Financial Services Consumer Panel
AN INDEPENDENT VOICE FOR CONSUMERS OF FINANCIAL SERVICES

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The Financial Conduct Authority
12 Endeavour Square
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By email: SMCR_DP@fca.org.uk

Dear Sir/Madam,

Financial Services Consumer Panel response: DP 23/3 Review of the Senior Managers & Certification Regime

The Panel welcomes the opportunity to comment on the review of the Senior Managers & Certification Regime (SM&CR). The SM&CR creates individual accountability for practitioners in the financial services industry, drawing a direct link between the conduct of individuals and the outcomes experienced by consumers. We believe this link is important and has the potential to drive up conduct standards and improve outcomes for consumers, assuming that the SM&CR is supervised and enforced robustly and in line with the spirit of its objectives. However, we do not believe the full potential of the SM&CR has been realised in practice and this review is an opportunity to address this.

We have not answered the questions posed in the Discussion Paper as we do not feel there is sufficient evidence available for us to be able to do so. Instead, we make overarching comments about measuring the success of the SM&CR and suggestions for how the regime could be strengthened in this covering letter. We also discuss how the SM&CR does and should interact with other regulatory regimes and, finally, pass comment on the Directory as an essential tool in the regime's effectiveness.

1. Measuring success

The Discussion Paper describes the SM&CR as a "mostly preventative" regime. A preventative regime relies on a strong deterrent. The number of enforcement actions, and how this changes over time, would be a useful measure of the SM&CR's success in this regard. The current available evidence, of which there is not much, suggests the SM&CR has not resulted in public enforcement action as often as expected and therefore the regime has lost its initially strong deterrent effect.

We note that the Prudential Regulation Authority (PRA) recently announced the outcome of enforcement action under the SM&CR and the only other high-profile example of the SM&CR being used was joint PRA and FCA action in 2018. In June 2022, the FCA published data which showed that between the SM&CR first becoming effective in 2016 and 27 April 2022, 57 investigations under the SM&CR had been closed of which 52 resulted in no further enforcement action. Only 2 resulted in a financial penalty and public censure. Enforcement action where the outcome is made public sends a clear message to the rest of the market that regulators can and will hold individuals to account. Without this, it is difficult to see how the deterrent effect of the SM&CR could be achieved.

It also seems that public enforcement action has to date been based primarily on direct personal misconduct by Senior Managers, rather than on failure to prevent misconduct by others. This suggests that the regime has not been enforced to its full effect.

We recognise the difficulty of measuring the success of preventative measures. One way regulators could do this is to draw a clear link between poor culture and poor outcomes which would allow firms to design ‘early warning’ systems with a greater and more proactive focus on outcomes as opposed to compliance. Furthermore, when the SM&CR was introduced, there was a strong narrative that it was designed to improve the culture within firms. If regulators can prove that, a) the SM&CR has led to positive culture change, and b) this better culture means better outcomes for consumers, then they can demonstrate the success of the SM&CR.

Another potential measure of success is a departure from a tick-box compliance culture. The Discussion Paper sets out industry’s concerns about the operational/ administrative burden of the SM&CR and delays in regulatory approvals. This suggests that firms view the regime as a compliance exercise and have lost focus on the desired outcome of cultural change. Regulators can also test firms’ focus on outcomes through its supervisory engagement with Senior Managers and by sampling corporate documents such as training manuals and Board minutes.

Once regulators have developed measures of success for the SM&CR, these should be made publicly available, for example, on the FCA’s outcomes and metrics webpages. This will bolster the deterrent effect of the SM&CR.

2. Strengthening the SM&CR

If the full enforcement and deterrent effect of the SM&CR is realised, it can be a useful tool for regulators to improve outcomes for consumers in financial services. In addition, we recommend the impact of the regime is strengthened by:

- Extending it to payments firms. This will help to address the significant concerns, which we share, outlined by the FCA in their recent [Dear CEO letter](#) to this sector.
- Extending it to Appointed Representatives (ARs). The Panel has longstanding concerns about the perceived light-touch, low burden regulation and lack of monitoring when it comes to the question of ARs[1]. Applying personal accountability to ARs will help address this and ultimately reduce the harm caused to consumers by ARs.
- Extending its application to Directors of relevant UK holding companies. This will ensure the right 'tone from the top' and prevent such Directors from using corporate structures to evade accountability for poor conduct in firms under their control.
- Creating a Senior Management Function to hold a named individual accountable for Customer Outcomes. We have previously called for this in relation to the New Consumer Duty as we feel this would ensure that Customer Outcome discussions become commonplace in Board and Senior Executive meetings[2].
- Creating a Senior Management Function to hold a named individual accountable for firms' ethical use of data and Artificial Intelligence. We have previously called for this in our responses to the Digital Regulation Cooperation Forum[3].
- Creating a Senior Management Function for the Head of HR/People because the person in this post has a key role in aligning incentive schemes, performance appraisals and hiring processes that drive the behaviour of Senior Managers and other financial services staff.
- Given the importance of culture change in delivering the benefits of the SM&CR, a named individual should be given responsibility for overseeing culture change within firms[4]. This would support an SMCR position accountable for delivering against the Consumer Duty and ensure the Duty leads to widespread culture change rather than just additional compliance activity.

[1] See our response to the FCA's consultation on improving the AR regime: https://www.fs-cp.org.uk/sites/default/files/final_draft_fscp_response_fca_ar_consultation_.pdf
[2] https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_cp21-36_a_new_consumer_duty_20220214.pdf p12
[3] See our responses to the DRCF: https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_drcf_auditing_algorithms_20220607_0.pdf and https://www.fs-cp.org.uk/sites/default/files/final_fscp_response_drcf_benefits_and_harms_of_algorithms_20220607.pdf
[4] We initially proposed this in our 2017 consultation response on the regime

- Using the SM&CR to 'reach over' the perimeter in order to address harms. We have welcomed the FCA recently taking this proactive approach to improve the conduct of currently-unregulated buy-now pay-later firms[5].
- Using the SM&CR to its full capacity by holding Senior Managers to account-including by way of effective public enforcement action-for failing to prevent misconduct.

Deterrents, such as the SM&CR, rely on the 'Three Cs' of communication, capability and credibility. It is clear that the SM&CR has been well communicated, by the FCA and by industry bodies. The Panel would suggest that the FCA has some way still to go on demonstrating its capability, where the FCA's ability to act has appeared slow and limited and even more so on credibility where there have been so few public censures or prosecutions under the SM&CR that its value as a deterrent is questionable.

3. Interaction with other regimes

It is important to consider the SM&CR in the context of the other regulatory regimes it co-exists with. This will aid regulatory coherence and maximise the potential benefits of the regime. We have comments on 3 regimes in particular:

(i) The Consumer Duty. This explicitly links individuals' conduct with consumer outcomes in a way not done before and we believe compliance with the Duty will require significant culture change in many firms. It is vital for the success of the Duty that Senior Managers be held accountable for the consumer outcomes their firms deliver under the Duty, including the overall objective that firms must act to deliver good outcomes for consumers. With this in mind, we believe regulators should create a Senior Manager Function to make one person within a firm accountable for consumer outcomes.

(ii) The CASS Regime. This is an example of a regime that has successfully created the deterrent effect that currently the SM&CR lacks. This is because firms are fearful of the implications (such as being forced to cease trading) of non-compliance with the CASS rules. The cost of non-compliance is therefore significant, making non-compliance not an option.

(iii) Whistleblowing. Firms' employees are likely to have better insight than anyone else into the culture within their firm, the behaviour of senior managers and ultimately the outcomes being

[5] https://www.fca.org.uk/news/press-releases/fca-warns-buy-now-pay-later-firms-about-misleading-adverts#:~:text=The%20FCA%20is%20concerned%20consumers,which%20may%20breach%20FCA%20rules.

delivered to their customers. It is vital regulators maintain robust protections and support for whistleblowers to ensure that they can raise concerns about conduct in their firms should they need to.

4. The Directory

Finally, we wish to comment on the Directory[6]. The Directory has been integrated with the Financial Services Register and we have long-standing concerns that the Register is not fit for purpose. Information contained in the Register is too complex and what appear to be duplicative entries make it confusing. This means consumers cannot make informed decisions about the firms they transact with.

We would like to see enforcement action against Senior Managers recorded on the Directory (and Register). This information should be repeated across all of that individual's entries on the Directory, especially where they move roles to a different firm. Otherwise, individuals can evade true accountability by simply switching roles.

We have copied this letter to HM Treasury to be considered as part of their Call for Evidence.

Yours sincerely,

Helen Charlton
Chair, Financial Services Consumer Panel

[6] For our previous response on the Directory, see here: https://www.fs-cp.org.uk/sites/default/files/fscp_response_introducing_the_directory.pdf