



MANAGED FUNDS
ASSOCIATION



Mohammed Moradi
The Financial Conduct Authority (FCA)
12 Endeavour Square
London E20 1JN

By email: cp19-04@fca.org.uk

23 April 2019

Dear Mohammed,

The Alternative Investment Management Association¹ (“AIMA”) and Managed Funds Association² (“MFA”, together with AIMA, the “Associations” or “we”) welcome the opportunity to respond to the FCA regarding its “Consultation Paper CP19/4: Optimising the Senior Managers & Certification Regime and feedback to DP16/4 – Overall responsibility and the legal function”³.

The Associations support the objectives that underlie the extended Senior Managers & Certification Regime (SM&CR) framework. We support the FCA’s approach to raising standards of governance and increasing individual accountability in the financial services sector and find it important that rules are designed effectively to ensure the regime’s success. Therefore, in particular, we welcome the FCA’s proposals to exclude the Head of Legal from the requirement to be approved as a Senior Manager and to amend the scope of the Client Dealing Function.

Our detailed comments on the questions included in the Consultation Paper follow in the Annex to this letter.

¹ The Alternative Investment Management Association (AIMA) is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA’s fund manager members collectively manage more than \$2 trillion in hedge fund and private credit assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry.

² Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

³ See <https://www.fca.org.uk/publication/consultation/cp19-04.pdf>

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We would be happy to discuss any aspect of this submission with you further.

Yours sincerely,

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Head of Markets, Governance and Innovation
AIMA

Michael Pedroni
Executive Vice-President and Managing
Director, International Affairs
MFA

Annex 1

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

The Associations agree with the FCA's proposal to exclude the Head of Legal from the requirement to be approved as a Senior Manager.

We do not consider it appropriate to include the management of the legal function in the Senior Managers Regime (SMR). In our view, its inclusion would create unjustified difficulties and conflicts, particularly when the responsibility falls to the relevant firm's General Counsel. In particular, we question whether, in practice, the statutory protections cited by the FCA in its Discussion Paper DP16/4: "Overall responsibility and the legal function"⁴ (e.g. Section 413 of the FSMA) will be sufficient; if a firm is under enquiry involving the legal function, in order to avoid the reputational damage of a formal investigation, the firm may feel under pressure to waive legal professional privilege, regardless of the statutory protections.

Furthermore, while we consider the new Individual Conduct Rules to be reconcilable with the Head of Legal's professional ethical and conduct obligations, we believe that the additional requirements under the SMR would fundamentally undermine the independence of the legal function. In our view, the cumulative impact of these issues will likely diminish the business' willingness to seek open and frank legal advice from in-house counsel – potentially having a knock-on effect on the firm's overall understanding of what it should prudently and sensibly do in a legal and risk management context. We share the FCA's view that the protections under the Certification Regime and the Individual Conduct Rules will be sufficient to drive up standards of conduct and ensure the fitness and propriety of legal staff.

In our view, it is relevant to reflect on the history of the development of the in-house legal function in firms. Whereas previously, large organisations may have accessed external counsel for their legal advice, the growing complexities of modern business have resulted in firms achieving improved economies by developing legal services in-house. Despite the shift, it is imperative that the lawyer/client relationship is maintained to ensure that the business is able to obtain full, frank and independent legal advice without fear that communications will need to be disclosed. In our view, equivalent risks do not arise in relation to inclusion of management of other internal-facing functions such as Human Resources and information technology.

On the whole, our members are of the view that the erosion of legal professional privilege and the independence of the legal function far outweighs the benefits of inclusion of responsibility for overall management of the legal function in the SMR.

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

⁴ See <https://www.fca.org.uk/publication/discussion/dp16-4.pdf>

We have no comments on this question.

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

The Associations agree with the FCA's proposed amendments to the scope of the Client Dealing Function.

We agree with the FCA's view that the activities undertaken by individuals who interact with clients in purely administrative capacities are unlikely to harm consumers or other users of financial services. We therefore agree with the FCA that requiring firms to certify such individuals is disproportionate (in terms of both costs and administration) to the risks posed, and that the scope should be amended so as not to catch such low-risk individuals.

Additionally, our members are of the view that the level of guidance provided on the scope of the Client Dealing Function is incongruent with the level of guidance published in relation to Persons Giving Information and Advice. In relation to the latter, the FCA has provided illustrative examples and decision trees in its PERG Handbook on what is and is not considered to be personal recommendations and advice. Our members would welcome similar guidance in respect of the Client Dealing Function to assist firms in their implementation of the rules and ensure consistency in terms of the approaches.

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

The Associations broadly agree with the proposal to include a new Certification Function to cover individuals in Systems & Control functions at firms where these functions do not require approval. We find the proposal to be reasonable as requiring an overlay of certification for those who are obligated to perform Systems & Controls roles should not be unduly burdensome.

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

We have no comments on this question.

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

We have no comments on this question.

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



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We have no comments on this question.

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

We have no comments on this question.