
Consultation Response

FCA Tackling non-financial misconduct in financial services CP 25/18

Submission date: 19 September 2025

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the **PRA and FCA Remuneration Reform Consultation Paper (CP 16/24)**. 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.

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Executive Summary

- Overall, our general observation is that the draft guidance seeks to be helpful to firms. However, from a practical perspective some areas are difficult to follow due to multiple cross references to parts of COCON, FIT as well as other Handbook references.
- As set out in further detail below, we welcome additional clarification in several key areas to improve consistency of application across firms and to reduce litigation risks.
- To support a consistent industry-wide approach and ensure fair and proportionate implementation, we recommend that the FCA clarify the application date of the guidance with respect to both banks and non-banks.
- We note that the consultation paper and policy statement does not address instances of non-financial misconduct which are not directed towards a specific individual or subject, for example, employees making racist or sexist statements within the workplace. We request that the FCA confirm the interpretation that such behaviour would fall outside the scope of COCON and dealt within disciplinary processes. Such behaviour would be relevant under FIT.

Question 1: To what extent do you agree that new Handbook guidance in COCON and FIT is needed to help firms apply FCA rules?

In principle we agree with the FCA's efforts to provide additional guidance on non-financial misconduct (NFM) via the proposed draft Handbook guidance. However, there are several areas where we provide proposed drafting and welcome further clarification regarding the FCA's approach and expectations.

One specific area requiring further clarity is the FCA's approach to **extra-territoriality**. As outlined, the Conduct Rules apply to Senior Management Functions (SMFs) and Material Risk Takers (MRTs) regardless of where the conduct occurs. For the wider 'all staff' population, however, the rules only apply to conduct occurring in a UK office or when dealing with UK clients from a non-UK location. Based on this, it appears that non-financial misconduct (NFM) by an employee towards a colleague—where both individuals are based

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outside the UK—would fall outside the scope of the Conduct Rules, even if the individuals are performing functions on behalf of a UK-authorised firm. If this interpretation is correct, it raises the question if this is the intended regulatory outcome. There appears to be no direct nexus to UK markets or clients in such cases, yet the conduct could still have reputational or cultural implications for the UK-regulated entity.

We request further guidance from the FCA on how the rules will apply to employees who are not SMFs and MRTs, and who are based outside the UK.

Question 2: To what extent do you agree the draft COCON guidance would help you to apply our rules?

Broadly speaking we agree that the draft COCON guidance is intended to support firms in applying the rules and recognise its value in promoting greater consistency across the industry. The guidance provides a practical framework that can assist in interpreting expectations, particularly in more complex or evolving areas of conduct such as non-financial misconduct and cultural behaviour. However, there are some areas of guidance where we do have comments, including where it is perceived that guidance may inadvertently be interpreted in a way that limits accountability.

Specifically, while examples and case studies can be informative, there is concern around the language used, particularly around intent and the emphasis on how the subjects of non-financial misconduct cases respond to their behaviour. This framing may create a perception that the regulatory focus is more closely tied to individuals' reactions than to the underlying severity of the misconduct itself.

In summary, we are broadly supportive of the draft guidance and believe it is a step in the right direction. However, we recommend further refinement in certain areas to ensure the guidance strengthens rather than limits firms' ability to apply the Conduct Rules appropriately and proportionately. This is further addressed in our response to Question 3.

Question 3: Do you have any comments on the draft COCON guidance?

Scope of COCON

We note that the drafting in 1.3.1G does not remove existing concerns relating to ambiguity. For example, where an employee is arrested depending on the seriousness of the incident, failure to inform their employer could be considered a breach of the conduct rules. It may also be the case that where an employee is questioned by the police their lawyer's advice may be not to speak with others including their employer. We recommend that the FCA consider clarifying this point and including suitable caveats, acknowledging that the circumstances in practice may be more nuanced than presented.

On 1.3.2G, we note that the current phrasing includes a double negative, which could create ambiguity. We recommend rewording this section to ensure clarity of interpretation.

On 1.3.3G (1) and (2) we welcome the alignment with employment law which was a previous AFME ask and is referred to in the accompanying CP text. However, we suggest that the guidance goes further than pure legal drafting to enable it to be implemented into firms' policies and procedures

On 1.3.5G(3), we propose that that this section is redrafted for greater clarity

On 1.3.7.G Table Private or personal life and COCON, we find the guidance helpful in providing further clarity; however, we note a potential risk that certain conduct may be inadvertently carved out either where it ought to remain within scope or where such conduct may still be relevant under other regulatory frameworks—

such as the FIT rules and broader fitness and propriety (F&P) assessments. It is important that the final guidance avoids creating unintended exclusions and clearly acknowledges that exclusion from COCON does not necessarily equate to exclusion from other applicable regimes.

On the scenario where *“Misconduct by M in relation to a fellow member of the workforce at a social occasion organised by M or another member of the workforce in their personal capacity”* we note that the table confirms this is within scope. We request additional clarification on whether this relates to multiple people, and additional context such as if this captures a personal event (such as a date) or just a work event.

Breach of conduct rules and disciplinary action:

The flow chart on p.13 of the consultation paper, has clarified that a Conduct Rule could be breached, without the firm determining the need for disciplinary action. In such cases these are classified as non-reportable conduct rule breaches unless they meet the criteria of the Form D (SUP 10C.14.18R) or where the firm's threshold conditions have been breached (SUP 15.3.1).

The flow chart, while clear, seems inconsistent with the FCA Our Response box on page 21, where the FCA state that some misconduct may not be serious enough to meet our regulatory thresholds.”

We would suggest that firms have interpreted and applied the Conduct Rules closer to the sentiment set out on page 21 (Our Response), than the approach set out in the flowchart, imputing a direct relationship between a conduct rule breach and formal disciplinary procedures, i.e. written warning or above, and/or reduction in variable compensation. In this sense, an investigation resulting in formal disciplinary action is the starting point for firms in determining whether a Conduct Rule has been breached – given that where no disciplinary action is required, the relevant behaviour is unlikely to meet the regulatory threshold of a Conduct Rule Breach. Firms would find it hard to consider an act / omission which may breach a Conduct Rule, which would not also result in a disciplinary action.

In response, some of our members have suggested that the concept of unreportable Conduct Rule breaches is discontinued and the flow chart amended in the ‘final’ guidance. It seems to be misaligned with some current industry practices, where activity is managed through existing disciplinary frameworks, it adds ambiguity to the threshold for Conduct Breaches, and does not serve a clear purpose, given that (i) anything which is not considered a (reportable) Conduct Breach, can still be taken into consideration when assessing F&P for regulated role holders (ii) it creates ambiguity as to the application and threshold of FIT / F&P considerations (iii) such behaviour is not disclosed on regulatory references (iv) leads to ambiguity as to the treatment of Conduct Rules staff which are not subject to FIT with reference to the regulatory threshold for a Conduct Breach.

Another firm noted several situations, where an individual has resigned before their disciplinary action has completed. In these cases, where there has been a strong case that had the disciplinary process completed, this would have clearly have led to a determination of a conduct rule breach, whilst not reportable, the firm in question would have disclosed it in a regulatory reference. This approach seeks to prevent the “rolling of the bad apples” which is a key objective of the SMCR regime.

Specific guidance on conduct rules

We note that in section 4, the FCA sets out their expectations for respective breaches of Conduct Rules 1 and 2. We note that NFM is likely to breach either breach IC1 (Integrity) or IC2 (Due care, skill diligence).

For IC1, consideration is made around actions/behaviour being deliberate or reckless. With this in mind, where an individual (i) thought there was good / proper reason for their conduct, and/or (ii) the conduct was proportionate to the intended aim and/or (ii) did not intend to have a negative impact, or did not know they were having such an impact (must be reasonable belief – 4.1.8KG(2)), then their behaviour is unlikely to breach IC1. We also note that the CP suggests that the behaviour may nonetheless still breach IC2 (Due care, skill diligence) with reference to 4.1.8KG. Our also members note that they view IC1 and IC2 as standalone rules

Perceived Effect and Reasonableness: The Subject of NFM

4.1.8I (2) the seriousness of a non-financial misconduct offence should not depend on the subject's response. Treating similar misconduct differently based on the reaction risks unfairly increasing sanctions for the perpetrator."

4.1.8I (3) outlines the relevance of the reasonableness of the subject's perception that the conduct violated their dignity etc. We note that this tracks the Equality Act, as we requested and as set out in the CP. This is an area where we also note that there is a subjective assessment, where flexibility and judgement is key. Different people may be offended by different things, and it may be difficult to determine how a 'subject' feels in any such scenario. We also agree that it is important to acknowledge that there may be serious incidents where an employee was subject to a serious event but was unwilling to speak up. Similarly, where employees are unable to be interviewed, it will be difficult to determine how a subject feels.

One approach may be for the FCA to consider the key factors to take into account when determining whether the subject's perception was reasonable, and whether this would be consistent with the criteria in assessing the reasonableness of the perception of the individual causing the conduct under 4.1.8K(2). On 4.1.8K we also note that it is similarly subjective and may inadvertently introduce litigation risk if it is used as a defence.

COCON Breaches and Line Managers

The proposed guidance acts to clarify that firms should consider whether the Line manager has also breached a conduct rule, typically IC2 (Due care, skill, and diligence) for not taking reasonable steps to:

- i. Stop forms of retaliation against individuals who have reported NFM / breach, or participated in an investigation,
- ii. Prevent NFM they know about – or should know about
- iii. Implement policies / systems and controls to detect and address NFM.
- iv. Appropriately investigate complaints and ensure a fair outcome. This should include consideration of the extent to which firms have the authority and capacity to make changes and investigate as noted in the text in the consultation paper
- v. Create psychological safety / safe environment for people to raise concerns – this could include instances where complaints have not been dealt with appropriately.
- vi. Escalate concerns where lack authority to resolve.

While generally supportive of the guidance, which effectively does not change the responsibilities in relation to IC2, we would ask the FCA to provide further clarity on:

1. The definition of Managers, and whether this should be strictly interpreted.

This is particularly relevant where individuals have Line Managers that sit outside the jurisdiction and are part of the functional reporting line of the individual.

This will also be relevant where the individual has an additional local matrix line, and that local matrix manager, while not the formal functional line manager, has closer geographical proximity, has more influence over the team culture and triggering processes linked to the prevention, detection and investigation aspects outlined above.

This point also goes towards the territoriality limitation of the regime.

2. Whether the considerations outlined in the guidance are directly linked to the competencies of the *Manager of Certified Persons* function and even where no breach / disciplinary is confirmed, whether F&P to hold this function would be impacted. We also note that in the current SMCR consultation the proposal is to remove this role.
3. On 4.1.8-BG which set out a non-exhaustive list of examples of conduct by a manager in relation to the matters referred to in COCON 4.1.8-AG that would breach rule 2 we note that in (1)(a) there is an expectation for a manager to (a) intervene to stop such behaviour where appropriate if the manager knows or should know of it; we welcome additional clarity on what the circumstances in which a manager 'should' have known non-financial misconduct was occurring and request additional guidance and/or scenarios on this.
4. Similar scenarios are welcome on when an incident in someone's personal life needs investigation by a firm and in relation to the defence clause(s) we have identified which suggest that non-financial misconduct will not breach conduct rules if an individual 'didn't mean' to do something and it was their 'belief' that the conduct was reasonable.

Approach to Conduct: At work, and outside of work

The clarity of the guidance in terms of the scope of COCON being limited to NFM within the workplace, and the clarity around what could be considered to be the workplace or workplace adjacent is helpful, recognizing grey areas will remain in some circumstances.

Additionally, the guidance on what firms may rely on when considering F&P and aspects of a person's private life/behaviour which may impact the assessment is also helpful, i.e. criminal convictions, findings of a court, tribunal, regulator, arbitrator, public enquiry when assessing wrongdoing in a private life. The FCA has made it clear that firms have no obligation to actively monitor private lives on an ongoing basis.

However, the guidance states that where a firm becomes aware of relevant information, firms should take reasonable steps to consider the impact on F&P, and ask the individual concerned for an explanation. We would like the FCA to confirm that 'relevant information' here means information substantiated by a finding from a public office, i.e., criminal convictions, findings of a court, tribunal, regulator, arbitrator, public enquiry, otherwise, the phrase 'relevant information' is drawn too widely to be operational.

We are also of the opinion that the following FCA statement within the CP should not form part of firm obligations and be specifically retracted:

“Not being able to establish the truth of an allegation of this kind does not mean they (a firm) should not report it to us, if were it established to be true would be material to the F&P assessment”.

The above adds a disproportionate and unreasonable burden on firms to report unsubstantiated allegations, which opens firms and the FCA up to reputational and legal risk and does not support the public interest or the FCA’s objectives.

An approach to factual accuracy more consistent with the principles of fairness and due care which is outlined in SUP 22.5.4 (Regulatory References) and the guidance in SYSC 22.5.2G would allow for better outcomes for individuals, firms, and the FCA.

Social Media

We note that the guidance (p.25 paragraph 3.35) states that, where the decision to finalise the guidance is made, that the FCA would make it clear that in principle a person can lawfully express in their private personal life, their views on social media, even if those views are controversial or offensive, even if work colleagues are upset by those views, without calling FIT into question.

While we understand the FCA is trying to balance the right to privacy and the concept of free speech with its rules, this is challenging for firms when considering the sentiment of other guidance related to conduct outside of work

Our members have considered the impact of where views may be sexually or racially motivated and/or where views are held which may:

- i. Pose a risk that it would be repeated in role.
- ii. If known about, impact the psychological safety / culture of a function / team, with knock on impacts on the effectiveness of systems and controls, and the ability of Line Managers to discharge their duties in line with the current CP’s guidance.
- iii. Undermine the firm’s reputation, public confidence or the FCA’s wider objectives.

The FCA states that if a person’s social media activity in their private life indicates a real risk the person will breach the requirements and standards of the regulatory system, then such activity will be relevant to their fitness and propriety, e.g. threats of violence or clear involvement in criminal activities.

We would suggest that a table, similar to that set out in 1.3.7G (Private or Personal Life COCON) be developed with reference to instances when views expressed on social media may be considered against the criteria set out in FIT and the assessment of F&P.

Question 4: To what extent do you agree the draft FIT guidance would help you assess fitness and propriety?

Broadly speaking, we agree that the draft FIT guidance is designed to support firms in applying the rules effectively, and we found several of the illustrative scenarios to be helpful in clarifying the FCA’s expectations.

The guidance provides valuable practical context that can assist firms in making informed assessments of fitness and propriety.

We welcome the FCA's rationale for providing additional guidance, as it is important to enhance consistency and transparency in how firms assess individuals' suitability. However, we note that there are some areas where we have comments. In particular, we are concerned that certain elements of the guidance could inadvertently be interpreted in a way that limits firms' discretion or undermining the principles-based nature of the Fitness and Propriety framework.

For further detail on these points, please see our response to Question 5.

Question 5: Do you have any comments on the draft FIT guidance?

On 1.3.10 G (10) in respect of the scenario where "*....an individual's health and life events which may have caused them to act out of character*" we are concerned that this may inadvertently be interpreted as mitigating the seriousness of certain behaviours and request that the FCA provides additional guidance.

Low-level Repeated Infractions

The FCA has referenced low level repeated infractions outside of the workplace and the suggestion that this could indicate a systemic rule breaking attitude impacting FIT – e.g., multiple and frequency minor motor offences.

We suggest a similar approach to unsubstantiated information and ask the FCA to clarify that firms should only rely on determination made by public offices when assessing whether low-level repeated infractions outside of the workplace would amount to something more serious, e.g. in the case of multiple minor motor offences, this could lead to a removal of a license and other more serious consequences. Firms cannot be expected to make this type of judgement without reference to determinations made by public offices.

If the scope is extended in this manner (e.g. to include minor motoring offences), this would depend on individuals disclosing such information. As a result, this will rely on individuals providing this data and will mean firms will then have to request more information from individuals and increase the administrative burden and raise concerns regarding data collection and compliance.

Relevance of behaviour in private or personal life

On 1.3.17 G (1) (a)(i) "*... disregard ethical or legal obligations*" we ask the FCA to remove 'ethical' which is a subjective term. There are different interpretations of what constitutes as ethical. More generally on this section, we suggest the FCA retains the drafting in para 1,2 and 3 and removes section 40n 1.3.18G, sub paragraphs (1)-(3) we note that whilst we understand the intention the drafting is repetitive and appears to seek to explain and justify the rules instead which we do not think is necessary.

On 1.3.20G, we note that the FCA has confirmed that it does not expect firms to generally monitor employee's private lives, but it appears they may if there is good reason (e.g. allegations) and references the point at which authorities may be called to investigate (in the CP). We suggest that firms have limited tools in this scenario and that this creates privacy concerns. We propose that the FCA reviews this section and considers how firms can practically operationalise this.

Social Media

Members understand the need to consider social media and would suggest that by its nature conduct on such a platform cannot typically be considered private. Firms will have existing codes of conduct which can be used to address behaviour when using social media, particularly where it may impact an individual's assessment under FIT. Members are also concerned that 'lawful' expression of views could be interpreted in a way that limits the ability to take action where such expression may nonetheless raise questions about Fitness and Propriety.

Question 6: Do you agree that the new Handbook guidance – if made – should come into effect at the same time as the new COCON rule (1 September 2026)?

We agree that it would be appropriate for the new Handbook guidance to come into effect at the same time as the new COCON rule, i.e. on 1 September 2026. Aligning the implementation dates would support a more coherent and coordinated approach, allowing firms sufficient time to prepare for and embed both the new rule and the accompanying guidance. It would be helpful for the regulators to consider aligning the timing of the updates to FIT to the proposed changes in the SMCR Consultation Papers to reduce the regulatory change burden on firms and allows firms to make changes to SMCR at the same time

Regarding timing and application to banks, we note that while the guidance is clearly intended to apply to both banks and non-banks, there is currently no specific definition of non-financial misconduct (NFM) within the rules as they relate to banks. This omission creates some ambiguity, particularly given that the FCA has acknowledged ongoing inconsistency across the banking sector in the application of the Conduct Rules to NFM.

To support a consistent industry-wide approach and ensure fair and proportionate implementation, we recommend that the FCA clarify the application date of the guidance with respect to both banks and non-banks. This clarification is particularly important in light of employee fairness considerations. For example, without clear and consistent application, there may be scenarios where Bank A reports an NFM breach while a similar breach at the same time is not reported by Bank B. Such discrepancies could lead to perceived or actual inequities in regulatory treatment and undermine confidence in the regulatory framework.

We also recommend that the FCA consider aligning the implementation timeline for any updates to the FIT guidance with the proposed amendments set out in the SMCR Consultation Papers. Coordinating these changes would support a more streamlined implementation process, reduce the cumulative regulatory change burden on firms, and facilitate the concurrent adoption of any revised requirements under the SMCR framework.

Question 7: If no, when do you think any new Handbook guidance should come into effect?

Please see our response to Q6 above.

Question 8: Do you have any comments on the costs and benefits of the guidance discussed in Chapter 3?

We note that all regulatory initiatives which come into force represent compliance and implementation costs to firms. However, we have no specific comments on this at this stage.

We welcome the opportunity to respond to this consultation and would be happy to meet with the FCA and provide further assistance if helpful.

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