

FCA CP19/4: Optimising the Senior Managers & Certification Regime and Feedback to DP 16/4 – Overall Responsibility and the Legal Function

17 April 2019

On behalf of their members, AFME and UK Finance (“the Associations”) welcome the opportunity to comment on FCA CP19/4: Optimising the Senior Managers & Certification Regime and Feedback to DP 16/4 – Overall Responsibility and the Legal Function.

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. AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.

UK Finance represents nearly 300 of the leading firms providing finance, banking, markets and payments related services in or from the UK. UK Finance was created by combining most of the activities of the Asset Based Finance Association, the British Bankers’ Association, the Council of Mortgage Lenders, Financial Fraud Action UK, Payments UK and the UK Cards Association. Our members are large and small, national and regional, domestic and international, corporate and mutual, retail and wholesale, physical and virtual, banks and non-banks. Our members’ customers are individuals, corporates, charities, clubs, associations and government bodies, served domestically and cross-border. These customers access a wide range of financial and advisory products and services, essential to their day-to-day activities. The interests of our members’ customers are at the heart of our work.

Executive Summary

- We welcome the proposed exclusion of the Head of Legal from the requirement to become a Senior Manager, supporting the continued application of the Certification Function and Conduct Rules. The FCA has clearly taken the industry’s concerns into consideration and produced a workable proposal.
- We have no comments in relation to the other proposal in this consultation

We set out our feedback in more detail in response to the individual questions in the consultation.

Consultation Questions

Q1: Do you agree with our proposal to exclude the Head of Legal from the requirement to be approved as a Senior Manager? If not, please explain why.

The Associations agree with the FCA’s proposal.

As noted in our response to FCA DP16/4 'Overall Responsibility and the Legal Function'¹, legal advice occupies a unique position, in that it is the only activity, regulated or unregulated, that anyone at a bank engages in that is protected as a matter of substantive right from intrusion by Courts and authorities, including the FCA, for fundamental reasons of public policy. The Head of Legal at a bank needs to be free to counsel a firm and its senior management on legal risks and to provide advisory services including: provision of privileged legal advice related to relevant legal and regulatory regimes; conduct of robust, independent investigations; advocating for the firm in contentious matters and to assist the firm in managing legal risk when exercising judgment in relation to areas of legal uncertainty (including in relation to conflicts of laws) without fear of being constrained by the enhanced SMR responsibilities.

In addition, the practicalities of separating out the management of the Legal Function from the provision of legal advice would be extremely challenging, and would potentially cause a conflict with the protected nature of legal advice noted above.

It is therefore very positive that the FCA has noted the concerns of the industry in this consultation paper in proposing to exclude the legal function from the Senior Managers Regime.

We are supportive of the continued application of the Certification Regime and Conduct Rules.

Q2: Do you agree with our proposed notification requirement for relevant intermediaries that do not submit RMA-B and our approach to the period before commencement? If not, please explain why.

The Associations have no comments in response to this question.

Q3: Do you agree with our proposed amendments to the scope of the Client Dealing Function?

The Association agree with this proposal.

Q4: Do you agree with our proposal to introduce a new Certification Function to cover individuals in Systems & Controls functions at firms where these functions do not require approval? If not, please explain why.

The Associations have no comments in response to this question.

Q5: Do you agree with our proposal to extend the application of SC4 (from Senior Managers and all Non-Executive Directors) to all directors of UK Limited Scope firms? If not, please explain why.

The Associations have no comments in response to this question.

Q6: Do you have any comments on the proposed amendments to our regulatory forms?

The Associations have no comments in response to this question.

Q7: Do you have any comments on the cost benefit analysis?

The Associations have no comments in response to this question.

¹ <https://www.afme.eu/globalassets/downloads/consultation-responses/afme-bba-response-to-fca-dp16.4-legal-function.pdf>

Q8: Do you agree that these proposals would not result in any direct discrimination against any of the protected groups? Please provide any additional feedback you believe is relevant.

The Associations have no comments in response to this question.

Responsible executives

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