FCA CP18/19: Introducing the Directory

5 October 2018

On behalf of their members, AFME and UK Finance ("the Associations") welcome the opportunity to comment on FCA CP18/19 "Introducing the Directory".

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.

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.

Executive Summary

The Associations support the FCA's desire to promote greater transparency for financial services customers and enable customers to verify the providers of the advice they receive in order to protect them against financial crime. We are grateful for the opportunity to comment on the FCA's proposals for a Financial Services Directory, but wish to raise a number of concerns with the proposal as drafted and suggest an amended scope.

Objectives of the initiative

- We understand the main function of the proposed Directory would be to protect retail customers, assisting them in verifying the providers of financial advice and avoiding scams, as opposed to more sophisticated wholesale counterparties. The current proposal goes beyond this objective, requiring firms to publish information of little use to the public (for example, reporting on non-client facing certified individuals)
- The additional benefits to larger firms, such as being able to check references for prospective employees, appear to be secondary and are not, we believe, significant enough to outweigh the costs of the proposal as drafted

Concerns with the current proposal

- The scale of the proposal is impacted by the fact that the Certified Persons population is larger and more fluid than the previous Approved Persons population and contains many categories of individual who do not directly interact with retail customers in the way conceived by this consultation

- It is also likely that the Directory as proposed would reveal confidential and/or sensitive personal data that would be inappropriate. Given that the current scope appears to be disproportionate to the goal that the FCA is seeking to address, there may also be potential for challenge under data protection law
- The current manual firm interface envisaged will present a significant administrative burden, particularly for larger firms with a consistently high level of change to their Certified Person population. We suggest that the FCA considers what technological solutions could be employed to make this obligation easier on the FCA and on firms, particularly if the FCA decides to continue with the scope of the proposal as drafted. This could for, example, include an API that firms can develop their systems to interact with to automatically upload changes to their own Certification populations. We also request that the FCA prioritises addressing the issues with its Connect system that have previously been identified before implementing the Directory
- The proposed 1-day deadline for changes to the Directory is unfeasible for many firms, given the nature and scale of the Certified Persons population
- The cost-benefit analysis accompanying the proposals is not fit for purpose – many of the proposed benefits are simply asserted, with little explanation of the mechanisms (including changes in consumer behaviour) required for the stated benefits to be achieved. The stated benefits also do not take account of existing initiatives in place, such as regulatory references, for which the FCA has previously claimed similar benefits. As such we believe the benefits are strongly overstated, whereas the costs of implementing the proposals are significantly under-estimated.

Alternative suggested scope

- We suggest instead that, rather than publishing information on individual employees, it would be more useful to customers to know that financial services firm are subject to the Senior Managers and Certification Regime (SMCR), and are subject to requirements to certify relevant staff as fit and proper for the roles they perform
- However, if the FCA does decide to pursue the creation of a Directory, we suggest that the FCA should focus on mapping potential scenarios of harm from populations of certified persons and identify the categories that are most relevant for retail customers seeking information. This would then allow the FCA to:
    - Define who should be on the Directory
    - Inform customers about what permissions a firm has (building on the existing Register)
    - Identify who at a firm is authorised to deal with customers
    - Ensure that it does not breach the GDPR

Timing of implementation

- Given the extensive ongoing regulatory change programmes within firms, and the considerable uncertainty as to the timing and details of the UK's withdrawal from the EU, firms need to be given adequate time to implement any final proposals, particularly if the scope remains as extensive as currently drafted. We suggest that the 12 months to complete the Directory begin after the identified issues with the Connect system have been addressed and that at a minimum this should start after the conclusion of Brexit[1].

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

<u>Consultation Questions</u>

<u>Q1: Do you agree with the proposed scope of the Directory? If not, which individuals should be additionally included or taken out?</u>

No. The Associations are supportive of the FCA's stated aim within the consultation paper of improving transparency for customers and helping to prevent crime but do not feel that the proposals (as drafted) within the consultation are the best way of achieving this. We appreciate that, since the implementation of SMCR, the Register contains

[1] By which we mean the end of any transitional period (currently 31 December 2020).

less publicly available data, and wish to support the FCA in seeking to allow retail customers the information required to make an informed decision about advisor choice.

However, we are concerned that the proposed scope of the Directory goes far beyond what should be necessary to meet this aim, imposes significant administrative burden on firms for little customer benefit and potentially requires the publication of information that could be detrimental to firms and individuals. As such, the proposal as drafted may invite challenge under data protection law and we suggest that the FCA should confirm this with the ICO before proceeding.

As proposed, the Directory would require firms to publish information on all Certified Persons, as an intended replacement of the Register of Approved Persons. However, the Certified Person standard is designed to be applied according to firms' individual approaches and structures. It is quite possible that, in certain situations, for the same function a customer may interact with a Certified Person at one firm and a non-certified person at another. In addition, the Certified Person population is larger and more fluid that the old Approved Persons population. This is because of the increased number of significant harm functions applicable to each employee (replacing the old CF30 with in some case 3+ separate functions), and because it is also subject to changes in firms' management structures. We therefore suggest that it is inappropriate and inefficient to require the Directory to contain information about such a large and ever-changing population for limited benefit.

In order to meet the FCA's stated objective, we therefore suggest an alternative scope for the Directory. While we agree that it should contain information about Senior Managers, as on the Register, we also believe that information on the authorisation status of firms rather than individual Certified Persons would be more useful to the retail customer. This is for two reasons: first, because by the very nature of SMCR, certification is a status conferred by the firm rather than the FCA, and second, since a customer of a firm does not usually request that they deal with a particular individual. Instead, the brand of the firm is often a more important factor in a customer's choice; further, in larger firms, client services may not be structured in such a way that it is possible for them to request a specific individual, particularly where services are provided centrally, such as via a call centre. In this instance, workplace location would also be of little value to a consumer.

We note that PSD2[2] extended the regulatory perimeter to include account information and payment initiation service providers from January 2018. For these services, both customers and firms need to be able to easily identify that firms have appropriate authorisations. PSD2 and Open Banking allow customers to give explicit consent to authorised third parties (AISPs and PISPs[3]) to access account information and initiate payments. In this instance, there may be a need for customers to easily access information to ensure they are dealing with authorised third parties for the provision of these services.

In addition, ASPSPs[4], AISPs and PISPs need a way to identify each other through the exchange of certificates that provide a true and authoritative proof of identity in order to provide AIS and PIS services to customers. The Open Banking Directory currently provides this service for firms participating in the open banking eco-system. Work is already underway, led by open banking, to consider the implications of upgrading the directory to use eIDAS[5] certificates.

Therefore, we believe that the existing Register could be enhanced into the new Directory by identifying firms and the specific permissions they hold, expressed in plain English, as suggested by the House of Commons Work and Pensions Committee[6]. There could also then be an explanation of the obligation that firms have to certify relevant staff as fit and proper to perform their roles, particularly in relation to interacting with clients. This may require a

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[2] Revised Payment Services Directive (EU) 2015/2366
[3] Account information Service Providers and Payment Initiation Service Providers
[4] Account Servicing Payment Service Providers
[5] Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market
[6] British Steel Pension Scheme Sixth Report of Session 2017-19, 15 February 2018, https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/828/828.pdf, paragraphs 57ff

level of public education as to the importance of dealing with an authorised firm rather than seeking out an individual (which may not even be possible), but this would undoubtedly be beneficial in any case.

In addition, paragraph 1.18 of the consultation paper says that the Register and Directory would both form part of the record of approved persons that the FCA is required to hold under FSMA Section 347. However, our reading of Section 347 seems to reference Senior Managers (who are approved by the FCA or PRA), rather than Certified Persons (who are certified by their firm and are not Approved Persons), which would seem to support our suggestion above.

If the FCA does decide to pursue a Directory in which information about individual Certified Persons within firms is published, we suggest that the scope should be narrowed from the entire Certified Persons population of a firm. This could be done by mapping the potential scenarios of harm to retail customers against individual criteria for Certification. For instance, it may be more appropriate to limit the individuals in the Directory to those who are Certified Persons because of their specific interactions with retail customers, such as Financial Advisors. This would also guard against the risk that retail customers would understand the Directory to contain a wide set of individuals whom they could contact for retail financial advice.

<u>Q2: Do you agree that the proposed information should be published on the Directory?</u>

No. As noted above in our comments on the current scope of the proposals, we believe that a Directory of firms with clear and easy to access information on the permissions held by firms would be of greater value to customers, or at least that the scope of Certified Persons covered by the Directory should be more targeted.

Under the current drafting, however, our impression is that firms would be required to publish 'everything on everyone', including a significant proportion of information that would be of no direct use to customers. This is based on feedback in 5.20 that all Certification Functions "have been identified as having 'a significant impact on customer, the firms and/or market integrity'". Given that the focus seems to be on protecting retail customers, the publication of information about Certified Persons who have no direct contact with retail customers, which for some firms is a significant proportion of the Certified Persons population, seems unnecessary. Indeed, it is unclear how publication in a Directory of information on individuals who do not have such a customer impact will bring any tangible benefit.

The publication of more data than is strictly necessary is likely to cause confusion rather than comfort to customers. For example, will customers attempt to interact with particular employees based on seniority, misunderstand the temporary absence of an individual from the Directory or assume that the size of the Directory means that they should not interact with any individual who is not included? The publication of data on such non-client dealing Certified Persons may also inadvertently allow individuals to determine confidential information about employees of firms, e.g. where an employee's Certified status is as a result of their remuneration level, rather than their job function. Furthermore, the publication of workplace location may be misleading or unhelpful, particularly where services are provided centrally, rather than by locally-based staff.

We are also concerned that the information available on the Directory may provide false comfort to individuals. The information that the FCA proposes to make public about Certified Persons (for example, workplace location) could equally be used by fraudsters pretending to be genuine employees of a financial institution. The FCA's frequent Warning Notices on cloned firms attest. Indeed, we suggest that the FCA should give careful consideration to how the information published on any final Directory would be protected from abuse and fraudulent activity. As a related note, the FCA's consultation itself states in section 5.19 that customers should be encouraged to contact the firm direct to verify the information provided on the Directory. This would appear to defeat the purpose given by the FCA, and supports our response under Q1 that the Directory should instead focus on the firms' permissions.

In addition, it is not clear what should be populated in the Start and End Date of each role. As staff need to be re-certified as Fit and Proper on an annual basis, it would be useful to get confirmation that this will only be the date that they started their role and that any re-certification of an individual for the same role does not require an amendment to the record.

It should be taken into account that all affected individuals would have to be informed that their details were to be published in this manner, and that their personal information would be shared with the FCA. At this point, it should be noted that not all employees will necessarily have a passport, and that the National Insurance Number should be sufficient in most cases.

Finally, we note a concern with the example screenshots of the proposed Directory (Figures 3 and 4). The example individual notices include the phrase "deals with clients and holds relevant qualifications". We do not feel that this is an accurate reference to the Client Dealing Function under SYSC 5.2 of the FCA's Handbook and suggest it should be reworded. We appreciate, however, that it is important for the FCA to display the authorisations and permissions referenced in the Directory in such a way that it is easy for users to understand and navigate, despite them being based on technical Handbook provisions.

<u>Q3: Do you agree that the Directory user interface should display information stored on the FS Register and the new Connect database? If not, how should these datasets interact?</u>

We agree that the customers should be presented with a single interface to find the information that is required. However, as noted above in our response to Q1 of this consultation, we do not believe that the scope of the proposal is currently well drafted and that it would be more useful for the Directory to contain either (i) clear information on the permissions held by firms, rather than individuals, or (ii) information on a more targeted subset of Certified Persons.

<u>Q4: Do you agree that the search parameters should return a broader range of results than the current FS Register?</u>

We agree that the implementation of the SMCR means that the current Register is no longer appropriate in its current form. However, as noted above in our response to Q1 of this consultation, we do not believe that the scope of the proposal is currently well drafted and that it would be more useful for the Directory to contain either (i) clear information on the permissions held by firms, rather than individuals, or (ii) information on a more targeted subset of Certified Persons.

<u>Q5: Do you agree with the proposed number of business days for reporting when an individual begins undertaking a relevant role, when their circumstances change or when they cease to perform a relevant role? If not, what timeframe do you think would be more suitable?</u>

No. As the scope of the proposal is currently drafted, the Associations are extremely concerned about the timeframe for updating the information on the Directory.

The Certified Persons population is extremely large and significantly more fluid that the Approved Persons population, due to several factors, such as the fact that it captures more junior staff, who may be more likely to move roles, or that it is affected by changes to management structures and hierarchies. This means that firm would have to make frequent changes to the information. For instance, one of our larger members has estimated as many as 400 reportable changes per month to their Certified Persons population, which is a significant administrative task, particularly given the proposed manual interface for firms and draft deadlines for reporting, which would require coordination across multiple functions within a firm. Another of our members has estimated that the Certified Persons population may require up to 3 times more changes than the old Approved Persons Regime would have done.

If the FCA continues with the extremely broad scope of the current proposals, we suggest that the time limit is extended to 7 days after the change in role or circumstances, as is currently the case under the Approved Persons Regime[7]. We also suggest that the FCA should consider what technical solutions could be employed to automate the process, perhaps leveraging the FCA's current work on 'Smarter Regulatory Reporting'[8]. This could, for example, include an API that firms can develop their systems to interact with to automatically upload changes to their own Certification populations. We also request that the FCA prioritises addressing the issues with its Connect system that have previously been identified before implementing the Directory.

Q6: Do you agree with the proposed timing of commencement and transitional arrangements? If not, which timeframes would be more appropriate?

We agree with the 12 month period for each category of firm, but also suggest that the timing may need to be dependent on extensive testing of the underlying technology. For instance, we note that there are several outstanding issues with the current Connect functionality, even before this significant extension.

In addition, firms are already undergoing ongoing regulatory change programmes, driven by major legislation such as MiFID/R, the EU Benchmarks Regulation and forthcoming initiatives such as the expected reviews of MAR and SSR. Combined with the considerable uncertainty as to the timing and details of the UK's withdrawal from the EU, we suggest that careful consideration is given to the timing of implementation of any final proposals, particularly if the scope remains as extensive as currently drafted. By way of a suggestion, we propose that the 12 months to complete the Directory begin after the identified issues with the Connect system have been addressed and that at a minimum this should start after the conclusion of Brexit.

In addition, we would be grateful for clarity on the timeline for the introduction of the amended Prescribed Responsibility B.

Q7: Do you agree that our proposed measures for ensuring data accuracy are appropriate? If not, please provide details of any additional measures you believe should be taken.

We have no comments on the measures for ensuring data accuracy.

Q8: Do you have any feedback on this CBA?

The Associations have several concerns with the CBA. We believe that the costs are underestimated, whereas many of the perceived benefits are simply asserted, with little explanation of the mechanisms through which they will be achieved. Many of the suggested benefits to customers are dependent on changes in customer behaviour and make assumptions about the ways in which customers will access, understand and act on the data made available. Previous market interventions and post-implementation reviews, including by the FSA and FCA, have shown that consumer behaviour is very difficult to predict, and that simply providing customers with greater information does not guarantee changes in customer behaviour or lead to better outcomes, especially for more vulnerable customers.

With no attempt made to quantify the benefits, the claim that the reduction in potential harm to consumers will outweigh the costs is little more than an assertion.

On the expected costs we suggest that:

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[7] SUP 10A
[8] https://www.fca.org.uk/publications/calls-input/call-input-smarter-regulatory-reporting

- It may not be possible for the FCA accurately to estimate the number of Certified Persons that will be subject to the extension of the SMCR, and this would therefore be an inaccurate assessment of the impact of the proposals.
- As we have noted under our response to Q2 of this consultation paper, the Certified Persons population is significantly larger and more fluid than the former Approved Persons population. It is therefore also inaccurate to use the Approved Persons Regime to estimate the number of changes that would be made to the Directory on an ongoing basis. Based on the number of changes to their Certified Persons population that our members have experienced under SMCR to date, we would except this figure to be higher than the FCA's estimate.
- Based on our belief that the figures will be higher than the FCA's estimates, we are also concerned that the timeframe proposed for firms to make updates to the Directory will impose a significant administrative and cost burden on firms, particularly given the penalties imposed for missing the deadline.

On the proposed benefits, we suggest that:

- It would be easier for consumers to derive benefits from the Directory if it contained only the information that is relevant to their needs, rather than information on all Certified Persons within a firm. As per our comments under Q1 of this consultation, we suggest that it should be sufficient for customers to be able to confirm that the firm with which they are interacting holds the appropriate authorisations and is subject to the requirement to certify its staff as Fit and Proper.
- In order for the benefits suggested for customers to be realised, they will need to have an understanding of what the information on the Directory relates to, and have some context as to which roles and services would normally require an individual to be listed on the Directory. Simply publishing the information is unlikely to deliver significant benefits, especially for vulnerable customers, unless it is accompanied by a programme of consumer education as to how the Directory information should be used and understood. We believe that this mechanism for deriving the benefits is overlooked (and not costed) in the FCA's CBA.
- The FCA suggests that there would be benefits to customers because the Directory reduces the risk that firms will employ individuals who lack the integrity, necessary skills or knowledge to work in financial servicers. But this overlooks the fact that there is already a regulatory references regime in place to address this risk. We believe the FCA is significantly overstating the benefits that the Directory would provide in this regard on top of the existing reference regime.
- In the event that the FCA decides not to limit the Directory to information about firms, we suggest that the Directory is limited to information on only those Certified Persons who deal directly with customers. We note that the FCA's own analysis concluded that only 8% of total pages viewed related solely to individuals, with a material proportion of this likely to be non-retail stakeholder views. We suggest that a more detailed breakdown of such figures would be required before the assessment could truly be made that a Directory of Certified Persons would bring the decided benefits for an appropriate cost.
- It is suggested that the proposed Directory would benefit firms when checking Regulatory References for new employees. However, this benefit would be marginal at best (given the requirement to collect and provide references) and limited to firms rather than their customers, who should be the main beneficiaries. Furthermore, unless there were changes to the requirements in SYSC 22 regarding Regulatory References, there will be limited benefit to firms, given that the obligation would remain to request and provide reference information, rather than using other sources such as an FCA Directory.

Q9: 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.

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