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Dear Sirs,

We write following recent discussions concerning the applicability of the Senior Managers Regime (**SMR**) to firms' Legal functions and the question of whether a firm's General Counsel or Head of Legal should, in his or her capacity as head of that function, be designated as performing a Senior Management Function (**SMF**) under the SMR.

APPLICABILITY OF THE SENIOR MANAGERS REGIME TO THE LEGAL FUNCTION WITHIN A BANK

The SMR requires individuals who are performing "significant management functions" to be approved by the PRA and/or FCA. A "significant management function" is defined in section 59ZA of the Financial Services and Markets Act 2000 (**FSMA**) as a function which requires the person performing it to be responsible for managing one or more aspects of the affairs of the authorised person, so far as relating to a regulated activity carried on by the authorised person, which involve, or might involve, a risk of serious consequences for the authorised person or for business or other interests in the United Kingdom.

We do not consider that the SMR is applicable to the Legal function for the following reasons.

1. The role of General Counsel or Head of Legal is not a designated SMF. The General Counsel position also does not satisfy the PRA definition of a Head of Key Business Area Function (SM6) (set out at rule 3.6 of Annex B to the PRA PS 3/15).
2. The only question that remains is whether it is necessary to allocate responsibility for the Legal function to an SMF pursuant to SYSC 4.7.8R, which requires a firm to ensure that, at all times, one or more of its SMF holders have overall responsibility for "*each of the activities, business areas and management*

functions of the firm” not separately prescribed by the FCA or PRA.¹ For the reasons set out below, we do not consider that SYSC 4.7.8R requires responsibility for the Legal function to be allocated to an SMF.

- (a) The Legal function is an advisory function that supports other business areas and functions (i.e. both the front office, support and control functions) in performing their responsibilities.
 - (b) As such, the Legal function is not one which involves “management” of the authorised person’s affairs (per section 59ZA FSMA), and is not a “business area” or “management function” (per SYSC 4.7.8R). During the Report stage of the Financial Services (Banking Reform) Bill in the House of Lords, Lord Newby, on behalf of the government, reassured Lord Mackay that it was unnecessary to move an amendment seeking formally to exclude the provision of legal advice in taking decisions or participating in the taking of decisions, by explaining that it was *“highly unlikely that the regulators would designate being a legal adviser as a senior management function simply because giving legal advice does not constitute management as set out in the definition of senior management”*.
 - (c) Those responsible for managing the Legal function should therefore properly be viewed as advising Senior Managers in the exercise and performance of their management activities, rather than as responsible for a management or business function itself. Nothing in the new FSMA provisions or the rules promulgated under them suggests that the SMR is intended to cover the Legal function’s principal role and main activity of giving legal advice. It would therefore be a perverse result for such senior lawyers to be captured by the Regime due to the secondary aspects of their role in managing the Legal function itself.
 - (d) We note that the FCA’s list of the main business activities and functions of a relevant authorised person (set out in SYSC 4 Annex 1G) does not include the Legal function. Additionally, none of the regulators’ prescribed responsibilities are inherent in or attach to the functions performed by Legal.
3. To require approval of the Head of the Legal function as an SMF would also be inconsistent with the regulators’ current approach under the Approved Persons Regime. The leadership of the Legal function is not a specifically designated Significant Influence Function (**SIF**) under the Approved Persons Regime, in contrast with (for example) the leadership of the Compliance function, and the FSA clearly determined that it was not appropriate or necessary to create a specific SIF holder role for Legal when the current SIFs were introduced in 2011. Historically, individuals within the Legal function have only been approved as SIFs where they perform other significant management functions (such as responsibility for the Compliance function) in addition to their legal role. We do not believe that change to the regulatory position of the Legal function within

¹ The purpose of SYSC 4.7.8R, as set out at SYSC 4.7.9G, is to avoid gaps and ensure that an SMF holder has responsibility for every part of a firm’s activities, business areas and management functions not otherwise covered by other sections of SYSC or the equivalent PRA requirements.

banks, or of General Counsel or Heads of Legal, has ever been expressed by the FCA as an objective of the SMR.

4. The conduct of the Legal function and those responsible for it will be adequately captured by other aspects of the SMR. The General Counsel will be in scope of the certification regime as a material risk taker under CRD IV and other staff within the Legal function will be subject to the Conduct Rules.
5. It is recognised by the European Court of Human Rights, the European Court of Justice and the English Courts that a person has a fundamental right to seek and receive impartial and independent legal advice² from a lawyer on a confidential basis. This right underpins English legal privilege and is recognised by Parliament in section 413 FSMA, and indeed within the SMR (e.g. at COCON 4.1.11G and 4.1.12G). Any regulatory regime that sought to make lawyers giving legal advice to financial institutions accountable for that advice to regulators (other than their professional association) as well as to their clients would cut across this fundamental right. It is difficult to see how the SMR could be applied to a General Counsel or other SMF with responsibility for the Legal function – e.g. to obtain evidence of compliance with the Senior Manager Conduct Rules, or when applying the presumption of responsibility – without effectively requiring disclosure of privileged material.
6. Although we consider that, in the light of section 413 FSMA, a General Counsel or Head of Legal would not be required by Senior Manager Conduct Rule SC4 to disclose a privileged communication, there is a risk that the perception will arise that General Counsel or Heads of Legal might be required or pressurised by the regulators to disclose information (in particular given the practical difficulty in some cases of drawing a clear line between privileged and non-privileged communications). Financial institution lawyers have reported to us a recent and marked trend of being pressed by regulators and other law enforcement agencies to waive or provide information without regard to legal privilege; we believe that requiring General Counsel or Heads of Legal to be an SMF would only exacerbate this trend. This could lead to reluctance to discuss issues with the General Counsel or Head of Legal, which could diminish the effectiveness of that role and weaken an important part of a bank's overall risk management arrangements.
7. For a General Counsel or Head of Legal to be held accountable by the regulator for legal advice provided to financial institutions would also cut across his or her client's fundamental right to independent legal advice as it would create, at the very least, a perception of a conflict of interest between the lawyer's own personal position and the interests of his or her client. This is incompatible with senior lawyers being fearless advocates of their clients' interests.
8. Given that General Counsel based in the UK are typically subject to personal regulation by the Solicitors Regulation Authority (**SRA**), there is a risk of overlap between the Senior Managers Regime and the SRA regime, leading to duplication.

² As a matter of English law, legal advice includes advice as to what should prudently and sensibly be done in the relevant legal context, as well as advice on legal rights and obligations.

Our position is therefore that the principal role and main activity of the Legal function of a bank, namely the provision of legal advice, and the role of General Counsel or Head of Legal, are not included within the scope of the SMR or of the regulatory regime more generally.³

Furthermore, it follows from this that a requirement for an individual to be designated as performing an SMF solely with respect to his or her role as General Counsel and/or as manager of the Legal function has little merit but significant disadvantages.

We recognise that there may be certain circumstances where a General Counsel or Head of Legal at a bank performs a managerial decision-making role or business function as opposed to a legal advisory role (for example as a business decision maker on a board). In that situation we accept that the General Counsel or Head of Legal could fall under the SMR for the managerial role which extends beyond the pure management of the Legal function. We consider that this situation could reasonably be dealt with by banks on a case by case basis, the outcome being dependent upon the precise role played by the relevant individual and the reporting lines and systems of supervision applicable to that role. Any decision to seek approval of the relevant individual as a Senior Manager would ultimately be dictated by factors unconnected to the provision of legal advice or management of the Legal function and should not result in a specific SMF holder having to be designated for the Legal function of the relevant bank.

Given that our members are currently developing their Management Responsibilities Maps, which in the majority of cases are unlikely currently to include the Legal function as an SMF or the General Counsel or Head of Legal as a Senior Manager, we would like confirmation that the regulators agree with our analysis as set out herein, failing which we suggest a meeting with the FCA and the PRA as a matter of urgency to agree how these matters should be treated under the SMR.

Yours faithfully,

Responsible Executives

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³ For example, we understand that COCON 4.1.10G (which provides that if a person takes steps to influence the decision not to report to the regulator or acts in a way that is intended to obstruct the reporting of the information to the regulator, then the regulator will, in respect of that information, view them as being one of those within the firm who has taken on responsibility for deciding whether to report that matter to the regulator) would not apply to a lawyer subject to the Conduct Rules who advised a bank that it is not required to disclose information to the regulators under Principle 11.