £5,000 but we have decided to reserve our position until we have satisfactory data on which to respond to the suggestion put to us that there should be no minimum fee. We will present our conclusions when we consult on the fee rate.'*⁵

It appears unreasonable that the FCA required more detailed data on which to base the proposed minimum fee, but it is not now prepared to share that data with those most engaged with the current consultation - the PBSs.

8. The fundamental flaw in the proposals within the consultation paper (and first proposed in CP17/35) concerns the operation of the minimum fee. Any PBS with 6,000 or fewer members would pay the minimum fee and no more. Therefore, the minimum fee is also the maximum fee for those bodies. A PBS with, say, 20 supervised individuals would pay £250 per person; one with 6,000 supervised individuals would pay 83p per person; and one with 25,000 supervised individuals would pay £31.38 per person $[(19,000 \times 41.03 + 5,000)/25000]$. Therefore, the proposed approach would favour only those PBSs with close to 6,000 supervised individuals, and we can find no logical reason for such an approach.

⁵ PS18/9, page 13



AREAS FOR SPECIFIC COMMENT

In this section, we respond to the two specific questions asked by the FCA in its consultation paper.

Question 1: Do you have any comments on our proposed variable fee of £45.49 per supervised individual?

9. We note that no specific question has been asked concerning the fixed fee of £5,000, which would cover the first 6,000 supervised individuals in firms supervised by a professional body. This question is, of course, closely linked to the question being asked here, as the amount of any variable fee is directly dependent upon the amount of the fixed fee and the number of supervised individuals (if any) the fixed fee is deemed to cover. We are very much opposed to the setting of the fixed amount in the way proposed, as outlined in our covering comments. As the table in Appendix 1 to this paper demonstrates, this gives rise to an unacceptable volatility in overall fee, and an inequitable variance in the fee per supervised individual when compared across PSBs.
10. The variable fee of £45.49, as proposed in the consultation paper, is incorrect. The FCA has subsequently acknowledged to the professional bodies that the variable fee under its proposals would be £41.03. This is not an insignificant error (an overstatement of almost 11%) and it serves to further undermine the consultation process. We note also the following commentary:

‘When we finalised the fees rules through PS18/9, we couldn’t set the fee-rate for 2018/19 as we had yet to gather the data. One of the main features of the instrument was the definition of the metric on which we will base our fees and we had no data under this definition.’ ... ‘We couldn’t confirm the minimum fee structure for the same reason. We needed the new data to test out the suggestion, made during the consultation, that costs could be distributed more fairly if we had no minimum fee.’

11. Despite the significant changes in data (since the publication of PS18/9), no changes in respect of the minimum fee have been proposed; nor do they appear to have been considered. We believe that the credibility of the consultation process is undermined by the FCA’s statement:



*'We are confirming the minimum fee structure we consulted on in CP17/35 as a fee of £5,000 up to a threshold of 6,000 supervised individuals. All PBSs must pay the minimum fee. Those supervising more than 6,000 individuals will pay £5,000 plus the variable rate per individual above the threshold.'*⁶

12. The consultation paper states that the fee rate 'falls to £25.91 without the minimum fee'.⁷ This calculation is not explained, as the correct rate would appear to be £20.32 per supervised individual (£1,650,000/81,216). Therefore, if a fixed fee of £5,000 is determined, it could logically be deemed to cover the first 246 supervised individuals (£5,000/£20.32). The table in Appendix 2 illustrates the impact of the minimum fee of £5,000 covering the fixed costs of OPBAS oversight and the first 250 supervised individuals. The remaining costs would then be allocated at a rate of £20.17 per supervised individual after the first 250.
13. Paragraph 2.10 contains several errors. It makes comparisons between a fixed fee that leaves a variable rate of £45.49 and a method of allocation at a variable rate of £25.91. When the correct variable rates of £41.03 and £20.32 (respectively) are used, the outcomes change. While a variable fee of £25.91 is said to 'benefit' only the two largest fee-payers, in fact a variable fee of £20.32 would 'benefit' six fee-payers. (The table in Appendix one shows six PBSs paying more than £20.32 per supervised individual.)
14. Leaving these errors aside, we believe it is inappropriate to encourage responses to the consultation paper based almost exclusively on how different fee structures will benefit or disadvantage certain PBSs. Rather, the focus must be on finding the *right* and fair basis of allocation. Therefore, we have provided three alternatives in the Appendices to this paper. These do not include the flat-rate fee of £20.32 per supervised individual, as we believe that it is necessary to acknowledge the fixed costs of oversight of a PBS.
15. Volatility in fees and the inequitable variance in cost per supervised individual are minimised by having a fixed cost that also covers the first 250 supervised individuals (Appendix 2). However, this is a poor representation of the costs of oversight actually incurred by OPBAS. Instead, we would prefer to see the variable cost applied in respect of every supervised individual, in addition to the fixed amount of £5,000. This is illustrated in Appendix 3, and more accurately reflects the

⁶ CP18/32, page 6

⁷ CP18/32, page 6

cost of OPBAS oversight in respect of each PBS.

Question 2: Do you agree that for fees purposes professional body supervisors should report the most recent count of supervised individuals in the 12 months ending 5 April each year and submit the figure to us by 31 October of the year preceding the relevant fee-year?

16. First, it has come to our attention that the definition of ‘supervised individuals’ is unclear. The definition includes BOOMs within supervised firms, and sole practitioners who are relevant persons. We have, so far, assumed that a ‘sole practitioner’ within the meaning of the 2017 Money Laundering Regulations will be an individual practising alone, without any employees. This meaning is narrower than the usual meaning as understood by practitioners, which would include all firms under sole ownership – with or without employees, who may include BOOMs. Therefore, it is possible that some PBSs will include *all* firms under sole ownership as sole practitioners, and any managers employed within such firms will be excluded from the calculations. We are concerned by the scope for inconsistency in this respect.
17. Allowing the PBSs to provide data on their supervised individuals as at different points in time is inconsistent with the principle that OPBAS’s costs are recovered on the basis of supervised individuals. This would inevitably lead to double-counting of some supervised individuals, and the omission of others. The fact that Treasury continues to require the PBSs to provide data (despite OPBAS being created to provide oversight and encourage consistency) is not relevant to the question of how the data should be collected by OPBAS and then provided to the FCA. It is reasonable to expect each PBS to know its supervised population, given that BOOMs must be approved by a PBS, and a PBS will be made aware when a relevant person changes supervisor. Therefore, at any point in time, a PBS should be able to inform OPBAS of the size of its supervised population.
18. Some of the PBSs are still undergoing a process of identifying the supervised individuals within their firms. In some cases, this process has been complicated by the need to identify trust or company service providers (TCSPs) and by the reluctance of some firms to provide the requested information. Therefore, we would expect the reporting date in respect of the 2019/20 fees to be delayed – perhaps until 28 February 2019 – although, in future, the reporting date may be earlier.



CONCLUSION

19. In the April policy statement, the FCA claimed that the extra time spent modifying the definition of the metric on which the OPBAS fees will be based has 'assisted in reaching what we believe is an objective, transparent and fair method of distributing cost recovery'.⁸ While we support the basis of supervised individuals within firms (including sole practitioners), the current proposals are neither objective nor fair, and the means of arriving at them has lacked transparency.
20. The proposals would give rise to a situation in which 19 of the 22 PBSs would all pay the same fee of £5,000. Of the other three, one PBS would be expected to contribute 123 times that amount and another 163 times. The proposed means of recovering the costs of OPBAS is inequitable and is not defensible, because it would require the members of three PBSs to subsidise the members of the other 19. The table in Appendix 1 illustrates the volatility of the fees each PBS would be expected to pay.⁹ In addition to requiring an equitable basis for cost recovery, the PBSs will need more certainty in order to be able to recover the OPBAS fees from their supervised firms.
21. We note the intention, set out in the April policy statement: that the FCA intends to 'finalise the rate in December 2018 so that we can issue invoices from January 2019'.¹⁰ This timescale is too short. Good practice dictates that all consultation responses are considered carefully. Due weight should be given to the responses of the three PBSs that are responsible for supervising 68% of the supervised population. The errors within the consultation paper also highlight the need to proceed with due care.
22. Careful consideration of the compatibility statement (section 4 of the consultation paper) highlights several areas that are open to challenge. For example, paragraph 4.2 states:

'When consulting on new rules, we are required by section 138I(2)(d) of FSMA to explain why we believe they are compatible with our strategic objective, advances 1

⁸ PS18/9, page 4

⁹ The FCA, on page 9 of Policy Statement PS18/9, alludes to the need to avoid volatility in fees.

¹⁰ PS18/9, page 5



or more of our operational objectives, and has regard to the regulatory principles in s.3B of FSMA.¹¹

We do not believe that any of the operational objectives set out in paragraph 4.5 would be advanced by the proposals. In particular, competition would be impeded, rather than promoted.

23. Other paragraphs in the compatibility statement that are open to challenge include the following:

*'The fee-rate we are consulting on fits into the framework for OPBAS fees that we consulted on earlier in the year. After testing alternative scenarios, we believe it distributes cost recovery between the relevant fee-payers as fairly as possible.'*¹²

We do not believe that alternative scenarios have been adequately tested, given the significant changes to data available during the course of the consultation and the errors in the consultation paper. We do not agree that the proposals are as fair as possible.

*'In Chapter 2 we explained the thinking behind the fee-rate that we are consulting on, and the different models of minimum fee we have looked at.'*¹³

This statement is made in relation to transparency. We have already highlighted the lack of transparency, and we do not consider the thinking behind the proposed fee rate to have been explained with the required degree of reasonableness.

*'We have tried to minimise distortion to competition by basing the fees on the number of persons supervised under the MLRs.'*¹⁴

This is a vague statement, and the distortion to competition that the proposed model would bring about is clear. In fact, the proposal that the fixed fee should cover as many as 6,000 supervised individuals is inconsistent with the claim that fees would be based on the number of persons supervised.

¹¹ CP18/32, page 10

¹² CP18/32, page 11

¹³ Ibid

¹⁴ Ibid



APPENDIX 1

The following table illustrates how OPBAS costs would be recovered from each of the PBSs, based on the proposals within the consultation paper.

| Professional Body | Supervised individuals | £ total | £ per head |
|---|------------------------|-------------------|------------|
| Association of Accounting Technicians (latest estimate) | 4,100 | 5,000 | £1.22 |
| Association of Chartered Certified Accountants | 8,803 | 120,007 | £13.63 |
| Association of International Accountants | 366 | 5,000 | £13.66 |
| Chartered Institute of Legal Executives/ CILEx Regulation | 19 | 5,000 | £263.16 |
| Chartered Institute of Management Accountants (latest estimate) | 2,000 | 5,000 | £2.50 |
| Council for Licensed Conveyancers | 494 | 5,000 | £10.12 |
| Faculty of Advocates | 431 | 5,000 | £11.60 |
| Faculty Office of the Archbishop of Canterbury | 212 | 5,000 | £23.58 |
| General Council of the Bar of Northern Ireland | 1 | 5,000 | £5,000.00 |
| Insolvency Practitioners Association | 166 | 5,000 | £30.12 |
| Institute of Certified Bookkeepers | 3,377 | 5,000 | £1.48 |
| Institute of Chartered Accountants in England and Wales | 20,959 | 618,768 | £29.52 |
| Institute of Chartered Accountants in Ireland | 798 | 5,000 | £6.27 |
| Institute of Financial Accountants (latest estimate) | 2,561 | 5,000 | £1.95 |
| International Association of Bookkeepers | 763 | 5,000 | £6.55 |
| Law Society / Solicitors Regulation Authority | 25,771 | 816,204 | £31.67 |
| Law Society of Northern Ireland | 1,075 | 5,000 | £4.65 |
| Law Society of Scotland | 2,583 | 5,000 | £1.94 |
| | 74,479 | £1,629,979 | |
| Unaccounted for (4 PBSs) | <u>6,737</u> | <u>£20,021</u> | £2.97 |
| Totals | <u>81,216</u> | <u>£1,650,000</u> | |

The demonstrates how the cost per supervised individual (ignoring the exceptional circumstances of the General Council of the Bar of Northern Ireland and the Chartered Institute of Legal Executives) varies between £1.22 and £31.67. Of the 22 PBSs, 19 would pay no more than the fixed amount of £5,000. This begs the question of why the costs of OPBAS should not simply be shared equally between the PBSs (at £75,000



each), even though this was a suggestion that was dismissed during the first consultation process. The current proposal is that the larger PBSs would be subsidising the smaller ones. (Subsidy of the smaller professional bodies is also the reason that the OPBAS set-up costs would not be shared with the minimum fee-payers on this basis. OPBAS does not try to hide this fact, despite its claim that it strives to reduce the risk of cross-subsidy.)¹⁵

¹⁵ CP18/32, page 5



APPENDIX 2

The following table illustrates how OPBAS costs would be recovered from each of the PBSs if the fixed fee of £5,000 was to cover only the first 250 supervised individuals.

| Professional Body | Supervised individuals | £ total | £ per head |
|---|------------------------|-------------------|------------|
| Association of Accounting Technicians (latest estimate) | 4,100 | 82,655 | £20.16 |
| Association of Chartered Certified Accountants | 8,803 | 177,514 | £20.17 |
| Association of International Accountants | 366 | 7,340 | £20.05 |
| Chartered Institute of Legal Executives/ CILEx Regulation | 19 | 5,000 | £263.16 |
| Chartered Institute of Management Accountants (latest estimate) | 2,000 | 40,298 | £20.15 |
| Council for Licensed Conveyancers | 494 | 9,921 | £20.08 |
| Faculty of Advocates | 431 | 8,651 | £20.07 |
| Faculty Office of the Archbishop of Canterbury | 212 | 5,000 | £23.58 |
| General Council of the Bar of Northern Ireland | 1 | 5,000 | £5,000.00 |
| Insolvency Practitioners Association | 166 | 5,000 | £30.12 |
| Institute of Certified Bookkeepers | 3,377 | 68,072 | £20.16 |
| Institute of Chartered Accountants in England and Wales | 20,959 | 422,701 | £20.17 |
| Institute of Chartered Accountants in Ireland | 798 | 16,053 | £20.12 |
| Institute of Financial Accountants (latest estimate) | 2,561 | 51,613 | £20.15 |
| International Association of Bookkeepers | 763 | 15,347 | £20.11 |
| Law Society / Solicitors Regulation Authority | 25,771 | 519,759 | £20.17 |
| Law Society of Northern Ireland | 1,075 | 21,640 | £20.13 |
| Law Society of Scotland | 2,583 | 52,057 | £20.15 |
| | 74,479 | £1,513,619 | |
| Unaccounted for (4 PBSs) | <u>6,737</u> | <u>£136,381</u> | £20.24 |
| Totals | <u>81,216</u> | <u>£1,650,000</u> | |

On this basis, 18 of the 22 PBSs would pay between £20 and £21 per supervised individual. Those that would incur more costs are those that are unable to benefit from economies of scale, although their fees would, of course, be capped at £5,000. This preserves the necessary competition within the legal and accountancy professions, and avoids the challenge that a few PBSs are subsidising the others.



APPENDIX 3

The following table illustrates how OPBAS costs would be recovered from each of the PBSs if the fixed fee of £5,000 covered only the fixed costs of OPBAS oversight, and a variable cost of £18.96¹⁶ was charged in respect of each and every supervised individual.

| Professional Body | Supervised individuals | £ total | £ per head |
|---|------------------------|-------------------|------------|
| Association of Accounting Technicians (latest estimate) | 4,100 | 82,736 | £20.18 |
| Association of Chartered Certified Accountants | 8,803 | 171,905 | £19.53 |
| Association of International Accountants | 366 | 11,939 | £32.62 |
| Chartered Institute of Legal Executives/ CILEx Regulation | 19 | 5,360 | £282.12 |
| Chartered Institute of Management Accountants (latest estimate) | 2,000 | 42,920 | £21.46 |
| Council for Licensed Conveyancers | 494 | 14,366 | £29.08 |
| Faculty of Advocates | 431 | 13,172 | £30.56 |
| Faculty Office of the Archbishop of Canterbury | 212 | 9,020 | £42.54 |
| General Council of the Bar of Northern Ireland | 1 | 5,019 | £5,018.96 |
| Insolvency Practitioners Association | 166 | 8,147 | £49.08 |
| Institute of Certified Bookkeepers | 3,377 | 69,028 | £20.44 |
| Institute of Chartered Accountants in England and Wales | 20,959 | 402,383 | £19.20 |
| Institute of Chartered Accountants in Ireland | 798 | 20,130 | £25.23 |
| Institute of Financial Accountants (latest estimate) | 2,561 | 53,557 | £20.91 |
| International Association of Bookkeepers | 763 | 19,466 | £25.51 |
| Law Society / Solicitors Regulation Authority | 25,771 | 493,618 | £19.15 |
| Law Society of Northern Ireland | 1,075 | 25,382 | £23.61 |
| Law Society of Scotland | 2,583 | 53,974 | £20.90 |
| | 74,479 | £1,502,122 | |
| Unaccounted for (4 PBSs) | <u>6,737</u> | <u>£147,878</u> | £21.95 |
| Totals | <u>81,216</u> | <u>£1,650,000</u> | |

This model more closely reflects the reality of how OPBAS incurs its costs, and still

¹⁶ (£1,650,000 – 22 x £5,000) / 81,216

recognises economies of scale. The cost per supervised individual (ignoring the exceptional circumstances of the General Council of the Bar of Northern Ireland and the Chartered Institute of Legal Executives) would vary between £19.15 and £49.08, and 68% of PBSs would incur costs of less than £26 per supervised individual. As with the model in Appendix 2, this model preserves the necessary competition within the legal and accountancy professions, and avoids the challenge that a few PBSs are subsidising the others. This model is, of course, open to testing different levels of fixed cost – as the fixed cost reduces, the range of fluctuation in cost per supervised individual narrows.

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