Consultation Response

PRA-FCA DP1/23 Review of the Senior Managers and Certification Regime

31 May 2023

The Association for Financial Markets in Europe (AFME) and UK Finance welcome the opportunity to comment on **DP1/23 REVIEW OF THE SENIOR MANAGERS AND CERTIFICATION REGIME** ("the DP").

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

UK Finance is the collective voice for the banking and finance industry. Representing more than 300 firms across the industry, we act to enhance competitiveness, support customers and facilitate innovation.

We summarise below our high-level response to the consultation, which is followed by answers to the individual questions raised.

Executive Summary

We welcome the initiative of the FCA and PRA, together with HMT, to review the SM&CR and the opportunity to provide input. Overall, our members' experience of the SM&CR has been broadly positive, with benefits seen in executive accountability and firm-wide conduct standards.

Our key messages are summarised below and we would be happy to discuss any aspect of our response in more detail:

1. Senior Manager Approvals: the industry has faced huge challenges due to the lengthy approval process, combined with the significant delays experienced. Our response identifies a number of ways in which the process could be streamlined, such as: narrowing the scope of roles requiring approval (as opposed to notification); taking previous approvals into account; and allowing candidates to hold Prescribed Responsibilities (PRs) during their approval process.

2. Scope Expansion: the trend towards adding additional responsibilities into the SM&CR rather than by formal SM&CR consultations is a significant concern for the industry. The gradual expansion of scope to include each current regulatory focus area goes against the overall obligation on firms to ensure that there is adequate accountability for each aspect of their firm's business according to their structure and does not provide an opportunity for industry feedback.

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3. Certification Functions: there are areas where the existing scope is too broad, particularly in relation to client dealing and extraterritorial reach. The frequency with which F&P screenings are repeated could also be reduced.

4. The FCA Directory: we strongly believe that the Directory is disproportionate to the aim of protecting retail consumers and instead places significant administrative burdens on firms for little demonstrative benefit. In line with the objectives of SM&CR to place more obligations upon firms to ensure the Fitness and Propriety (F&P) of their staff, we suggest that it should be curtailed to show information at a firm level only, or failing that, to show only information relating to individual who interact with retail customers, roles requiring qualification or notified Non-Executive Directors (NEDs).

5. Conduct Rules: we would welcome confirmation that the Conduct Rules should not be used to cover all non-financial misconduct, or misconduct occurring outside of a work context (although these remain relevant to an individual's F&P). In addition, we remain concerned by the lack of regulatory feedback on the application of the Conduct Rules, given the impact that a Conduct Rule breach can have on an individual's subsequent career.

6. International Competitiveness and Talent Attraction: there remain aspects of the SM&CR that impact the UK's competitiveness, such as the delays to Senior Manager approvals, the Requirement to obtain Regulatory references and criminal records checks from abroad, understanding of personal liability and the UK's approach to variable remuneration.

7. Regulatory Alignment: in addition to the UK's remuneration rules, we have identified areas where the approaches taken by the PRA and FCA could be more aligned, for example in relation to allocation of responsibilities or drafting of rules.

8. Regulatory Dialogue and Feedback: concerns have been raised about uptake of industry views provided under consultation, the lack of feedback about important aspects of the SM&CR (such as the Conduct Rules application or the Directory usage), as well as on more administrative issues such as difficulties relating to the submission of information via Forms or resolution of technical problems with Connect.

Q1: To what extent do you agree or disagree that the SM&CR has made it easier to hold individuals to account?

The PRA and FCA's own reviews of the SM&CR, along with feedback from our member firms, suggest that introduction of the regime has increased awareness and clarity about individual accountability. Senior Managers are now even more focussed on doing the right thing and being able to evidence that they are doing so, than on the fear of sanction, either internal or external. The regime has reinforced the importance of a firm's culture, albeit that the principles behind the SM&CR were already embedded in many firms' cultures before it was introduced.

Rather than asking about individuals' buy in to the regime, the question asks more directly about 'holding individuals to account'. As the DP notes, Senior Managers' variable remuneration is linked to their Statements of Responsibility (SoRs), creating a degree of internal/personal accountability, but we have not noted significant use of the SM&CR by regulators as a mechanism to publicly hold individuals to account. We view this as good outcome which confirms the preventative value of the regime and its concomitant focus on culture, in ensuring the behaviour of senior individuals does not fall below the regulators' high expectations.

We cover further under Q6 our concerns in relation to how the SM&CR has pushed individual accountability at the expense of collective accountability.

Q2: To what extent do you agree or disagree that the SM&CR regime has improved safety and soundness and conduct within firms?

The wide application of the Conduct Rules, and importantly our members in-house training about them, has improved conduct within firms, as part of a wider evolution of culture in UK banks following the financial crisis.

We are less sure that the SM&CR *itself* has improved safety and soundness of firms and the financial system. Enforcement action has made a second order contribution to safety and soundness, but the major improvements have come as a result of a broad package of post global financial crisis reforms to the prudential capital requirements, catalysed by the Basel Committee requiring, *inter alia*, higher capital and liquidity requirements, coupled with stress testing and recovery and resolution planning.

Q3: To what extent do you agree or disagree that the fitness and propriety requirements support firms in appointing appropriately qualified individuals to Senior Manager roles?

When recruiting for a Senior Manager position, the main driver in the candidate assessment process is their technical and interpersonal skills and the extent to which these complement those of other senior colleagues, rather than the SM&CR requirements *per se*.

However, once a hiring decision has been made, delays in the approval process have resulted in costly delays before a newly recruited individual can fully contribute to the business. We discuss this further in our response to Q12 below.

In addition, there remain concerns that there is a dampening effect hiring from outside of financial services, given the way that the questions on candidate experience are framed.

Finally, we note that the questions relating to criminal proceedings (Form A Section 5.01) also continue to cause concern amongst member firms, particularly given the mix of questions between those relating to an individual and their past employers. When hiring a senior individual from a large firm, it is extremely likely that the firm itself will have been subject to investigation by the authorities. Detailing these cases, which are often large and complex, is time consuming and does not appear to add any value to the application. We suggest that a more proportionate approach would be for these questions to be limited to cases in which the candidate was directly involved.

Q4: Please provide any suggestions that can help ensure that appropriately qualified individuals are not deterred from taking up relevant Senior Manager roles.

As noted above in our response to Q1, we suggest that there could be improvements to the way that non-financial services recruits are considered and to how criminal proceedings are disclosed. Our responses to Q10 in relation to remuneration and Q12 on application delays are also extremely pertinent here. In addition, we would like to raise the following points.

Start-up banks rely on attracting experienced, senior level bankers to join their boards to support them as they grow. The PRA's remuneration requirements complicate the methods of reward notified NEDs can be offered. So we welcome the PRA's recent CP5/23, which seeks to introduce a welcome degree of proportionality by removing some of the current remuneration requirements applicable to smaller firms.

Our members support the need for a diverse board, with a range of complementary skills and broad opinions. We would welcome additional openness from regulators to employing directors without a financial services background but with useful skills in, for example, data, marketing or technology. Feedback from our members suggests that they have perceived less willingness from the regulators to consider such candidates, which has led, in turn, to a reluctance from firms to consider putting them forward.

In the case of individuals who have worked overseas, it can be difficult and sometimes impossible to obtain criminal checks, due to local differences in approach. Furthermore, in some cases, police require the individual to attend a local police station in person to complete the checks. This causes delays in completing the collection of evidence for regulatory approval. In the case of individuals who are moving within the same group, and have worked for the same group for over 6 years, we would ask that the requirement to perform foreign criminal checks is waived.

Prior employers sometimes fail to recognise qualifications, particularly those taken overseas. This leads to employees having to retake exams when they change firms, at a cost to the new employer. We request that the FCA and accredited bodies instead recognise previously held qualifications and other relevant training.

There remain concerns that the SM&CR focus on personal accountability is a deterrent to candidates from other jurisdictions. Even where the firm clearly explains the regime and the benefits which a clear demarcation of accountability can bring, individuals from outside the UK, and particularly from jurisdictions where there is a tradition collective accountability, are often concerned about the UK's approach.

Furthermore, we note that, where investigations are opened into individuals, these can take years to come to conclusion. While we are aware of the consultation currently open from the Bank of England as to how its enforcement processes can be improved, the length of investigations is a serious consideration for individuals taking up Senior Manager roles. Having an investigation ongoing for a number of years can seriously impact the health and wellbeing of the individual(s) involved, as well as affect their ability to move, or take on new, roles.

Finally, for international firms, these lengthy investigations can interact with other regulatory or legal requirements, impacting the remuneration of the employee being investigated. The risk of this taking place can act as a direct impediment to diversity amongst Senior Managers, making it a role potentially unviable to those without substantial private financial resources, including those from lower socio-economic backgrounds, single parents or others with dependents.

Q5: To what extent do you agree or disagree that the SM&CR has made it easier for firms to hold staff to account and take disciplinary action when appropriate against them?

As we note above, the SM&CR has emphasised the importance of individual accountability at a senior level but we are not aware of significant utilisation of the SM&CR framework by firms to discipline individuals at the top of the firm. Appropriate mechanisms to do so pre-date the introduction of the regime and many firms would bring a disciplinary case against an individual according to their own internal processes before deciding whether an aspect of the SM&CR was also breached. However, we also support the regulators' view that the regime is preventative in nature and consider that the apparent lack of enforcement cases suggest that it has been successful in this regard.

There is a concern in relation to the perception of Conduct Rule breaches. Many firms will simply not employ an individual who has a conduct notification, despite there being a potentially wide range of seriousness of offences. So a Conduct Rule breach may end an individual's career in financial services as a result of a minor failing which could have caused no, or only an immaterial amount of, customer detriment. With this in mind, we would like feedback from the regulators on the notifications submitted by the industry, as well as for COCON 4.2 guidance on SC1 ('reasonable steps') to be expanded and include illustrative examples of common breaches notified to the FCA. This would provide a level of consistency on what is considered to be a Conduct Rule breach, the interaction with the disciplinary process and the impact of disclosures made in a regulatory reference. This would also help to create a consistent and proportionate interpretation, to ensure that similar cases are treated fairly, both for the individual and the firms, across the industry.

Q6: To what extent do the specific accountabilities of individual directors established by the Senior Managers Regime work in ways that complement the collective responsibility of the board of directors or decision-making committees? Are there ways this could be improved?

In our view, the collective responsibility of the Board or decision-making committees arises from the separate governance regime of the UK Corporate Governance Code. It requires the board to exercise good judgement which should be subject to robust challenge by other, particularly non-executive, directors.

In parallel, SYSC governance and risk control provisions focus on the firm as a regulated entity, rather than the board or the individual (whereas the focus of SM&CR is on individual accountability).

Therefore, there is an innate tension between individual and collective responsibility with the ultimate test being 'against which party would a regulator seek to enforce?' It seems to us that the regulator does not have the capacity to sanction the board collectively - action can only be taken against the firm and/or the individual.

The allocation of specific responsibilities to senior managers does not *per se* enhance board collective responsibility although it does ensure that boards and decision-making committees have a suitable range of expertise on which to draw, thereby improving their functioning.

Indeed there could be an unintended impact on diversity at board level were individual accountability to dilute the role of collective decision making, as individual Senior Managers may feel they no longer need to invite, listen or take account of divergent views, given that they carry ultimate accountability. However, we think this potential risk should be mitigated by a culture which encourages diversity of thought and open, constructive debate throughout the firm, especially at board level.

Some members have suggested that there is potential for confusion between the formal Board Delegated Authority as part of a board's fiduciary duties as part of broader Corporate Governance and the individual accountabilities in the SoRs of Senior Managers and how they then 'delegate' tasks to their direct reports.

It's not clear how, in practice, the regulators would deal with a case where a board or committee collectively reaches a decision which the regulators view as unreasonable. It is important that the Chair of a board/committee is not held to be solely personally responsible and made a scapegoat for the collective decision of the committee.

In light of the above, we would appreciate further direction from the regulators, perhaps in the form of example scenarios, on the relationship between individual and collective accountability and the regulators' expectations in this area.

Q7: To what extent do you agree or disagree that the prospect of enforcement promotes individual accountability.

Immediately after the introduction of the SM&CR, individuals may have focussed on building a portfolio of documentation to evidence their exercising of reasonable steps as the regulators' appetite for enforcement was unknown.

Now, whilst senior individuals still maintain a portfolio of such documentation, its key purpose is to support the effective running of the business by ensuring appropriate, clear delegated authorities are in place which are attested to and Management Responsibility Map (MRMs) are up to date. Therefore, we would suggest that the prospect of enforcement is relevant, but not the main driver of employees' commitment to the values the SM&CR seeks to promote.

However, we also note that the prospect of enforcement, while encouraging individuals to take the correct action in a given situation, may deter them from volunteering for additional responsibilities outside of their immediate role, particularly where those responsibilities may be particularly challenging or come with inherent risks.

Q8: How could our approach to enforcement be enhanced to better support the aims of the SM&CR?

Neither our members nor we believe that the regulatory community sees benefit in enforcement action. Indeed, we have noted only a very few sanctions on individuals arising from the SM&CR, which we believe underscores its efficacy as a preventative regime. We would add that often firms do not wait for enforcement to take remedial action and may start to do so well before the regulator has embarked on the journey to an enforcement action. The approach to enforcement could be better enhanced by improving the supervisory regime, allowing for information exchange and enhanced collaboration across firms to take disciplinary actions.

We continue to believe that a cooperative approach, with regulators working with industry to achieve good outcomes, is preferable to enforcement-based, external legal regimes, which impose requirements that cannot be improved or made appropriately proportionate.

Members and their Senior Managers have often commented to us that they are unsure how they would demonstrate that they had taken reasonable steps to avoid a contravention happening. So it is important that, where enforcement action is deemed appropriate, at its conclusion the decision notice should explain in detail what behaviour, or omission, caused the regulator to reach its decision. This will allow other Senior Managers to test whether their 'reasonable steps' meet regulatory expectations. Further dialogue with industry on the definition of reasonable steps would also be welcomed.

As discussed in our response to Q4, thought should be given to the length of time over which investigations take place. In some circumstances an investigation can take many years, during which time the Senior Manager under investigation has a high level of uncertainty over their current and future career, often even after they have changed roles or moved firms. This can be detrimental to the wellbeing of the individuals, even where there has been no wrongdoing, as well acting as a disincentive to international individuals taking up Senior Manager roles in the UK and an active impediment to fostering diversity amongst senior management.

Q9: To what extent do you agree or disagree that the scope of the SM&CR is appropriate?

Responsibilities

The scope of the SM&CR has widened since its introduction, with the introduction of new "overall" or "other" responsibilities in response to wider policy developments, and often via informal methods such as supervisory letters, Dear CEO letters or Policy Statements without rule-making consultation (we cover this also in our response to Q15b below). This is, for example, the regulatory practice in Periodic Summary Meeting (PSM) letters, requiring a Senior Manager to be designated responsibility for each PSM action. We are strongly concerned by this use of SM&CR to drive the implementation of new policies, which goes beyond the regime's original core objectives.

In addition, the proliferation of new responsibilities appears to undermine their original design as a "limited set" (FCA CP14/13/PRA CP14/14 section 2.28) and to constrain the flexibility that firms have to define and allocate responsibility for key issues according to their own internal structures – particularly where these issues are broad and would naturally sit within the remit of more than one individual, or, for firms with group headquarters abroad, where decision on these issues would usually be taken at group level.

We believe that targeted scope changes would focus scarce PRA / FCA resources where they are most needed, while reducing the compliance burden and uncertainty for firms.

Where the PRA and FCA wish to define new responsibilities (including Prescribed Responsibilities, or other SM&CR requirements), this should be done via formal consultation.

In relation to the Certification Regime and Directory (which we cover further in our responses to Q18 and Q19 below), we suggest amendments to the scope which would ease the resource burden on firms and remove obligations that bring minimal benefit to the industry or consumers.

Focusing Approvals on Key Officers

A possible modification to the regime could be to narrow down the range of Senior Management Function (SMF) roles that needs prior approval. For instance 'ExCo' type roles such as CEO, CFO, CRO, CCO, COO as well as MLRO could be subject to prior approval by PRA/FCA, whereas other SMF roles could be subject to notification by the firm, with the firm taking responsibility for conducting sufficient due diligence, with appropriate governance and audit trail.

This would mitigate the problem of approval delays and focus PRA/FCA resources on key officers. Firms would still have to show F&P which is model works well for notified NEDs.

Q10: Are there actions the regulators could take in respect of the SM&CR that would help enhance competition or international competitiveness?

Remuneration

A key area where the SM&CR is negatively impacting the UK's competitiveness relates to remuneration, specifically the deferral period of no less than seven years for Senior Managers, with delivery commencing no earlier than the third year after the award.

While we support the use of variable remuneration measures such as deferrals to strengthen the link between conduct and remuneration, the UK's deferral periods are currently longer than those applied in other financial centres. Retaining deferral periods that are longer than comparable financial centres will continue to be a hurdle to encouraging the movement of talent within the global industry, particularly for non-UK firms who may have to combine the application of UK rules with additional requirements from their home state. Furthermore, the differing approaches set by the PRA and FCA regarding remuneration for Senior Managers is an unnecessary inconsistency. We recommend that the UK reevaluates its approach to variable remuneration and considers other financial centers, for example aligning deferral periods with the EU, at up to five years or the US at up to three.

Group Structures

In addition, for businesses operating globally, and more specifically for those headquartered outside the UK, the regime's distinction between developing strategy, which can be done by global staff who do not hold an SMF role, versus local implementation of that strategy, which must be done by a locally approved Senior Manager, is difficult to separate in practice. As a consequence, the regime may lead to decision making being overly localised in the UK, as Senior Managers attempt to demonstrate the independence of their decision-making, which could result in UK subsidiaries / branches being viewed as less strategically important entities outside the UK, and therefore the UK attracting less investment and support from the Group. Similarly, global firms may also be encouraged to put in place purely administrative reporting lines and structures of governance from the UK to meet the requirements, while ensuring a globally coordinated approach. These additional compliance and administrative structures are not necessary so consideration should be given to solutions which allow UK subsidiaries and branches to rely on group level individuals who are responsible for elements of the UK business without requiring them to become Senior Managers and/or be based in the UK.

Criminal Records Checks

In the case of individuals who have worked overseas, it can be difficult and sometimes impossible to obtain criminal checks, due to local differences, including requirements to attend a local police station in person to complete the them. This causes delays in collecting the evidence for regulatory approval. Therefore, we recommend that for individuals who are moving within the same group and have worked for the same group for over six years the requirement to perform foreign criminal checks is waived.

Regulatory References

Finally, members have suggested a rationalisation of Regulatory References (RR). Under SYSC 22.2.1, firms are currently required to take reasonable steps to obtain a RR for individuals being recruited or moving internally into SMF or Certified positions covering the last six years of employment history, with a corresponding duty to provide a RR to another firm on request.

Currently the reasonable steps to obtain a RR includes requesting details for employers out of scope of the SM&CR / SYSC requirements including those not regulated by the FCA, i.e. those outside the territorial scope of the UK regulators, and those outside the financial services industry. In such cases, companies do not hold records aligned to the requests set out in the RR template, and/or obligations under employment law may

preclude or make it difficult them from providing information to the extend required under RRs. With this in mind, such requests do not add value, meaningfully supplement the firm's due diligence, or meet the intended objectives of the RR approach.

Therefore, we propose that requirements for firms to request RRs from employers out of scope of the SM&CR, i.e. non-financial services firms, and those outside the territorial scope of the UK Regulators are removed.

The result of this proposal would reduce lags in the hiring process for staff from outside the financial services sector and from overseas, while retaining the benefits of RRs where firms have a duty to provide them, i.e. those in-scope of SYSC 22.2.1. In turn this would increase competition and increase the international competitiveness and attractiveness of the UK financial sector for appropriate candidates, again reducing the potential barriers to entry.

Q11: To what extent do you agree or disagree that the SM&CR is applied proportionately to firms and individuals?

Our members are not of the opinion that the SM&CR is applied proportionality. This particularly impacts smaller firms, as more Prescribed Responsibilities are ascribed to fewer individuals (since enhanced firms are required to apply the same scope of SM&CR as large firms). Firms take their responsibilities seriously, but managing their responsibilities does detract from the time senior individuals have available to think strategically about their businesses. In line with the moves to create a strong and simple framework, the requirements of an enhanced firm should be assessed to determine whether the SM&CR requirement are proportionate for a smaller institution.

Whilst we have characterised this as a 'small banks' problem it is also true that even in the largest firms, the proliferation of responsibilities under much of the new regulation, and from supervisory guidance, can make the number of detailed responsibilities for individuals unwieldy and difficult to manage,

Q12: How could the process for SMF approvals be further improved?

Delays to the SMF approval process have been a critical issue for our members for several years. We are grateful for the acknowledgement of this issue within the DP. The delays not only cause administrative issues within firms, such as a backlog of changes to documentation, but can also negatively impact firms' ability attract talent (particularly from overseas, if the practical stages of a planned move have to be repeatedly postponed).

There are several possible modifications to the process which we feel could reduce the likelihood for delays:

- One solution could be to narrow the scope of SMFs requiring active approval (for example to 'Exco' type roles such as CEO, CFO, CRO, CCO, COO, as well as MLRO) with other SMFs being subject to notification by the firm once it had carried out its F&P process .
- In addition, there could be a notification (rather than approval) process for individuals already approved as Senior Managers who are taking on additional responsibilities, e.g. the same role at a different group entity.
- Similarly 'non-notified' NEDs, chairs of Board sub-committees for instance, could be subject to a similar streamlined process with an effective transportable NED record/passport being created.. Where an individual already holds such a NED role at another firm reliance could be placed on this

passport and other firms' due-diligence and approval processes to accelerate that individual's appointment to a further such NED role.

- Equally, where prospective Senior Managers have previously been approved for a similar role, a fast-track process could be used, placing a degree of reliance on the previous approvals to reduce the burden both for the firm in terms of a streamlined application process and for the regulator in terms of a simplified approval.
- The regulators could permit Senior Managers to hold Prescribed Responsibilities prior to their approval by the regulator, but after the Form A or J has been submitted by their firm.
- The development of a sample "best practice" application pack would also help firms ensure consistency in the content and level of detail of their submissions, particularly if paired with further details on the process of analysis performed by the regulator within the 3 month period, or more detailed status updates for applications. Firms also note that it is not obvious why the supervisor chooses to interview some candidates and not others. Clarity about this decision process would be welcome.
- Form M, relating to notified NEDs requires an excessive range of documentation, including the necessary ESMA and MiFID forms. Notification could be radically pruned to require only notification of personal details and confirmation that the firm had undertaken an F&P assessment.
- Additionally, Form M cannot be submitted online, via Connect. For certain firms, the submission methods are therefore either by email or post. However, the PRA does not accept password-protected or encrypted documents from firms, which adds an additional administrative burden as the only choice is to submit via post (generally via courier to ensure safe and timely receipt). If submission via Connect is not an option, it would be helpful if the PRA were able to accept password-protected or encrypted emails. Whilst the regulators reassure firms that their email system is safe, sending unprotected documents via email is generally against firms' internal policies. We have also had instances in which there has been a significant delay in receiving a response from the PRA when submitting Form M via post.
- In the medium term the FCA and PRA should also explore the benefits of deploying Artificial Intelligence and Machine Learning to augment and accelerate the approval process.

As a general comment, members find the Forms (for approvals and other notifications) very difficult to use in practice. Outside of the submission itself, they are provided only as pdfs, making it more difficult for firms to use these to obtain the requisite information prior to submission.

Inconsistencies between the Forms for submission and the FCA Handbook/PRA Rulebook versions have also been identified. We would request that the Forms are checked for accuracy and provided as both pdf and Word versions to ease firms' preparations for submission. However, we also note our recent submissions to both the FCA and PRA[1] on removing Forms from the Handbook and Rulebook, in which we cautioned against those proposals.

We also note that, where additional documents are required to be attached to submissions, they often contain information that is duplicative with the submission itself.

[1] https://www.afme.eu/Portals/0/DispatchFeaturedImages/UKF-AFME%20UK%20F%20Quarterly%20CP%20repsonse%20October%202021.pdf
https://www.afme.eu/Portals/0/DispatchFeaturedImages/230228_PRA2.23_AFME_UKF_Response-1.pdf

We would welcome further dialogue on how the submission process could be improved, including whether there are opportunities to capture information from affected individuals, such as Senior Manager candidates, more directly than via providing them with a pdf listing the information required.

Finally, members have raised concerns about the "Overlap Rule", which can cause significant difficulty in realigning responsibilities in response to business needs and results in the FCA Directory being materially inaccurate. For example, an individual who is an executive director on the board of a dual-regulated entity is deemed not to be performing that function and is not included in the Directory if they happen also to be performing a PRA function – but only if they applied for both at the same time. We would recommend that this rule and underlying FSMA provisions are removed.

Q13: To what extent to do you agree that the process for obtaining criminal records and notifying these to the regulators is effective in supporting the aims of the SM&CR?

As noted in our response to Q4, delays to, or difficulty obtaining, criminal records checks from abroad can be a problem for firms seeking to attract international talent. In the case of individuals who are moving within the same group, and have worked for the same group for over 6 years, we suggest that the requirement to perform foreign criminal checks is waived.

There can be practical issues with the process when onboarding new hires. As part of the onboarding, a criminal records check is completed before they start with the firm. Frequently, by the time a newly hired external Senior Manager goes through the internal processes (such as the Nomination Committee) and completion of application forms, their DBS may be close to expiring (or already expired) before submission. An increase in the validity period for criminal records checks would be welcome, for example to six months or even up to a year.

Q14: To what extent do you agree or disagree that the 12-week rule sufficiently helps firms to manage changes in SMFs?

The 12-week rule, although designed to be helpful, would benefit from clarification and simplification. Currently, firms can only rely on the 12-week rule where a SMF is temporarily absent (and expected to return) or where their departure was reasonably unforeseen. However, there will be cases where, notwithstanding that a change is initiated by the firm and is therefore 'foreseen', waiting three months or more for approval in order to implement a change is sub-optimal (while such changes are, of course, planned in advance, the information needed in a Senior Manager application such as job profiles, structure charts and the details of the responsibilities the Senior Manager will hold, means that generally firms would not be in a position to submit the application until the final stages of planning). The lack of certainty around timing for Senior Manager approvals, including whether statutory deadlines will be met, also means it is not possible to plan the timing of such reorganisations, which creates uncertainty for affected colleagues and hampers firms' ability to manage these changes efficiently. This is particularly the case for senior roles, as it often takes longer to find replacements for departing individuals.

This interim application approach creates significant complexity when maintaining an accurate MRM as it requires changes to role profiles, SoRs and the MRM, with all the associated approvals, for an approach that might only be in place for a short period of time. There are also broader issues associated with maintaining an accurate live MRM when a firm has multiple changes at different stages in the approvals process. Finally, we note that the definitions of "absent" and "reasonably unforeseen" are not always straightforward to understand in practice.

Currently, even where an individual is able to cover an SMF role under the 12-week rule, they are not able to hold the Prescribed Responsibilities (PRs) associated with that SMF, and these must be allocated to another, approved, SMF. This approach appears irrational within the framework of the SM&CR; as the regulators note there are certain responsibilities which are inherent in a role and for which prescribed responsibilities do not exist (e.g. the main responsibilities inherent in roles of CRO or Head of Internal Audit). It is not clear why the regulators consider it acceptable for these important responsibilities to be covered on an interim basis but unacceptable for prescribed responsibilities to be covered in the same way.

In practice, this requirement means that prescribed responsibilities need to be 'rolled up' to another Senior Manager, generally the CEO, who is less close to the particular issues and does not have direct responsibility for them. This, in effect, blurs lines of responsibility and is contrary to the aims of the SM&CR.

Therefore, a more general grace period for SMF transfers which i) also covers 'foreseen' moves ii) and allows the individual acting under the 12-week rule to hold prescribed responsibilities, where the individual has already been deemed F&P by the firm., would be beneficial (combined with improvements to the speed of the approval process and other efficiencies in the application process discussed elsewhere).

Alternatively the 12-week rule could be materially lengthened, as happened during the pandemic to help firms better manage role changes, or flexibility could be given to firms to inform the regulator of the reason why additional time is required to avoid incentivising firms to put a different person in role just to avoid breaching the 12-week limit. Alternatively, speeding up the authorisation process would reduce firms' need to rely on the 12-week rule.

Q15: To what extent do you agree or disagree that the regulators have in place

a. an appropriate set of Senior Management Functions to achieve the aims of the SM&CR?

We broadly agree that there is an appropriate range of SMFs, but (per our answer to Q12 above) not all of them should be subject to prior approval.

Shared responsibilities are sometimes necessary and yet are not easily accommodated in the regime, for example SMF24 roles where one individual is responsible for IT and another responsible for operations such as back office and call centres. Another example is SMF18 being accountable for the product service and design and SMF24 being accountable for delivery of service from an operations perspective. In this example the responsibility is not shared but there is crossover and examples of how this should be managed would be useful. The new Consumer Duty further complicates this as different individuals become accountable for different elements of contributing to good customer outcomes (such as IT outages, manual errors in execution or poor product design). Also in larger firms there often co-heads of divisions, jointly responsible for a business area. Sharing responsibilities does not run counter to the SM&CR's objectives and could in fact help ensure good outcomes.

In conjunction, there are instances in which it would be helpful to allow firms more flexibility to allocate SMFs or PRs according to their structures, instead of the current approach where wording of the SMF or PR defines the governance structure of the firm. SMF24 is also an example of this. It would also be beneficial to ensure that the assignment of PRs to certain SMFs is not restricted by firm types (e.g. SMF 2s not being permitted to be SMFs for solo authorised firms).

SMF18s and SMF22s should be permitted to hold other PRs, not just responsibility for CASS.

In relation to international groups structures, there is a lack of clarity as to the scope and implications of an individual being identified as SMF7 e.g. when and for what they are liable. Conversely, there are situations in

which a Group Head sits in the UK but in practice has little direct impact on the UK entity and consideration of this situation by the regulators would be welcome.

For SMF6, the quantitative criteria are not straightforward to apply in practice, particularly in a complex cross-border group.

b. an appropriate set of Prescribed Responsibilities to achieve the aims of the SM&CR?

PRs cannot and should not be an exhaustive list - what is important is that the Senior Manager understands they are responsible for their business / function and exercises judgement focused on getting the right outcomes.

As noted in our response to Q9 above, there has been significant proliferation of informal PRs added via supervisory letters, Dear CEO letters or Policy Statements without rule-making consultation. As a result they are not incorporated into the core SM&CR rules, creating a compliance burden and uncertainty for firms, as well as challenging the original intention of PRs. This creates a particular problem for NEDs and may raises issues with UK company law. We are also concerned about the regulatory practice in PSM letters of requiring a SMF to be designated as responsible for each PSM action.

The review may create an opportunity to reduce the number of PRs - for instance there are currently four which relate to the SM&CR itself.

Members have also experienced difficulty in allocating PRs where in practice responsibility for different aspects of a PR are held by different people (e.g. financial crime, outsourcing).

In practice, certain PRs are likely to span multiple areas of the bank so the regulators' guidance should be clearer that this is acceptable. Guidance on sharing and splitting responsibilities is currently confused and even contradictory. For example, in SS28/15 para 2.40 states that *"PRA Prescribed Responsibilities can therefore be shared but not split among two or more SMFs."* However the next paragraph goes on to say that firms should specify which aspects of the responsibility each SMF holds (with the example given of different SMFs being responsible for different regulatory returns under PR Q), which strongly implies there is a split arrangement (rather than both SMFs jointly being responsible for the entirety).

In order to clarify this point and avoid the SM&CR pushing firms into particular structures, we request that the regulators confirm that PRs can be split between two or more Senior Managers. This could be subject to a requirement that all aspects of the responsibility are covered by the split arrangement.

Q16: To what extent does the Duty of Responsibility support:

a. personal accountability and

b. better conduct of senior managers?

The Duty of Responsibility as outlined in the Financial Services and Markets Act (FSMA) and restated in the FCA Handbook has supported the concept of personal accountability by outlining expectations as to the concept and supporting guidance of what may be reasonable at the time of the circumstances of the contravention / breach occurring.

Additionally the Duty of Responsibility has encouraged Senior Managers to formalise and document meetings and decision-making processes which may take place outside of formal committee governance and increased the rigor around record keeping of all types, which has helped to focus minds and has acted to increase management best practices, and therefore in this sense, support better conduct. But there must be a balance

between expecting Senior Managers to document everything and having sufficient focus on documenting key things to ensure that Senior Managers can focus on their roles.

Q17: To what extent do you agree or disagree that Statements of Responsibilities and Management Responsibilities Maps help to support individual accountability?

Our members are very supportive of SoRs and MRMs in general, but note that the rules require frequent notification of changes, which can be particularly frequent for our larger members.

Firms are required to keep MRMs up to date at any given time. However, we would welcome a reduction in the frequency at which updates to the MRM must be submitted to the regulators, for example the updating of MRMs with changes on a monthly basis and the temporary allocation of PRs where necessary.

This is also an area in which Members experience significant issues with the operation of Connect. In particular, they are unable to amend a description of how a PR is shared or understood without withdrawing it and in due course re-allocating it – which is technically two separate Form Js. This is unnecessarily complex and results in the PR not being allocated to anyone (at least per Connect records) in the interim.

Q18: To what extent do you agree or disagree that the Certification Regime is effective in ensuring that individuals within the regime are fit and proper for their roles?

The Certification Regime arguably adds little value and is complex to navigate, particularly for smaller firms. For instance, the client dealing function draws in a large number of junior individuals, as well as individuals working abroad. In particular, this is because the definition of "client dealing" in the FCA Handbook is also extended - SYSC 27.8.20 states that *"the FCA interprets the phrase 'dealing with' as including having contact with and extending beyond 'dealing' as used in 'dealing in investments"* which we believe is disproportionate. There has also been little feedback on the extent to which the Certification Regime has been useful for regulators.

We suggest that there are some Certification functions which could be:

- removed: such as the significant management function, which in practice captures individuals who are almost always already captured as Material Risk Takers, or "MRT" An alternative approach would be to remove the MRT Certification Function entirely, given that MRTs are already captured by Remuneration rules and the Conduct Rules; ,
- streamlined: for example by combining the certification functions of PRA MRT and FCA MRT; or
- narrowed: as noted re client dealing above.

The annual Fitness & Propriety (F&P) assessment requirements creates considerable administrative burden for firms and the benefit of such frequency is unclear. Annual certification should be replaced with a less frequent, or even event-driven approach (for example material role changes, extended absence or disciplinary action).

We note too that firms are required to identify and certify managers of Certified Persons in the managerial chain until a Senior Manager is reached. In larger firms, where role changes are a frequent occurrence, this is administratively burdensome. The rules should be amended to permit firms to analyse manager chains periodically, perhaps quarterly.

Finally, we would welcome a re-evaluation of the 30-day rule, in particular whether the chaperone requirement is necessary in all circumstances.

Q19: Regarding the Directory of Certified and Assessed Persons, to what extent do you agree or disagree that:

a. it captures the appropriate types of individuals?

The intention of the Directory, as stated in FCA PS 19/7, paragraph 1.13 was *"to empower customers and other stakeholders to make sure they only deal with SMFs or those who an authorised firm has assessed as fit and proper, or otherwise suitable and those who have appropriate qualifications"*. However, the breadth of Senior Managers and Certified Persons whose individual information must be submitted and displayed on the Directory goes far beyond this aim, covering who will never interact with the retail customers who are the Directory's intended core users.

Additionally, there has been no feedback from the FCA to demonstrate whether the Directory is delivering against the intended benefits (including evidence of customers having a sufficient understanding of the SM&CR and which roles should be shown on the Directory to be able to use the information appropriately).

Our belief has been that the Directory should be amended to provide details of regulated firms only, rather than individuals, on the basis that the SM&CR puts the onus on such firms to ensure that their staff are all Fit and Proper for the roles that they perform, including with appropriate qualifications where necessary. It should be sufficient for a customer to know that the firm they are interacting with is regulated and therefore subject to these requirements.

Failing this, we suggest that the Directory requirements should be radically trimmed and restricted only to non-SMF directors, functions requiring qualifications and client dealing Certified Persons, i.e. those with retail customer facing roles. This would ensure that retail customers can obtain information on the individuals with whom they are interacting, while removing the records of other individuals which are unnecessary for this purpose. However, if those records are to be retained, we suggest that the information that is required to be provided and displayed for such individuals is also reviewed and reduced.

b. the requirements for keeping it up to date are appropriate.

Firms must currently provide Directory information on joiners, leavers and changes in circumstance to the FCA within seven business days . We believe this information is less time sensitive than this comparatively tight deadline implies and the approach should be to focus on timeliness rather than meeting a specific time limit. This would allow firms to establish regular (e.g. monthly or quarterly) review processes. If the regulators believe a specific time limit is absolutely necessary, we suggest that it should be extended to 28 business days.

Firms, particularly larger ones with more complex structures, find it difficult to reconcile their Directory data. The requirement to annually attest that Directory information is up to date would be aided by the FCA providing firms with an annual report of all the firm's records.

As a general point, we would also like to raise significant concerns about FCA Connect and the Contact Centre/Helpdesk. Our members continue to experience problems with submitting and reviewing their Directory data, for which resolution via the Contact Centre/Helpdesk is difficult, with long wait times and operatives sometimes unable to provide a solution (or where the firm is merely referred back to the rules). Some of this may be alleviated if the solutions we propose above are adopted, but we would welcome further dialogue on how firms' experiences in this area can be improved. We also note that the PRA phone line is only open for two hours a day, which is limiting for firms experiencing issues.

Q20: To what extent do you agree or disagree that regulatory references help firms make better-informed decisions about the fitness and propriety of relevant candidates?

We support the Regulatory References regime but note that different firms engage with different levels of enthusiasm in the process. There is still a reluctance amongst some HR departments to engage and we recommend that the Regulatory References regime be restricted to PRA or FCA registered firms only. Overseas or non-financial services firms are not required to respond and very rarely do in our experience.

In general we would welcome greater clarity on regulators' expectations given the tension between rights and responsibilities with regard to employment and data protection laws. Where firms ask a previous employer for more details where there has been an issue with an individual some encourage the employee to provide the information themselves to the new employer.

See also our response to Q10.

Q21: To what extent do you agree or disagree that the Conduct Rules are effective in promoting good conduct across all levels of the firm?

We agree that the Conduct Rules are beneficial across all levels of the firm, not the least because our members have put in place challenging, scenario-based training programmes that highlight the behaviours the Conduct Rules are seeking to encourage. These enable colleagues to understand how their actions, even if seemingly remote from any customer or market interaction, contribute to delivering good stakeholder outcomes on behalf of their employer.

Linking to our comments under Q5 regarding disciplinary action, we would welcome feedback from the regulators regarding Conduct Rule breach notifications, and the extent to which there is consistency of judgement across firms. The lack of feedback provided to date makes it difficult for firms to assess whether their thresholds for determining a Conduct Rule breach are in line with the wider industry. As we have noted, a breach notification can have a significant effect on an individual's career, emphasising the important of industry benchmarking in this area.

Members would welcome further guidance on the extent to which personal/non-financial misconduct and incidents that take place outside of work should not be considered as within the remit of the Conduct Rules. . Our members assess personal behavioural issues unrelated to the activities of the firm to be relevant to the assessment of fitness and propriety and not specifically the conduct rules where there is not a nexus to the activities of the firm. An example of a nexus to the firm that might drive a Conduct Rule breach is proven allegation of bullying of fellow staff member outside of the office which might have a detrimental impact upon staff performance and the firm's culture. Others may include acting dishonesty or without integrity. Confirmation from the regulators about their approach to personal/non-financial misconduct and incidents outside the workplace would be greatly appreciated, particularly in light of ongoing concerns about a lack of harmonisation across the industry with respect to Conduct Rule breaches. Where firms are using the Conduct Rules to address personal/non-financial misconduct, they are doing so via Individual Conduct Rule 1, which is often also seen as the most serious Conduct Rule to breach, with a corresponding potentially negative impact on an individual's future career.

Finally, the introduction of a new Individual Conduct Rule 6 *"you must act to deliver good outcomes for retail customers"* for the FCA Consumer Duty is causing some confusion, given that it overlaps with the existing Individual Conduct Rule 4 *"you must pay due regard to the interests of customers and treat them fairly"*. Since

the new rule also only applies to a limited scope of staff, it also cuts across the universal applicability of the Conduct Rules. This raises the concern that the rule has been drafted for the Consumer Duty purpose without consideration of how the wider SM&CR context operates.

Q22: Are there other areas, not already covered in the question above, where you consider changes could be made to improve the SM&CR regime?

Documentation

The need to maintain official documentation at all times creates a disproportionate administrative burden for firms. While we agree that firms should maintain robust and auditable governance over changes to responsibilities and accountability, moving to a periodic update of official documentation could alleviate the operational burden without compromising the enforceability of the regime. We note, for example, that the Central Bank of Ireland's proposals for its Senior Executive Accountability Regime (SEAR) takes a more proportionate approach to document submission.

Regulatory Approach

Feedback from our members included some expression of frustration that comments made by the industry during consultation processes are often acknowledged but not taken serious account of. Where the regulators decide to adopt new rules "as consulted on", we would appreciate it if the regulators could give a fuller explanation of why they have decided not to address industry feedback and/or why the industry's concerns should not arise.

We have also noted some areas in which greater coordination and harmonisation between the FCA and PRA would be appreciated. Aside from the examples covered in our response above, for example in relation to remuneration, Members have also suggested that the regulators take differing approaches to the allocation of Prescribed Responsibilities (for example to SMF 18s) and that the PRA Rulebook is generally drafted in a more concise, and therefore clear, manner than the FCA Handbook. Greater alignment and harmonisation of style would be appreciated in such instances.

Guidance to industry

After seven years in operation, it is likely that the regulators have accrued a substantial body of examples and best practice, as well as being able to clarify the detail of their expectations. In addition, the current examples provided for MRMs and SoRs are based on the FCA's own structure, limiting their usefulness for industry.

Additional guidance and examples across a range of topics would be beneficial for the industry as a whole, both for consistency but also in helping firms deliver against the regulators' expectations efficiently and effectively. Topics on which guidance, examples and best practice would be particularly helpful include:

- Reasonable steps assessments;
- Delegation matrices;
- Conduct Rule breach reporting;
- Senior Manager applications
- Management Responsibilities Maps; and
- Statements of Responsibilities.

The publication of these could be further enriched by a process by which the regulators provided regular annual) observations along with both weak examples and examples of good practice to provide a baseline for industry.

Maintenance of records

The need to maintain official documentation at all times creates a disproportionate administrative burden for firms. While we agree that firms should maintain robust and auditable governance over changes to responsibilities and accountability, moving to a periodic, no more frequent than monthly, update of official documentation could alleviate the operational burden without compromising the enforceability of the regime.

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