

Financial Conduct Authority
Governance and Cross Cutting Standards Policy
Cross Cutting Policy, Supervision, Policy & Competition
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By email: SMCR_DP@fca.org.uk

1 June 2023

Dear Governance and Cross Cutting Standards Policy team

Re: FCA/PRA Discussion Paper on the Senior Managers and Certification Regime (SM&CR)

The BVCA is the industry body and public policy advocate for the private equity and venture capital (private capital) industry in the UK. With a membership of over 700 firms, we represent the vast majority of all UK-based private capital firms, as well as their professional advisers and investors. Between 2017 and 2021, BVCA members invested over £57bn into around 3,900 UK businesses, in sectors across the UK economy ranging from heavy infrastructure to emerging technology. Companies backed by private equity and venture capital currently employ over two million people in the UK and 90% of the businesses our members invest in are small and medium-sized businesses.

We do not consider that the SM&CR is in need of fundamental reform. Firms expended significant time and resources in implementing the regime, and there is no need to make significant changes which would result in firms incurring significant additional costs. We consider that improving the operational efficiency of the SM&CR, particularly the process for approving Senior Managers, would provide the greatest benefit to firms and we welcome the steps the FCA and PRA have taken to reduce the time for approvals to be issued and to meet their statutory timeframes. However, we have set out in the responses to the specific questions some suggested adjustments to the regime which could improve its efficiency and reduce the burden on firms. We would note that the BVCA's member firms are solo regulated firms, and most will be Limited Scope or Core firms.

We have responded only to the consultation questions relevant to private capital and on which our members have specific views.

Q1: To what extent do you agree or disagree that the SM&CR has made it easier to hold individuals to account?

We agree that the focus on individual accountability under the SM&CR has reinforced the awareness of Senior Managers on their individual responsibilities, and that this has had a generally positive effect on firms.

Q2: To what extent do you agree or disagree that the SM&CR regime has improved safety and soundness and conduct within firms?

Whilst it is difficult to evidence that the SM&CR has had a measurable positive impact on safety, soundness and conduct within firms, we think it has supported firms in these areas by reinforcing what was existing good practice. The SM&CR has also reinforced the importance of establishing the right culture within firms.

Q3: To what extent do you agree or disagree that the fitness and propriety requirements support firms in appointing appropriately qualified individuals to Senior Manager roles?

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Most firms would seek to appoint appropriately qualified individuals to roles regardless of the specific requirements of the SM&CR. However, the fitness and propriety requirements reinforce and support firms' own recruitment processes.

Q4: Please provide any suggestions that can help ensure that appropriately qualified individuals are not deterred from taking up relevant Senior Manager roles.

One of the most significant disincentives is the length of time (and lack of certainty about the length of time) that it will take to obtain regulatory approval. We recognise that the PRA and FCA have taken steps to reduce the approval period and to handle applications within the statutory time frame, and this is welcomed.

In addition, there can be wide variation in the approach taken to individual applications by case officers; some will attract significant scrutiny and requests for additional information, and some will not and there is often no clear reason for the differential approach. This adds to the uncertainty surrounding the approval process.

Some elements of the SM&CR regime could also be streamlined to make it more efficient. We would support a fast-track process for certain applications where the risk is lower – for example, where a Senior Manager who is approved for one SMF is taking on an additional SMF within the same group, taking on a similar SMF role e.g., SMF3 (Director) and SMF27 (Partner) within the same group, or moving to a different firm to undertake the same or similar SMF function. We would also support the concept of a fast-track process for Senior Managers who have been approved by an overseas regulator under an individual framework that the regulators consider to be comparable. In addition, we think there would be merit in considering whether members of professions who are regulated by professional bodies (such as the SRA, ICAEW or ACCA) could benefit from an expedited process when applying for SMF roles which are relevant to their professional accreditation.

Q5: To what extent do you agree or disagree that the SM&CR has made it easier for firms to hold staff to account and take disciplinary action when appropriate against them?

We do not think that the SM&CR has necessarily made it easier to hold staff to account and to take disciplinary action against them. Many firms will have codes of conduct and similar which are at least as broad as the Conduct Rule requirements, and which enable them to hold employees to account and take disciplinary action.

Q6: To what extent do the specific accountabilities of individual directors established by the Senior Managers Regime work in ways that complement the collective responsibility of the board of directors or decision-making committees? Are there ways this could be improved?

We have not seen the specific accountabilities of individual directors impacting the collective responsibility of boards either positively or negatively. We would note that many of the BVCA's members are structured as limited liability partnerships where the governing body is either the members collectively or an executive committee (depending on the size of the LLP).

Q7: To what extent do you agree or disagree that the prospect of enforcement promotes individual accountability?

In general, we would agree that the prospect of enforcement has promoted individual accountability. However, there is a lack of clarity regarding regulatory expectations of Senior Managers, particularly in relation to what would constitute 'reasonable steps' and this can lead to uncertainty on the part of Senior Managers as to when they will be exposed to enforcement action. We would encourage the regulators to consider providing additional guidance on regulatory expectations of Senior Managers, particularly in relation to what will, and will not, be considered 'reasonable steps'.

However, we would also note that there are very few decided enforcement cases against Senior Managers, and the decisions so far are limited to the banking sector and do not involve Core firms. To that extent it is still unclear how enforcement will impact Senior Managers in Core firms.

Q8: How could our approach to enforcement be enhanced to better support the aims of the SM&CR?

As set out in the response to Q7 above, we think that providing as much clarity as possible on the expectations of Senior Managers, particularly with respect to the 'reasonable steps' which they are required to take would serve to reduce the uncertainty which Senior Managers have regarding their potential exposure to enforcement action and financial sanctions from performing their roles – for example, the FCA could consider publishing anonymised examples of behaviour which they have observed through their supervisory activities which they consider meets (or does not meet) the 'reasonable steps' standard. This aspect of the regime is also an issue for individuals considering whether to accept a role which would require them to be approved as a Senior Manager, particularly given that D&O insurance will not cover individuals for regulatory fines or the costs of an unsuccessful defence. Without guidance on 'reasonable steps' and a consistent pattern of enforcement against a measurable standard, quantifying risk to prospective Senior Managers in a meaningful way is very difficult.

Q9: To what extent do you agree or disagree that the scope of the SM&CR is appropriate?

Generally, we agree that the current scope of the regime is appropriate in terms of the identification of Senior Managers, Certification staff and Conduct Rules staff. We do however think that the FCA should consider limiting the application of the Client Dealing Certification staff (at least for Limited Scope and Core firms). Many firms are applying the Client Dealing function to a wide range of front office staff, from their senior Investment Committee members to very junior members of staff. We believe a more focussed approach would be proportionate and efficient, without creating a risk of material harm. The current issue stems from the fact that the rules apply a low threshold of simply "taking part" in, for example, investment management or arranging deals in investments. This can be interpreted broadly as covering anyone with any involvement in a transaction, however incidental. In the private equity context, deals typically involve a vast array of people from junior analysts (with no real autonomy) to very senior investment committee members (who make the investment decisions). We consider it would be more proportionate for the FCA to define the Client Dealing function in such a way that only those with the requisite seniority and authority are covered and we would be happy to discuss how this might be best achieved.

Q10: Are there actions the regulators could take in respect of the SM&CR that would help enhance competition or international competitiveness?

As set out above, improving the operational effectiveness of the regime is an important element in enhancing competition and international competitiveness.

In addition, there are aspects of the regime which could be streamlined to reduce the burden on firms which would also aid competition and international competitiveness, for example:

- (i) introducing a fast-track procedure for certain applications (e.g. where an individual is moving from a SMF at one firm to perform the same SMF at another firm);
- (ii) removing the requirement to issue a certificate annually – a certificate could be issued at the outset of an individual's employment with the firm and would remain in place until the firm determined the individual was no longer fit and proper – firms would continue to conduct an annual assessment of fitness and propriety but the administrative burden of issuing a certificate could be removed;

- (iii) restricting the requirement for regulatory references to Senior Managers – the requirement to provide a regulatory reference for Certification staff is burdensome and it is not clear that the references really fulfil the function they were originally intended to fulfil.

The expectations of Senior Managers, particularly with respect to the ‘reasonable steps’ requirement in the Senior Managers’ Conduct Rules, are also unclear. The FCA provides some guidance on behaviour which would not meet the requisite standards. However, there is no guidance on what would amount to ‘reasonable steps’. We would encourage the regulators to provide further guidance so that Senior Managers (and individuals considering taking on Senior Manager roles) have a clearer view of the regulators’ expectations.

Q11: To what extent do you agree or disagree that the SM&CR is applied proportionately to firms and individuals?

The SM&CR has an element of proportionality in the distinction between Limited Scope, Core and Enhanced Firms for solo regulated firms. However, there is relatively little proportionality within the application of the framework to each category of firm. For example, all SMF applications are subject to the same process regardless of the risk presented by the firm or by the particular SMF. We would encourage the regulators to consider whether further proportionality could be introduced to reflect the risk posed by firms or specific SMF roles. We also consider that reducing the scope of the Client Dealing function (as set out in the response to Q9) would be a proportionate approach.

Q12: How could the process for SMF approvals be further improved?

As mentioned above, improving the speed and consistency with which applications are processed would significantly improve the SMF approval process. As would the suggestions outlined above in the response to Q10 for streamlining the regime.

We would also encourage the regulators to consider permitting individuals to start to perform the SMF role when the application for approval is submitted – perhaps with oversight from an existing SMF. An individual could be considered to be conditionally approved pending confirmation from the relevant regulator. This would avoid the situation where there is a gap between an individual being hired and their being able to start performing their SMF role.

It would also be helpful if the relevant regulator could provide greater transparency regarding the progress and anticipated timing for a decision on an application.

Finally, we suggest that the form and content of the relevant application forms be reviewed to ensure that all information requested is necessary for the regulator to receive under the SM&CR regime. We note that an application for a Senior Manager for a MiFID firm actually involves the provision of multiple forms with attachments and that some of the information sought is duplicative across the forms. We would also encourage the regulators to provide more on-line guidance for completing applications, especially around any new questions.

Q13: To what extent do you agree that the process for obtaining criminal records and notifying these to the regulators is effective in supporting the aims of the SM&CR?

It is a requirement to obtain criminal record checks for Senior Managers, and we consider that this is effective in supporting the aims of the SM&CR. However, we think it would be helpful for this to be extended to certified staff. Some firms request criminal record checks for certified staff, but the absence of a regulatory requirement means these firms have to identify a lawful basis for processing the data under GDPR. The GDPR creates a challenge for firms processing criminal record check data where this is not mandated.

We would also note that if the Senior Manager candidate is coming to the UK from another country, the process for obtaining criminal record checks in that other country may not be as straightforward as in the UK.

Q14: To what extent do you agree or disagree that the 12-week rule sufficiently helps firms to manage changes in SMFs?

The 12-week rule does not always align with the time it can take to recruit a new Senior Manager and obtain approval. If a Senior Manager leaves unexpectedly, it may take longer than 12 weeks to recruit a replacement and obtain approval.

As suggested above, permitting individuals to commence their Senior Manager's role on a conditional basis following submission of the application would mitigate this problem as the 12-week rule would at least give firms a 12-week period to recruit a replacement.

Furthermore, the restriction of the rule to circumstances where the absence is temporary or reasonably unforeseen is unduly limiting. It may be reasonably foreseen that a Senior Manager would leave (for example, where there is a takeover and the Senior Manager has indicated that they do not intend to remain following the acquisition), but in these circumstances it is not possible to use the 12-week rule to cover the period before a new Senior Manager can be appointed.

Q15: To what extent do you agree or disagree that the regulators have in place

a. An appropriate set of Senior Management Functions to achieve the aims of the SM&CR?

In general we consider that the SMFs are appropriate for the aims of the SM&CR. However, we would note that the shift from Core to Enhanced Scope firm introduces a number of additional SMFs as well as other requirements and so it is critical that the threshold for applying the Enhanced Scope status is appropriately calibrated. We believe the thresholds are currently appropriately calibrated, and any change which brought more Core firms into the Enhanced Scope category would have a significant adverse impact.

b. An appropriate set of Prescribed Responsibilities to achieve the aims of the SM&CR?

In general we agree that the Prescribed Responsibilities are appropriate. The proportionate application of Prescribed Responsibilities between Core and Enhanced Scope firms is very important, and any increase in the number of Prescribed Responsibilities applicable to Core firms would increase the burden on such firms significantly.

Q16: To what extent does the Duty of Responsibility support Personal accountability and better conduct?

The Duty of Responsibility generally reinforces the idea of personal accountability and supports the required conduct. However, as stated above, we think it would be beneficial if the relevant regulators could provide additional guidance on the expectations of Senior Managers, particularly with respect to what constitute 'reasonable steps'.

Q17: To what extent do you agree or disagree that Statements of Responsibilities and Management Responsibilities Maps help to support individual accountability?

Generally, we agree that Statements of Responsibility and Management Responsibilities Maps support individual accountability by setting out the matters for which Senior Managers are responsible. However, we would note that most of the BVCA's member firms are Limited Scope or Core firms and so do not need to maintain Management Responsibilities Maps. We would also suggest that the regulators consider whether it would be possible to centrally store the Statements of Responsibility – for example, these could form part of the annual FCA directory or firm details attestation process.

Q18: To what extent do you agree or disagree that the Certification Regime is effective in ensuring that individuals within the regime are fit and proper for their roles?

We agree, in general, that the Certification regime is helpful in ensuring individuals are fit and proper for their roles. However, as set out above in response to Q10 we think the requirement to issue a certificate annually is unnecessary and imposes an unnecessary burden on firms and, as set out above in our response to Q3, we would note that most firms would seek to appoint appropriate individuals regardless of the specific requirements of the SM&CR. We also repeat our comments to Q9 that it is disproportionate for the Client Dealing function to apply to such a wide range of staff.

Q19: Regarding the Directory of Certified and Assessed Persons, to what extent do you agree or disagree that:

a. It captures the appropriate types of individuals?

We agree that the Directory captures the appropriate types of individuals.

b. The requirements for keeping it up to date are appropriate?

We agree the requirements are appropriate and note they are similar to the previous regime.

Q20: To what extent do you agree or disagree that regulatory references help firms make better-informed decisions about the fitness and propriety of relevant candidates?

The objective behind requiring regulatory references was to ensure that individuals who may have engaged in conduct which calls into question their fitness and propriety cannot simply move from one authorised firm to another with their new employer being unaware of the previously poor conduct.

We agree with this objective; and, in principle, the obligation on firms to disclose Conduct Rule breaches in regulatory references does assist in ensuring that where there is a question about an individual's fitness and propriety this is disclosed to a future employer. However, the requirement to provide references for all Senior Managers and Certification staff imposes a significant burden on firms. We are aware that some firms are receiving requests for regulatory references for very junior employees and we understand this is exacerbated by reference agencies who routinely request references for a very wide range of employees. We would suggest that the regulators consider whether the requirement to provide a regulatory reference might be revisited and the scope of those employees for whom a firm must provide a reference be restricted to more senior roles.

Q21: To what extent do you agree or disagree that the Conduct Rules are effective in promoting good conduct across all levels of the firm?

In general, we would agree that the Conduct Rules promote good conduct. However, additional guidance from regulators of good and poor conduct would assist individuals' and firms' understanding and clarity of regulatory expectations.

Please do not hesitate to get in touch if you have any questions or if you would like to discuss any of the above in more detail (please contact Tom Taylor ttaylor@bvca.co.uk / Nick Chipperfield nchipperfield@bvca.co.uk).

Yours faithfully,



Tim Lewis

Chair, BVCA Regulatory Committee