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Leading on Investments and Savings

**Response by TISA to
Consultation on Individual
Accountability: Extending
the Senior Managers &
Certification Regime to all
FCA firms**

3 November 2017



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About TISA

TISA is a unique, consumer-focused membership organisation. Our aim is to improve the financial wellbeing of UK consumers by aligning the interests of people, the financial services industry and the UK economy. We achieve this by delivering innovative, evidence-based proposals to government, policy makers and regulators.

TISA's growing membership comprises over 160 firms involved in the supply and distribution of savings and investment products and services. These members represent all sectors of the financial services industry, including asset managers, insurance companies, fund managers, distributors, building societies, investment managers, third party administrators, FinTech, consultants and advisers, software providers, financial advisers, pension providers, banks and stockbrokers.

Current themes of TISA policy work include:

- **Brexit:** developing proposals for government that will enable the savings and investments sector to prosper on a global scale
- **Digitalisation:** a digital identity for consumers of financial services, innovation, standards and data responsibilities
- **ISA's:** LISA, simplification of the regime
- **Retirement saving:** the Auto Enrolment review, self-employed and pension tax relief
- **Housing:** the use of property to supplement retirement income
- **Guidance:** developing a framework and services to make guidance more widely available
- **Education:** supporting the education of young people to make them aware of the impact of finance on their life.

TISA also provides support on a range of operational and technical issues targeted at improving infrastructure and processes, standards of good practice and the interpretation and implementation of new rules and regulations. TISA has a successful track record in working cooperatively with government, regulators, HMT, DWP and HMRC to improve industry effectiveness by reducing cost and risk and to enhance customer outcomes. This work currently includes: MiFID II, CASS, the UK Fund Settlement initiative and Payments Strategy Forum. TISA Exchange (TeX) is providing a model for transfers and re-registrations.



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Introduction

We support the overall aims of the policy and believe that individual accountability is needed in the financial services industry to drive positive change.

In its Consultation Paper on extending the Senior Managers & Certification Regime to all FCA firms (“**Extension**”), the FCA requested feedback from firms more widely on the proposed consultation if concerns would not necessarily be addressed by responding to the specific questions raised. We set out in Part 1 below, our general feedback, comments and concerns and in Part 2 we respond to the specific questions raised.

PART 1 – General Feedback, Comments and Concerns

Proportionality

We note that the intention of the FCA is that the Extension should be implemented in a way which is proportionate taking into account the varied nature of the 50,000 or so firms within scope of the Extension. In addition, that the Extension should be simple, clear and easily understood. In a number of areas, we feel that proportionality could reasonably involve alternative or additional items.

The FCA appears to have approached proportionality in two ways only:

- Dividing firms into 3 categories
- Switching off some of the elements of the senior managers part of the regime that applied to banks for two of those categories of firms.

Much of the cost and time associated with implementing this regime relates to the certification requirements and the conduct rules. Therefore, we would in particular welcome the FCA giving consideration to whether proportionality should also mean that the extent of the certification regime and application of the conduct rules should be varied for different types of firms.

Exemptions

We note that there is no ability in the Extension for firms to seek an exemption from needing to comply with it. In other individual accountability regimes around the world (e.g. the Australian version called BEAR), there is the ability for firms to seek exemptions from being within the regime or from having to comply with certain of the requirements of the regime. We ask whether the FCA would consider allowing firms to be exempt from the regime in its entirety or from certain aspects of the regime in certain cases. For example in sole trader firms, it is already clear who has individual accountability and it is difficult to understand how requiring a sole trader to hold a SMF function and to file statements of responsibilities, etc. would provide any additional benefit.

Unclear definitions/tests

Our members view is that proportionality means that firms should not be asked to ring-fence additional resource or incur additional costs in trying to analyse legal tests in order to scope the



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various aspects of the Extension. Every definition needs to be appropriate for what it is intended to address/cover and be absolutely certain and clear to ensure consistent understanding and application. At present a number of the definitions are unclear and would benefit from additional clarity.

For example, the definition of an employee that requires certification refers to those individuals who are involved in one or more aspects of the firm's affairs, as far as relating to a regulated activity, and those aspects involve, or might involve, a risk of significant harm to the firm or any of its customers. In addition, it includes those individuals who are material risk takers. It also states that certification covers people who are not Senior Managers but whose jobs mean they can have a big impact on customers, the firm and/or market integrity.

We believe this definition is unclear. For example, one of the activities on the list of certification roles is 'Functions subject to qualification requirements' and reference is made to the full list in the T&C Sourcebook. The activities subject to qualification requirements are listed in TC App 1.1 and include a number of activities (e.g. advising on various products, advising and dealing and managing investments) which have the potential to involve a risk of significant harm to the firm or its customers. However, one of the activities within the list in the T&C Sourcebook is 'overseeing on a day to day basis' a number of administrative functions (see refs 17, 18 and 19). Administrative activities would not normally involve a risk of significant harm to the firm or its customers or have a big impact on the firm or market integrity. It is not currently clear whether the qualification item is then subject to an overlay assessment of significant harm, involvement in regulated activities, etc. For example, it could be argued that some activities such as pricing funds could give rise to significant risk or harm.

Part of the test for assessing those within scope of the certification regime is that a firm must also consider who its Material Risk Takers are. For almost all firms in the Extension, they have never had to consider this test before which is, essentially, reserved for those firms regulated by the PRA. Our members feel that being asked to understand a definition that does not otherwise apply to them to then assess the outcome of that definition in order to feed into complying with another definition is not a proportionate approach.

We consider that proportionality in the certification regime would see the FCA simply specify those roles within a firm that the FCA is concerned with, rather than introducing layers of (in some cases) complex new tests that firms need to assess and conclude upon. For example, we assume that the FCA is simply interested in capturing: mortgage advisers, financial advisers, algorithmic traders, traders, portfolio managers, head of the complaints department, etc. We would suggest that specific functions are specified to ensure there is no uncertainty in the definition. For example the specific function of advising on mortgages rather than the role of mortgage advisor.

We also consider that proportionality means that the requirement for line managers of certification staff to be certified staff themselves should be 'switched off' or altered. The vast majority of line managers that would be caught by this requirement would not have been approved persons because the role they undertake is not a significant management function (CF28/29). Therefore, requiring them to be certified is akin to now saying that they hold a significant management function which is not the case. In larger firms there are likely to be multiple layers of line managers between, for example, a mortgage adviser and a senior manager. We do not believe it is proportionate to require a firm to go to the cost of implementing and maintaining the certification regime for a whole set of staff that have never had a significant management role. As an alternative to 'switching off'

this requirement entirely, we would suggest that the reporting chain of certified staff is followed to the most senior position reporting into a Senior Manager and that person is required to be certified but not the individuals in between (unless they meet any of the other requirements for certification). This would ensure that oversight responsibility is present at an appropriate level.

We would support the FCA reviewing the definitions that it has introduced for the Extension to confirm that they are not asking firms to undertake new and potentially complicated assessments.

Rulebook Structure

We consider that the current proposed amendments to SYSC result in the Handbook being very complicated. A firm needs to understand the myriad of definitions into which it falls in order to follow the Handbook and the obligations that apply to it. What this means in practice is that a Limited Scope firm needs to read through all of the rules that apply to the banks in order to determine whether they do or do not apply to them. We would support the adoption of separate SYSC rulebooks for Core, Enhanced and Limited Scope Firms. Rather than considering each part of SYSC, a firm would be able to go directly to the applicable rulebook. An alternative solution would be to highlight the different requirements in different colours or text types as they apply to a certain category of firm. We believe this would significantly aid clarity for all firms.

Principles and Guidance

If the FCA considers that firms should be allowed to implement the regime in a way which is proportionate for them, we would recommend more use of guidance and principles as opposed to detailed rules. If detailed rules are introduced, then they need to be clear and appropriate and the definitions that relate to them need to be absolutely clear. The approach that the PRA has to its rulebook is to introduce a small set of rules which are then supplemented by Supervisory Statements which generally add clarity by providing softer guidance. We would support an approach more akin to that of the PRA in relation to the Extension.

Implementation timeline and approach – certainty needed

We note that the Government will ultimately dictate the earliest implementation date of the Extension and that the FCA will comment on its intended approach to implementation in its technical consultation paper. Before that technical consultation paper is published, we would like to draw the FCA's attention to the fact that UK firms are facing an unprecedented level of regulatory change and uncertainty and that this is expected to continue with Brexit.

Timing of implementation date

We would request that the FCA considers the burden being faced by UK firms and ensures that any implementation proposals are structured to reduce, as much as possible, the additional regulatory burden being placed on firms. For example, ensuring that implementation does not occur simultaneously with the implementation dates of other significant regulatory changes.

Clarity on implementation dates

We would request absolute clarity and certainty on the implementation date for the Extension and for the various phases of implementation if the FCA will implement the regime in a similar phased

way as for the banks – e.g. senior managers aspects first, then certification, then conduct rules. Our members have heard various dates voiced by the FCA for the implementation ranging from 2018 to 2020 and this uncertainty and lack of clarity does not allow firms to plan and budget appropriately. If it will be the case that different firms will have to comply by different dates, we would support the FCA writing to all firms to let them know their implementation date in a similar way that the FCA did for consumer credit firms in the migration from OFT to FCA regulation and supervision.

Sector-by-sector implementation

If the FCA is proposing to introduce implementation on a sector-by-sector basis, we would support the insurance sector implementing the regime first. We suggest that this would be the easiest and most logical approach to implementation as insurance firms are likely to be the most prepared for implementation.

Having said that, we would ask that the FCA avoid the approach taken to the consumer credit regime where firms were divided regionally and according to the type of business they carried out as this adds additional tests that firms need to work through in order to determine their implementation date which we do not consider would meet the FCA's aim of proportionality.

We would ask the FCA to consider the impact on groups where there can be multiple in-scope firms operating in different sectors (e.g. an asset manager firm, separate from a broking firm, etc.). Groups with firms straddling multiple categories would prefer to avoid different implementation dates for different parts of their business if possible, particularly if there will then also be different implementation dates for the different phases (senior managers, certification and conduct). Our preference would be for the FCA to allow such groups to choose their implementation date within the range of implementation dates applicable to the sectors within their group.

Implementation based on other threshold tests

If not a sector-by-sector implementation approach, we would ask the FCA avoid the introduction of any new metrics to decide which firms implement when (e.g. based on size). The Extension already incorporates a number of threshold tests which firms will need to spend resource and cost analysing in order to come to a conclusion.

Phased implementation

We would support a similar phased process as that employed in implementing the regime for banks (rather than a 'big bang' approach whereby everything would come into force in one go). It will take firms at least a full year to prepare for the certification regime given that certifying fitness and propriety is likely to be linked to a firm's annual performance appraisal cycle. Firms cannot be expected to start this process before knowing when implementation will be. For example, implementation in early 2019 if implemented in a 'big bang' approach will mean that firms will need to start the certification process from January 2018 in order to have completed the fitness and propriety assessment process before 2019. We therefore support a phased approach to implementation with certification requirements applying at a later date.

Careful alignment of the Extension with other regulatory measures

Our members are concerned with the amount of change in the regulatory landscape and would request that the FCA considers how the Extension fits with other regulatory changes that firms are currently faced with implementing. There appears to be some disparity on the interplay between the MiFID II senior management requirements, the MiFID II Knowledge and Competence requirements and the Extension, amongst other items. For example, the MiFID II Knowledge and Competence requirements will require any employee in a firm involved with sending information to customers to hold a qualification. Under current proposals, this will mean that that person will need to be certified as they hold a qualification, which is one of the tests of being able to cause significant harm, yet it is doubted whether an employee involved in sending information to a customer can cause significant harm to a firm or is intended by the FCA to be required to be certified. By way of another example, it is unclear how the extensive templates associated with the ESMA Guidelines in relation to the Joint ESMA and EBA Guidelines on the assessment of suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU would fit with the Extension. Some clarification on these matters would be welcomed.

Waivers

We are broadly in favour of the FCA exercising their power to grant waivers, assuming that the process is clear for firms. For example, if a firm approaches the threshold to be an Enhanced firm but then will (within 6 months) no longer meet the test, we consider it appropriate that the firm should not have to comply with the Enhanced firm requirements. Otherwise, this would see firms lodge applications for any new in-scope senior managers, to only have to withdraw those applications before they have finished being considered. Making needless applications is time-consuming and having to withdraw an application for approval can have a negative impact on a senior manager's other applications and should therefore be avoided.

We would support both a fast-track process for getting waiver approval and an automatic waiver process. The fast-track process could assist firms in applying and submitting their forms when requesting a waiver. As part of this fast-track process, we would strongly support each firm being assigned an FCA contact who can answer queries and provide updates on the status of their application. We believe this would be a more effective mechanism for both firms and the FCA than each firm having to go through the FCA contact centre individually.

An automatic waiver system could apply for firms who repeatedly cross thresholds both upwards and downwards. We would support a system where a firm could notify the FCA each time a threshold is crossed and the FCA would automatically grant a waiver. This would save both the FCA and the firm the time and expense of the examination process of a normal waiver application. This would reflect the interaction with the existing CRD waivers, i.e., Enhanced firms should not need to have a local REMCO if they have a group one and that has been deemed as acceptable by the FCA.

Extra-Territoriality

We do not believe that all aspects of extra-territoriality have been addressed by the proposals. We note that the FCA has introduced a territorial limitation for certification staff (however we would ask for clarity on what 'dealing with customers' in the UK means as not all staff have a 'dealing' function). One example of an area where the implications of extra-territoriality are unclear can be seen in relation to a global portfolio of an asset manager. These global portfolios are operated for a



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wide range of clients (not just UK clients) and can have joint or multiple portfolio managers – one manager (who may be UK based) may manage the portfolio from the UK when the UK and European markets are open, another from a different location when the Asian markets are open and finally another from the US when the US markets are open. Our members are unclear as to whether all of these managers would be required to be certified.

Reasonable Steps

We would support the FCA setting out what reasonable steps would look like through worked case examples. In particular, within scope of the Extension are both those firms that use outsourced service providers and those firms that are the outsourced service providers (where they are regulated). It would not be proportionate for outsourced service providers to be held to different standards by multiple appointing firms because those firms had interpreted reasonable steps in completely different ways. We would support the FCA setting out in detail what reasonable steps would look like for a firm using another firm to provide outsourced services such as, for example, custody or transfer agency.

Groups

A group may include a multiple of different types of firms from Limited to Enhanced to banks and insurers. This group may have senior managers that carry out senior manager functions across the regulated entities in the group. Where that senior manager is required to undertake different responsibilities for the different firms (e.g. for a Core firm, the senior manager does not have to have overall responsibility for any aspect of the firm), this will potentially be confusing for the senior manager. We believe a simpler regime for senior managers that exist within groups should be considered. Having said that, where a senior manager is choosing to adhere to a stricter regime (so the group decides that all entities will meet the Enhanced firm standard), we would support the FCA providing clarity that where a senior manager has voluntarily held themselves to a higher standard than was required by the regulatory requirements, this would not mean that in an enforcement situation, reasonable steps will be judged against that higher standard which did not strictly apply.

FS Register

We would support the continuance of the FCA register in some form.

We believe that a central register of people performing Certification Functions should be maintained by the FCA. We are of the opinion that such a register is extremely useful to firms and the public in a variety of circumstances. In particular, some of our member firms use the register as an essential part of their due diligence when hiring new employees, when dealing with employees of other firms as counterparties and when reassuring themselves that a client has already received investment advice when acting on an execution-only basis.

In addition, the lack of a single public register may create a barrier to entry for smaller or new firms or new advisers. In the absence of a register, firms and members of the public may be inclined to turn to those they know through past dealings are adequately certified. They may be less confident in recommending or taking advice from new advisers as they may lack confidence that they are properly certified or registered.



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A central register would avoid a situation where the same information was duplicated across a number of firms' own websites. It would also enable firms and the public to be able to track where certified individuals have worked as they move between firms more easily than if the information is only available on the website of that person's employer.

We also consider that a register maintained by the FCA will be seen to be more reliable and carry greater authority than information on firms' own websites. It would enable all those covered by the certification regime to be captured in one place, even those working at smaller firms which might not have a sophisticated website (or any website) and would avoid a situation where information might not be easy to find for some firms.

We would suggest that the register cover 6 years as per the referencing requirement and include persons' status as approved persons under the existing regime.

Who should the new register cover?

We believe that all those subject to the certification regime should be included on the new register with details of the specific Certification Function they perform. This would provide most information and be most useful to firms and customers.

As firms have to have this information compiled for internal use already this would not impose any additional administrative burden.

We would propose that firms might submit the information to the FCA in a form similar to the table found at paragraph 5.8 of CP17/25.

How regularly should the proposed register be updated?

We would propose that firms be required to provide details of all those carrying out Certified Functions on their behalf to the FCA on an annual basis.

We would propose that it should then be a mandatory requirement for firms to notify the FCA (by submitting a form similar to the current Form C or D) on an ongoing basis of any material changes regarding those persons they are responsible for including on the register (for example anyone new, who has left or who has changed roles or is no longer considered fit and proper).

The above requirements to provide information annually and notify the FCA of changes on an ongoing basis should be mandatory in order to maintain the integrity of the new register and ensure the information on it is as up to date as possible.

Should the register include historical information?

Some TISA members consider it would be helpful for the register to continue to hold historical information as it does now. Therefore it should be possible to see that a certified person used to be an approved person where that is the case. This is likely to be useful for due diligence purposes where firms and consumers may wish to look back at a person's history.

Part 2 - Response to individual consultation questions

Q1: Does the proposed list of Senior Managers in the core regime cover the appropriate roles, i.e. the most senior decision makers within a firm?

Yes, we believe this to be a comprehensive list of the uppermost tier of responsibility of firms. There does appear however to be a bias towards the second line with the inclusion of the MLRO and CCO. With the exclusion of SMF18 there is little scope to include other significant managers e.g. head of business lines/unit, within firms which could still be substantial in size.

Q2: Are there any other roles that the FCA should consider specifying as SMFs? (You may wish to consider the list of proposed Senior Managers under the enhanced regime in section 8.16)

No, the roles specified as SMFs provide broad coverage over core firms and we feel any additions to this would provide undue complexity for those firms, with the possible exception of the current CF10a role. With this possible exception, the extended list for Enhanced firms seems proportionate and reasonable given the scale of those firms.

Q3: Are there any proposed Senior Managers that the FCA should consider excluding from the core regime?

No, we feel this would dilute the coverage and may lead to gaps in consistency of application within firms.

Q4: Do you agree with our approach to Senior Management Functions for Limited Scope Firms? If not, please explain why.

Not in all cases. In our view, some of the Limited Scope Firms could be exempt from the regime as the policy intention behind the Extension is not being thwarted by exempting them (e.g. sole traders, small partnerships). See our response to Part 1.

Q5: Do you agree with our proposed list of Prescribed Responsibilities? If not, please explain why.

We do not understand prescribed responsibility 6 for Core Firms which is then dropped when a firm moves up to Enhanced, especially as only prescribed responsibility 14 refers to providing accurate and timely information to the FCA.

We also do not consider it appropriate for there to be a prescribed responsibility for overseeing the management of the legal function. There is the potential for the Head of Legal to be placed in a position where their personal interests and professional duties conflict (in particular as regards acting in their client's best interests and preserving confidentiality and bearing in mind that many of the documents that such a senior manager would need to provide to show they took reasonable steps are likely to be privileged and such privilege belongs to the firm not the senior manager). This

could deter firms from seeking proper legal advice which may have adverse consequences for their risk management/compliance with regulatory requirements.

Q6: Do you agree with our proposed Prescribed Responsibility for AFMs as set out in CP17/18? If not, please explain why.

We believe the prescribed responsibilities as set out in CP17/18 are complimentary to those set out in this paper and will further enhance the overall regime. However the current articulation of this prescribed responsibility (acting in investor's best interests) in CP17/25 could be considered as at odds with other current corporate duties such as: 1) acting in accordance with the best interests of clients (COBS); 2) acting in the best interests of Unitholders (COLL); and 3) paying due regard to the interests of customers (Principle 6). Clarity on this prescribed responsibility would be welcome, particularly around who would hold this responsibility – a NED Chair of the AFM Board (CP17/18) or "the Senior Manager who is responsible for that issue" – given the differing slants through the various consultations given. On the subject of the "value for money" assessment, we would appreciate further clarity to avoid unreasonable expectations and assessments potentially being made on value for money retrospectively. Examples of how a senior manager discharges this prescribed responsibility to assess whether value for money is "good" or "poor" would be welcomed and also a shift more towards how each company has assessed value for money (i.e. the frameworks used for that assessment) so the burden of responsibility is not unnecessarily onerous. Considering this, our members have suggested that a NED may not be best placed to take on this responsibility.

Q7: Do you agree with the functions we have proposed making Certification Functions? If not, please explain why.

No, for the reasons cited in Part 1. Those being the impact that other regulatory changes will have on the definition of a significant harm function (e.g. the MiFID II K&C impact), the requirement for firms to understand a test that has not previously been applied to them (the Material Risk Takers test) in order to then understand how it applies and capturing the chain of line managers who may not have held a controlled function before. We would support the FCA listing those functions that they are primarily concerned with instead of the current complicated layers of definitions – e.g. mortgage advisers, financial advisers, traders, portfolio managers, etc.

Q8: Are there any other functions that we should make a Certification Function?

See above response to Q7.

Q9: Do you think the identity of people performing Certification Functions should be made public by firms? If so, which Certification Functions should be made public?

Yes, we believe all Certification Function holders should be made public in a centralised register. See our response to Part 1.



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Q10: Do you agree with our proposed territorial limitation for the Certification Regime? If not, please explain why.

We agree with a territorial limitation however we do not consider that the current territorial limitation is clear, as per our response to Part 1. We would support the FCA providing examples of when a certified staff member is deemed to be 'dealing with customers' in the UK.

Q11: Do you agree with the approach we have proposed to allocating CASS responsibilities? If not, please explain why.

Yes, however it should be made clear that it is acceptable for firms to allocate multiple CASS oversight to multiple employees to allow for segregation of duties (e.g. assets and cash) depending on their structure. We feel it should be highlighted that CASS compliance and oversight continues to be of high importance to the FCA.

Q12: Do you agree with our proposed approach to rules and guidance on the fit and proper test? If not, please explain why.

Yes, though a table stating all requirements for senior manager, certification and other roles (e.g. NEDs) would be welcomed.

Q13: Do you agree with our proposed requirements on criminal record checks? If not, please explain why.

Generally yes although we feel that an allowance should be made for applications for approval as a result of recruitment for firms to rely on checks completed by a previous employer within the last year. Such employees would then be included in the firm's own annual compliance checking cycle.

Q14: Do you agree with our proposed requirement of regulatory references? If not, please explain why.

We agree with this in principle however there may be further consideration required towards any conflicts with employment law, a topic our TISA working group is currently exploring. We would welcome further guidance and examples from the FCA in relation to regulatory reference requirements including transitional arrangements for those who have not worked in financial services for a number of years before the requirement is in place.

Q15: Do you agree with our proposal to apply the Conduct Rules to financial services activities?

Generally yes although we feel that the way the distinction has been explained may create confusion. We understand the intention as a firm could conduct both regulated and unregulated business and it is only those involved in the regulated business that the FCA is seeking to capture (e.g. a car sales firm that does credit broking as an ancillary activity). We feel the way the current distinction has been explained may create confusion as it could be interpreted so that it is only when



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an in-scope employee is actually involved in the regulated activities that they need to comply with the Conduct Rules and not, for example, more generally in their employment with the firm. For example, some of the FCA's previous fines for approved persons and dishonesty offences related to activities that occurred outside of the person's involvement in the firm's regulated activities (e.g. the hedge fund manager who avoided train fares on his journey from home to work). Under the new distinction, as that activity (travelling to work) is not related to delivering the regulated activity, an employee arguably would not be caught by the Conduct Rules in relation to that conduct.

Q16: Do you agree with our proposal to apply the Conduct Rules to all employees who perform financial services, with the limited exclusions listed in section 7.14?

Yes, although we feel the list of inclusions should include a 'limited risk, temporary administrative function' to this list to ensure that relevant temporary roles (i.e. data input role over a maximum period of 12 weeks with no re-appointment within 12 months) can receive high level training appropriate to that role rather than training against the full conduct rules.

Q17: If you disagree, please explain why, including (where appropriate) cost implications.

N/A

Q18: Do you agree with our proposal to link notification requirements for disciplinary action to breaches of the Conduct Rules?

Yes and we would welcome a facility to check concerns over an employee (new or existing) against a register of such notifications to supplement the regulatory references regime. A right of appeal to the FCA would likely be required to prevent malicious reporting.

Q19: Do you agree with our proposed frequency of Conduct Rules notifications? If not, please explain why.

Generally yes however we feel there should be scope for an immediate (within seven business days) notification to the FCA of any significant conduct breaches by employees not in a Senior Management or Certification Function.

Q20: Do you agree with our proposed approach of using the objective criteria set out above to identify firms for the enhanced regime? If not, please explain why and propose alternative approaches.

Yes in principle but as set out in our comments on definitions in Part 1, we consider that the criteria need to be further clarified. For example, there is confusion over the meaning of 'intermediated' in the context of one of the tests. This is particularly pertinent as many firms sell their products / services through intermediaries.



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Q21: Do you agree with our proposed approach to moving firms between core and enhanced? If not, please explain why.

Yes, where a firm is moving from Core to Enhanced, and see our comments on waivers in Part 1. No, where a firm is moving from Enhanced to Core. If a firm no longer satisfies the threshold, unless they consider that they might meet the threshold within a short timeframe, e.g. 3 months, then an Enhanced firm should be able to move down to comply with Core standards much quicker than one year.

Q22: Do you agree with our proposed Senior Management Functions for enhanced firms?

Broadly yes although given the additional requirements on HR as a result of implementation of the regime it may be beneficial to separate that to be independent from the Chief Operations Function.

Q23: Do you agree that this will ensure the most senior people in firms are covered by the Senior Managers Regime, regardless of organisational structure? If not, please explain why.

Yes. We welcome the FCA's approach to not require non-executive directors who are not also chairs of in-scope committees to be notified to the FCA. We consider that introducing any 'notified NED' / 'standard NED' regime similar to the bank regime creates an unnecessary level of administrative burden on firms for little purpose.

Q24: Do you agree with our proposals for Prescribed Responsibilities in enhanced firms? If not, please explain why.

Yes though developing and maintaining the firm's business model could be extended to all firms.

Q25: Do you agree with our proposal to apply the Overall Responsibility requirement to enhanced firms? If not, please explain why.

We agree with the requirement in principle however the current wording of the Overall Responsibility, to include all transactions that take place overseas (whether in full or in part), may be overly prescriptive and could be re-worded to refer to only firms operating in the UK or providing services to customers in the UK.

Q26: Do you agree with our proposal to apply Responsibilities Maps to enhanced firms? If not, please explain why.

Yes as this offers a further degree of clarity to responsibilities over a large and complex management structure. Examples of maps would be considered helpful.

Q27: Do you agree with our proposal to apply handover procedures to enhanced firms? If not, please explain why.

Yes, although good practice guidance from the FCA would be useful to ensure consistent application of this requirement.

Q28: Do you agree with our proposals for Senior Managers in EEA Branches?

We would expect that Senior Managers operating outside of the UK would not be required to comply with these requirements as they will be subject to home country regulations and requirements. Requiring application of the Senior Manager requirements to non UK Senior Managers would place additional administrative burdens onto firms which we feel to be unnecessary. We also query how these firms will be treated post-Brexit (e.g. will they become Core firms?) and in particular any transitional period in order for the UK branch to comply with additional requirements and how any sanctions would be imposed.

Q29: Do you agree with our proposals on the Certification Regime and Conduct Rules for EEA Branches?

Yes, we feel this is a proportionate approach.

Q30: Do you agree with our proposals for Senior Managers in non-EEA branches? If you disagree, please explain why.

Yes, we feel this is a proportionate approach.

Q31: Do you agree with our proposals for Prescribed Responsibilities in non-EEA branches? If you disagree, please explain why.

Yes, we feel this is a proportionate approach.

Q32: Do you agree with our proposals on the Certification Regime and Conduct Rules for non-EEA Branches?

Yes, we feel this is a proportionate approach.

Q33: Do you agree with our proposal to introduce a new Prescribed Responsibility for the Conduct Rules that will also apply to banking firms?

Yes as this provides consistency across the industry. Without this additional responsibility there is a risk that different standards will be adopted by firms.



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Q34: Do you agree with our changes to the 12-week rule? If not, please explain why.

We do agree the 12-week rule should be extended to all Senior Managers, Certification Functions and the Overall Responsibility Function to ensure business continuity during unforeseen circumstances.

Q35: Do you agree with our approach to applying the partner function to banking firms? If not, please explain why.

No. In limited liability partnerships, it is only the managing partner or general partner that has senior manager responsibilities. We do not consider that limited partners or purely economic partners should be within scope of the regime. Further clarity about which partners the FCA intends to capture is needed.

Q36: Based on the summary above and the full analysis www.fca.org.uk/publication/research/cba-extensionsenior-managers-certification-regime.pdf, do you agree with our approach and methodology for the cost-benefit analysis? If not, please explain why. If not, please explain why.

See below for Q37.

Q37: Based on the summary above and the full analysis www.fca.org.uk/publication/research/cba-extensionsenior-managers-certification-regime.pdf, do you agree with our findings and conclusions for the cost-benefit analysis? If not, please explain why.

No. We consider that proportionality means that firms should not be put to additional cost than is absolutely necessary. As such, we wish to highlight that it appears that all costs that firms will face as part of implementing and operating the Extension have not been taken into account. For example, based on our members understanding of the implementation of the regime to banks:

- Firms will be faced with additional legal fees as they try to ascertain how aspects of the Extension fit with employment law – such as the regulatory references regime – where the FCA left firms to figure out how to implement the Extension in a way that complies with employment law for themselves.
- The bank regime saw, as an unintended consequence of SM&CR, senior managers requesting more money as compensation for their increased individual accountabilities and non-executive directors seeking additional remuneration. This will increase the cost to firms of hiring/retaining existing staff and increase competition for what is already a very small pool of non-executive directors.
- Legal costs will generally increase as the experience to date has been that employees are requesting legal support in disciplinary processes given the outcome that they could have.
- Due to the increased administration associated with this regime (including maintaining the documents, assisting senior managers evidence reasonable steps, greater due diligence by incoming senior managers on taking up roles, etc.), there is a significant amount of additional paperwork with this regime which requires a firm to either hire new staff or purchase expensive software.



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- Firms face increased costs in having to upskill a number of areas of the workforce – for example, the human resources departments are critical to operating and maintaining certain elements of the regime and they require significant upskilling and training to ensure they understand how the regime impacts on the entire employee lifecycle. Again this comes with upskilling costs and ongoing training.
- Firms facing increased costs of insurance as D&O insurance policies were revisited as part of the bank regime and premiums went up.

We would welcome discussions with the FCA in relation to this response and related matters.