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Dear Sophie

RE: Discussion Paper16/4 – Overall responsibility and the legal function

The Investment Association is delighted to provide input to your consultation.

The FCA has published this discussion paper to clarify how and why the legal function is currently captured under the Senior Managers and Certification Regime (SM&CR) and to consider whether it should continue to be part of the regime.

Although the DP is primarily aimed at those firms already captured by the regime (banks, building societies and credit unions), any outcome will ultimately affect asset managers when the SMCR is extended in 2018.

On this basis, the IA felt it would be useful for legal functions within firms to consider what this would mean for their roles.

Yours



Johannes Woelfing

Regulatory & Legal Specialist

ANNEX I

RESPONSES TO QUESTIONS

ABOUT THE INVESTMENT ASSOCIATION

The Investment Association is the trade body that represents UK investment managers, whose 200 members collectively manage over £5.5 trillion on behalf of clients.

Our purpose is to ensure investment managers are in the best possible position to:

- Build people's resilience to financial adversity
- Help people achieve their financial aspirations
- Enable people to maintain a decent standard of living as they grow older
- Contribute to economic growth through the efficient allocation of capital

The money our members manage is in a wide variety of investment vehicles including authorised investment funds, pension funds and stocks & shares ISAs.

The UK is the second largest investment management centre in the world and manages 37% of European assets.

More information can be viewed on our [website](#).

QUESTIONS

1. Do you agree with our summary in Chapter 3 of the key policy arguments for and against inclusion of the management of the legal function in the SMR? Have we missed any key arguments?

We agree with the implicit assertion in the DP that the role of Head of Legal (HoL) includes a heavy administrative and management component. However even acknowledging that - for example, the drafting and negotiation of an IMA carries a substantial component of implicit legal advice, the Board will look to the HoL more often for delivery than for pure legal guidance.

We also agree that carrying out the management/delivery component of the role to a high standard is important to the proper running of a financial services firm and ultimately to the FCA's objectives.

Therefore, we understand the desire to bring the HoL within the Regime and this may ultimately bring advantages in reinforcing the significance of the role within firms.

However there remains a number of substantial concerns and objections (some already raised within this DP) which focus primarily on the need for the HoL to give unbiased advice to their client and maintain protection by legal professional privilege. This need must not be compromised.

In considering the proposals, one of the key statements in this DP can be found at 3.21 "...it is the management of the function and not the provision of legal advice that brings the head of legal function into the SMR." The DP also states at 3.23 "...concerns [about management of the function] are distinct from the quality and accuracy of any specific legal advice provided by the function, which we are not seeking to regulate".

We would welcome some reassurance to the profession that this distinction will be protected. HoL need to advise fearlessly, in the best interests of their client, including circumstances where there may be a conflict of interest to be managed.



In some cases, the FCA may not have in-house expertise to judge the quality of a piece of legal advice (that function is fulfilled by the SRA and the courts). At the same time, the FCA should not be given such powers, whether in respect of firms or HoL themselves, which might enable them to pressurise HoLs into disclosing the content of that advice.

Given the concerns which have been raised, we urge that such protections should be incorporated explicitly in the rules.

2. Do you believe that the SM&CR should include a requirement to allocate overall responsibility for the management of the legal functions to a Senior Manager? Why?

The Investment Association is representing a broad range of different investment management firms and we received a broad range of views in response to the question of whether the FCA should include a requirement to allocate overall responsibility for the management of the legal department to a senior manager. Members agreed, regardless of their views on the allocation of the legal function to a senior manager, that such a requirement would be a significant change in existing regulation and should be subject to a full consultation process.