



BANK OF ENGLAND
PRUDENTIAL REGULATION
AUTHORITY

Consultation Paper | CP2/16

Buy-outs of variable remuneration

January 2016

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Responses are requested by 13 April 2016.

Please address any comments or enquiries to:

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1 Overview

1.1 In this consultation paper the Prudential Regulation Authority (PRA) sets out its proposal for the introduction of a new rule on buy-outs of variable remuneration, relating to the practice whereby firms recruiting staff 'buy-out' deferred bonus awards that have been cancelled by their previous employer.

1.2 The proposed rule would strengthen the existing Remuneration Part of the PRA Rulebook¹ (formerly 'Remuneration Code'), which applies to all PRA-regulated banks, building societies and designated investment firms, subject to the PRA's proportionality framework².

1.3 The overall purpose of the rules in the Remuneration Part is to ensure greater alignment between risk and individual reward, to discourage excessive risk-taking and short-termism and encourage more effective risk management. This supports the PRA's statutory objective to improve the safety and soundness of firms.

1.4 The current rules require the deferral of variable remuneration to allow firms the opportunity to reassess the nature, scale and outcomes of the risks taken in order to more adequately assess the performance for which these bonuses were awarded. This enables firms to apply an *ex-post* risk adjustment or 'malus' to these unpaid or unvested awards where justified. The PRA's rule on clawback, introduced in July 2014³, extended the principle of *ex-post* risk adjustment to the return of awards that have already been paid or vested to employees (or former employees) for up to seven years from award.

1.5 In 2015 this framework was strengthened by the introduction of new remuneration rules to improve further the incentives of employees at the point at which bonuses are earned⁴. This included increasing minimum deferral periods for senior managers to seven years and the introduction of a requirement for the period of clawback for senior managers to be capable of being extended to ten years where there are issues under investigation at the end of the standard seven year period that could otherwise give rise to clawback.

1.6 The practice of buy-outs undermines the effectiveness of malus and clawback. By moving employers and having their cancelled bonuses 'bought-out', individuals are effectively able to insulate themselves against an *ex-post* risk adjustment of their past awards as risks crystallise or the consequences of poor risk management emerge at their old employer. The proposed rule (set out in Appendix 1) is intended to address this gap in the current framework and ensure that the practice of buy-outs does not blunt the beneficial incentive effects of the existing rules on malus and clawback or allow employees to avoid the proper consequences of their actions.

1 The Remuneration Part of the PRA's Rulebook sets out the standards that banks, building societies and designated investment firms have to meet when setting pay and bonus awards for their staff. It aims to ensure that firms' remuneration practices are consistent with effective risk management. The introduction of the rule on buy-outs will have no impact on the PRA's existing approach to proportionality: www.bankofengland.co.uk/pr/Pages/publications/ss/2015/lss813update.aspx

2 *PRA Supervisory Statement LSS 8/13 UPDATE*, 'Remuneration standards: the application of proportionality'. www.bankofengland.co.uk/pr/Pages/publications/ss/2015/lss813update.aspx

3 *PRA Policy Statement 7/14*, 'Clawback': www.bankofengland.co.uk/pr/Pages/publications/ps/2014/ps714.aspx

4 *PRA and FCA Policy Statement 12/15*, 'Strengthening the alignment of risk and reward: new remuneration rules' www.bankofengland.co.uk/pr/Pages/publications/ps/2015/ps1215.aspx

1.7 The proposal follows a joint PRA and FCA Consultation Paper 15/14 'Strengthening the alignment of risk and reward: new remuneration rules', published in July 2014¹, that sought views on four possible options for resolving the issue of buy-outs. The four options were:

- i. banning buy-outs;
- ii. requiring firms to maintain unvested awards when employees leave a firm;
- iii. applying malus to bought-out awards; and
- iv. relying on the existing clawback rules.

1.8 There are practical challenges with any of these approaches, but the feedback from the consultation highlighted in particular the practical and operational difficulties with the first two options. Banning buy-outs was seen as the option most likely to lead to a competitive disadvantage for UK firms given the absence of international agreement on the issue. Requiring firms to maintain unvested awards, except where grounds for malus existed, also raised concerns because it would reduce the retention effects of deferral, with individuals having less incentive to remain at firms. This option would also substantially raise costs by preserving awards where no buy-out would have been offered, while firms would still need to pay buy-outs when hiring from firms not subject to the UK remuneration rules.

1.9 There was support, however, for applying malus to bought-out awards, though respondents questioned the potential role this would create for the regulator as an arbiter in any decisions. The option to rely on the existing clawback rule also received some support, although it was generally recognised that it would only apply to the amount of variable remuneration that had vested prior to the employee leaving (rather than the remaining unvested awards being bought-out by the new employer).

1.10 The PRA and FCA confirmed in its Policy Statement 12/15 'Strengthening the alignment of risk and reward: new remuneration rules', published in June 2015², that they would consider whether more detailed proposals should be brought forward for applying *ex-post* risk adjustment to bought-out awards. This consultation paper sets out the PRA's proposals.

1.11 The FCA recognises that the practice of buy-outs may pose a risk to the regulators' remuneration regimes and supports the PRA in exploring solutions to address this. As the practice of buy-outs is common across both dual- and FCA solo-regulated firms, the FCA has decided not to consult alongside the PRA at this stage in order to maintain a consistent approach on this issue across FCA-regulated firms. The FCA will closely follow feedback to this consultation and the changes proposed by the PRA, and will consider at a later stage whether it is appropriate to apply any rules on buy-outs more widely across the FCA solo-regulated population. The proposals set out in this consultation paper would thus only apply to MRTs at PRA-regulated firms.

1 PRA and FCA Consultation Paper 15/14, 'Strengthening the alignment of risk and reward: new remuneration rules' www.bankofengland.co.uk/pr/Pages/publications/cp/2014/cp1514.aspx

2 PRA and FCA Policy Statement 12/15, 'Strengthening the alignment of risk and reward: new remuneration rules' www.bankofengland.co.uk/pr/Pages/publications/ps/2015/ps1215.aspx

Responses and next steps

1.12 This consultation closes on Wednesday 13 April 2016. The PRA invites feedback on the proposals set out in this consultation. Please address any comments or enquiries to cp2_16@bankofengland.co.uk.

2 Proposals

2.1 The aim of the proposed rule is to ensure that the practice of buy-outs does not blunt the beneficial incentive effects of the existing rules on malus and clawback or allow employees to avoid the proper consequences of their actions. The PRA views this rule as an important addition to its existing remuneration framework, whilst acknowledging the limitations resulting from the necessarily limited scope of its application.

2.2 The scope of application of the proposed rule is the same as the scope of the existing rules on deferral, malus and clawback, in terms of both the individuals and firms to which it will apply. It would apply to all MRTs at PRA-regulated banks, building societies and designated investment firms. However, in accordance with the PRA's existing approach to proportionality, these rules would not need to be applied to firms which fall within level three of the proportionality framework.¹

2.3 The PRA proposes a model that allows for the possibility of malus and clawback to be applied to bought-out awards, based on a determination by the old employer. It is the PRA's view that it would be impractical to require the new employer to make a determination on events or decisions which occurred during the employee's previous employment. However, the PRA has also concluded that it would be difficult to operate an effective model based on an extension of the contract of employment with the old employer, which would otherwise have ceased.

2.4 The principal mechanism would therefore be a contract between the new employer and employee, which would provide for the possibility of malus and clawback to be applied on the basis of a determination notified by the old employer. It would involve the old employer notifying the new employer of the determination and that a certain amount should be applied to the employee's deferred variable remuneration by way of malus and/or clawed back where the variable remuneration has already vested.

2.5 The grounds on which the old employer would be able to apply malus or clawback would have to include, as a minimum, misconduct or failures of risk management. However, it would not need, or be expected to include a material downturn in the financial performance of the old employer. The PRA takes the view that this ground, which is also excluded from the required grounds under the existing clawback rule, could be regarded as being too open to misuse by an old employer.

Responsibilities of the old employer

2.6 More generally, the PRA recognises that it is important to the integrity of the malus and clawback framework that the old employer should be subject to a clear duty to act fairly and reasonably in making the determination. The old employer should be able to demonstrate that it has acted consistently in relation to current and former employees and previous or concurrent cases of malus or clawback. The proposed rule therefore sets out the procedural obligations on the old employer and places an explicit obligation on them to act fairly and reasonably in making the determination to apply for malus or clawback with regard to their former employee.

2.7 The PRA proposes to reinforce this obligation by providing in the rule for there to be a private right of action for damages under section 138D of the Financial Services and Markets

¹ PRA Supervisory statement LSS 8/13 UPDATE, 'Remuneration standards: the application of proportionality'. www.bankofengland.co.uk/pr/Pages/publications/ss/2015/lss813update.aspx

Act 2000 (FSMA) in the event of a failure by a firm to comply with the rule. Comments on the implications of providing for such private rights of action are particularly invited.

2.8 The proposed rule also requires the old employer to provide the former employee with details and reasons for any proposed malus or clawback and allow the former employee to make representations as to why any such determination should not be made. The old employer must take account of any representations when making a determination. The old employer would also be expected to report cases of malus or clawback against bought-out awards to the PRA on at least an annual basis. To facilitate this, the PRA would update its remuneration policy statement (RPS) templates¹ in due course following the consultation process.

Responsibilities of the new employer

2.9 The new employer would be expected to act on receipt of this notification, except to the extent that the awards concerned had already been subject to malus or clawback. It should be noted that the rule does not prohibit the new employer from making provision in the contract to allow it to provide malus or clawback to the bought-out awards on the basis of misconduct or failures of risk management at the new employer, although it is not anticipated that such a provision would be commonly included. Where clawback is sought, the new employer would act as the claimant in a contractual claim against their employee, supported by the old employer's notification, for those sums already vested.

2.10 The proposed rule would also provide scope for new employers to apply for a waiver where they have reason to believe an old employer's decision to apply malus or clawback has been manifestly unfair or unreasonable. The grounds for seeking such a waiver might include the apparent severity of treatment toward a former employee based on the information provided, or a pattern of determinations which suggested that the old employer was not acting fairly and reasonably toward their former employee(s).

¹ The RPS templates are available at: www.bankofengland.co.uk/prs/Pages/supervision/activities/remuneration.aspx

3 The PRA's statutory obligations

3.1 The PRA must ensure the proposals are compatible with the PRA's statutory objectives under FSMA to promote the safety and soundness of PRA-authorised firms.¹ The proposals set out in this consultation paper apply to Capital Requirements Directive IV firms.² They are aimed at further strengthening the malus and clawback rules in the Remuneration Part, which is intended to ensure greater alignment between risk and individual reward, to discourage excessive risk-taking and short-termism, and to encourage more effective risk management. The proposals are therefore compatible and further support the PRA's safety and soundness objective.

3.2 The PRA must also assess the costs and benefits of proposals and have regard to the regulatory principles as set out in FSMA, including proportionality, and consider the impact on mutuals. The PRA also has a duty to facilitate competition as a secondary objective subordinate to its general safety and soundness objective. Finally, the PRA must consider the equality and diversity impact of its proposals. The PRA's assessment of these obligations is set out below.

Cost benefit analysis

3.3 FSMA requires the PRA to perform a cost benefit analysis of its proposals. In particular, FSMA requires the PRA to publish estimates of the costs and the benefits, unless these cannot reasonably be estimated or it is not reasonably practicable to do so.

3.4 The analysis set out below covers the costs and benefits arising from the buy-out policy proposal set out in this consultation paper. The proposal will affect MRTs at PRA-regulated firms subject to the Remuneration Part of the PRA Rulebook.

Benefits

3.5 The proposals in this consultation are aimed at strengthening the general objective of the Remuneration Part. The proposals will address an existing weakness in the remuneration framework, reinforcing the existing rules on malus and clawback and therefore strengthening the incentives of individuals at the time bonuses are being earned, even where such individuals may later move employers. It would also ensure that the consequences of misconduct and bad risk management are less likely to be evaded.

Direct costs to firms

3.6 The PRA proposes that the principal mechanism for delivering the rights and obligations should be the contract between the new employer and the employee, which would provide the possibility of malus or clawback being applied on the basis of a determination by the old employer.

3.7 The PRA has considered the potential of further costs relating to:

- the addition of buy-out provisions to new employment contracts;
- incorporating new elements inherent in the buy-out rule within existing employment contracts;

1 See s.2B(1) and s.2B(2) FSMA.

2 CRD IV is an EU legislative package covering prudential rules for banks, building societies and investment firms. See the PRA's dedicated webpage for more information: www.bankofengland.co.uk/pr/Pages/crdiv/default.aspx

- setting up mechanisms for the notification of buy-outs (by the new employer) and determinations (by the old employer), including the requirement to maintain information on those employees subject to buy-out awards;
- the assessment by an old employer of specific cases that may be subject to an application of malus or clawback;
- employers pursuing actual cases of malus or clawback, including the related legal fees;
- employees challenging the application of malus or clawback, including the related legal fees; and
- the application for waivers by new employers and consideration by the PRA of those applications.

3.8 The PRA does not anticipate that the routine costs are likely to be substantial or disproportionate, although it is recognised that where action is pursued the potential costs of pursuing litigation may indeed prove to be substantial. Where serious cases of misconduct or failure of risk management have occurred, firms would anyway be expected to undertake thorough consideration of the circumstances giving rise to the misconduct or failure and identify the extent to which staff, current and former, may be responsible. So, while the cost of considering and, where appropriate, pursuing such actions may well prove to be substantial in particular cases, the PRA takes the view that such costs are fully justified in order to ensure that the overall approach to risk adjustment of variable remuneration is effective.

3.9 The PRA welcomes comments on the above costs as well as their implications for individual firms.

Impact on mutuals

3.10 Under FSMA the PRA must assess whether, in its opinion, the impact of the proposed rules on mutuals will be significantly different from the impact on other firms.¹ The PRA does not view the proposals put forward in this consultation paper as disproportionately impacting mutuals, with the application of the rule based on the size, internal organisation and the nature, scope and complexity of a firm's activities, rather than its specific corporate structure.

Impact on competition

3.11 When discharging its general rule-making function, the PRA must so far as is reasonably possible act in a way which, as a secondary objective, facilitates effective competition in the markets for services provided by PRA-authorized persons in carrying on regulated activities.² The PRA has assessed whether the proposals in this consultation paper facilitate effective competition.

3.12 One issue considered was the risk that malus and clawback might be used strategically, particularly by larger firms, to limit the likelihood of staff moving to rivals or potential rivals. The PRA has sought to limit the impact of this risk in the rule, imposing a duty on the old employer to act fairly and reasonably in making the determination to apply malus or clawback with regard to their former employee. The PRA would expect firms to be able to demonstrate that they have applied malus and clawback fairly and consistently between staff and former staff and between cases. New employers would also be able to apply for a waiver where they

1 Section 138K FSMA.

2 See s.2H FSMA.

considered the basis of an old employer's determination to be manifestly unfair or unreasonable, including where they considered that it might be intended to restrict fair competition.

3.13 A further consideration relates to the jurisdictional limitations of the rule, and the extent to which this may impact on the competitiveness of PRA-regulated firms. The PRA's view is that the introduction of the rule would have a relatively marginal impact relative to the impact of the new remuneration rules (both domestic and international), including the bonus cap, longer deferral and clawback. This impact is considered to be justified in the interests of making the malus and clawback rules more effective and ensuring that they are given adequate weight at the point at which risk decisions are being taken. The policy is therefore deemed to be compatible with achieving the PRA's secondary objective of facilitating effective competition.

Regulatory Principles

3.14 In establishing its practices and procedures, the PRA must have regard to the Regulatory Principles as set out in FSMA.¹ The PRA considers that the proposal is in line with the Regulatory Principles under section 3B FSMA including the principle that any burden or restriction imposed on a person is proportionate to the benefits, considered in general terms which are expected to result from the imposition of that burden.

Equality and diversity

3.15 In making its rules and establishing its practices and procedures, the PRA may not act in an unlawfully discriminatory manner. It is required, under the Equalities Act 2010, to have due regard to the need to eliminate discrimination and to promote equality of opportunity in carrying out its policies, services and functions.² The PRA has considered equality and diversity issues but has not identified any impacts arising from the proposal.

¹ See s.2H and s.3B FSMA.

² Equalities Act 2010, section 149(1).

Appendices

1 Remuneration Part of the PRA Rulebook

PRA RULEBOOK: REMUNERATION BUY-OUT RULES 2016

Powers exercised

- A. The Prudential Regulation Authority (“PRA”) makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 137G (the PRA’s general rules);
 - (2) section 137H (general rules about remuneration);
 - (3) section 137T (general supplementary powers); and
 - (4) section 138D(1) (actions for damages).
- B. The rule-making powers referred to above are specified for the purpose of section 138G(2) (Rule-making instrument) of the Act.

Pre-conditions to making

- C. In accordance with section 138J of the Act (consultation by the PRA), the PRA consulted the Financial Conduct Authority. After consulting, the PRA published a draft of proposed rules and had regard to representations made.

PRA Rulebook: Remuneration Buy-out Rules 2016

- D. The PRA makes the rules in Annex A to this instrument.

Commencement

- E. This instrument comes into force on [].

Citation

- F. This instrument may be cited as the PRA Rulebook: Remuneration Buy-out Rules 2016.

By order of the Board of the Prudential Regulation Authority

[]

Annex A

In this Annex, new text is underlined and deleted text is struck through.

Part

REMUNERATION

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1. APPLICATION AND DEFINITIONS
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18. HIGH EARNERS REPORTING REQUIREMENT

Links

1 APPLICATION AND DEFINITIONS

...

1.2 In this Part, the following definitions shall apply:

buy-out

means that part of an *employee's* variable remuneration:

- (a) agreed in any contracts relating to the commencement of employment with, or provision of services for, a firm; and
- (b) the aggregate value of which is less than or equal to such unvested variable remuneration:
 - (i) in the *employee's* contracts relating to employment with, or the provision of services for, a previous firm in which the *employee* was employed or to which the *employee* provided services, and
 - (ii) which terminated when the *employee* left employment with, or ceased to provide services for, the previous firm.

private person

has the meaning given by regulation 3 of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001.

remuneration requirements

means the requirements in 6 to 15A.

shares

has the meaning given in article 76 of the RAO.

2 APPLICATION DATES

2.1 Subject to 2.2 and ~~2.3~~ to 2.4, a firm must apply the remuneration requirements in relation to:

...

2.4 A firm must apply 15A.2(b) to 15A.11 in relation to any buy-out entered into on or after [] 2016.

...

15 REMUNERATION STRUCTURES

~~15.8 A firm must ensure that remuneration packages relating to compensation for, or buy out from, an *employee's* contracts in previous employment align with the long term interests of the firm including appropriate retention, deferral and performance and clawback arrangements.~~

15A BUY-OUTS

15A.1 Rules 15A.2 to 15A.9 apply where:

- (a) a firm agrees with an employee to pay or provide a buy-out;
- (b) the buy-out relates to employment with a previous firm that was subject to the remuneration requirements or a member of that firm's group in relation to which the remuneration requirements applied; and
- (c) the employee was a material risk taker in that previous firm or the member of its group.

15A.2 A firm must ensure:

- (a) a buy-out aligns with the long term interests of the firm including appropriate retention, deferral, performance and clawback arrangements; and
- (b) the duration of retention, deferral, performance and clawback arrangements applied to a buy-out, or where relevant, part of a buy-out, must be no shorter than such duration as was applied and remained outstanding in relation to unvested variable remuneration awarded by a previous firm to the person as an employee of that previous firm.

[Note: Art. 94(1)(i) of the CRD]

15A.3 Prior to providing an employee with a buy-out a firm must identify:

- (a) the amount of unvested variable remuneration which could be bought out;
- (b) any previous firm to which any part of the buy-out relates; and
- (c) the duration of retention, deferral, performance and clawback arrangements that would apply to each amount or part of an amount identified in (a).

15A.4 A firm must not award, pay or provide a buy-out to an employee unless it enters into a contract with the employee which:

- (a) enables the firm to reduce all or part of the buy-out; and
- (b) requires the employee to repay all or part of the buy-out to the firm
in accordance with this Chapter following receipt by the firm of a notice provided by a previous firm under 15A.6(3).

15A.5 A firm must, in writing, notify a previous firm to which a buy-out relates:

- (a) that it has entered into a contract which includes the terms required by 15A.4;
- (b) any amount attributable to that previous firm; and
- (c) the duration of retention, deferral, performance and clawback arrangements that would apply the amount or part of the amount identified in (b).

15A.6

(1) A previous firm which has been notified under 15A.5 must promptly consider any misbehaviour or material error of the former employee in accordance with the criteria it has set under 15.21 until the end of the last period notified under 15A.5(c).

(2) The previous firm must:

- (a) determine the amounts by which:
 - (i) it would have reduced unvested variable remuneration; or
 - (ii) it would have required the repayment of an amount corresponding to vested variable remuneration;

had the former employee remained in its employment and the duration of retention, deferral, performance and clawback arrangements were as notified under 15A.5(c);

- (b) make such determinations fairly and reasonably, including by:
 - (i) providing the former employee with details and reasons for the proposed determination ;
 - (ii) enabling the former employee to make representations as to why the proposed determination in (a) should not be made; and
 - (iii) taking account of those representations in making the determination.

(3) The previous firm must, in writing, notify the new firm of any amounts determined under (2) no later than 14 working days after it makes the determination.

15A.7 A firm must reduce, or make all reasonable efforts to recover an amount corresponding to, the buy-out, in the amounts notified to it by the previous firm under 15A.6(3), before the vesting of the next relevant deferred payment, or in a case where clawback is applicable, within a reasonable period, and in any event, no later than the end of the clawback periods referred to in 15.20(3) and 15.20(4) as applicable.

15A.8 Upon request, a previous firm must provide a firm which has entered into a buy-out with its former employee with the following information:

- (a) details of any previous notifications it has received under 15A.5; and
- (b) copies of all notifications it has made to any firm pursuant to 15A.6(3).

15A.9 A firm must not:

- (a) structure any element of an employee's remuneration in a way that could result in remuneration which otherwise would be characterised as part of a buy-out, not being characterised as such; or
- (b) act or fail to act in a way which would otherwise seek to avoid the requirements of this chapter.

15A.10 A contravention of 15A.6(2) by a firm is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to such actions for breach of statutory duty.

16 BREACH OF THE REMUNERATION RULES

16.1 Subject to 16.2 to 16.7, the voiding provisions in 16.9 to 16.13 apply in relation to the prohibitions on *material risk takers* being remunerated in the ways specified in:

- (1) 15.7 (guaranteed variable remuneration);
- (2) 15.17 to 19 (deferred variable remuneration);
- (3) 15.20(2) (performance adjustment – clawback); and
- (3A) 15A.4 (buy-out contract); and
- (4) 16.16 (replacing payments recovered or property transferred).

...

16.6 ...

~~(2) This rule applies only to variable remuneration relating to a performance year to which the contravening remuneration related.~~

(2) This rule applies:

- (a) in the case of a contravention of 15A.4, only to remuneration relating to the commencement of employment with or provision of services for the firm; and
- (b) in any other case, only to variable remuneration relating to a performance year to which the contravening remuneration related.

Part

REMUNERATION

Externally defined glossary terms

Term	Definition source