EVIA European Venues & Intermediaries Association

The European Venues and Intermediaries Association ["EVIA"] supports increased Diversity and Inclusion (D&I) in the financial services sector, the FCA's objectives highlighted in CP23/20 and the aim of ensuring the UK is an attractive place for firms to do business.

However, our members operate global and wholesale markets and at least for such firms without any retail facing participation, we believe substantial aspects of the proposed requirements could be amended to ensure that they are more practical and operate efficiently. We have set out these concerns both in summary and in question by question responses to the consultation paper below.

Summary Concerns and Comments

We note that the scope of our concerns and queries in respect of the D&I proposals under consultation align with the themes of questions raised and discussed on the FCA webinar of 30th October. These are namely:

i. FCA "going it alone," without other authorities or global standard setters making any similar conduct regulations
ii. FCA applying "Consumer Duty" conduct approach to wholesale and cross-border firms
iii. application to group service companies for proposals applying at a solo-entity basis
iv. application to staff within overseas branches, or to UK branches of overseas firms or group subsidiaries
v. further guidance as to how Non-Financial Misconduct rule breach findings could be applied consistently across the industry, the context of onboarding new employees, and guidance concerning materiality thresholds
vi. on whether target setting will actually drive the desired outcomes
vii. on the adequacy of data collection, the consequences of reporting it & risks to its storage and transmission
viii. regarding the unintended and opposite effects of data disclosure on the target outcomes

The FCA approach here is predicated on outcomes for "consumers" and consequently it is too closely constructed from the "Consumer Duty" to be effective for wholesale markets firms. We would rather advocate that its application across wholesale markets firms should be via:

i. a more delegated and a far less prescriptive approach,
ii. agreed and implemented global standards within CPMI/IOSCO at a global level and the FMSB at a national one.

This would align with the current overarching direction in the UK government's FRF/SFR reforms to delegate more self-regulatory powers down to firm governance and rules in order to promote competitiveness and proportionality. Under a policy approach where the FCA seeks to apply the territorial perimeter across staff in both UK situated branches and subsidiaries, both derogation and proportionality should be integrally designed for firms whose limitations of permissions exclude retail customers.

By extension, the FCA's basis for intervention would be neither efficient, nor effective, where firms operate in a global marketplace for talent and who intrinsically recognise that in order to

EVIA
Warnford Court
29 Throgmorton Street
London, EC2N 2AT

evia@evia.org.uk
www.evia.org.uk
+44 (0)20 7947 4900

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compete, they need to proactively offer existing and prospective employees the culture and conditions that exceeds the marginal thresholds under consideration.

In these sectors, and as often made clear in the UK by both HM Treasury and the Parliament Treasury Select Committee, market forces act far more effectively in providing the impetus which the firm and its stakeholders require, whilst those outcomes which the FCA is seeking to replicate by intervention are not relevant to the scope of business.

Firms need to give this effect across the geographical footprint of their business operations, whereas the FCA proposals are limited in scope and raise complexities across and between both group subsidiaries and geographical borders. By the same token, and at the FCA's admission, any failure to attain the benefits of a D&I strategy to attract and retain staff would impede a firm's ability to survive and compete, thus negating the need for interventions.

Given that D&I therefore now plays a role in a competitive market place, many or most of the proposals in the consultation run again the FCA accepted principles of good regulation including: [1] Necessity, being Targeted only at cases in which action is needed; and [2] being Proportionate. In seeking to duplicate market forces, the FCA proposals are also frictional against new operational objectives to promote effective competition. Overall we would prefer that the FCA construct proposals for wholesale firms more around principles [5] for Senior management responsibility; and [7] regarding Openness and disclosure where firms are able to comply or explain their approaches via transparent public disclosures.

Specific Comments

i. Proposals applying at a solo-entity basis

Collecting the relevant data at a regulated legal entity level is not possible where staff are employed by a services company. While front office staff who are employed by a services company can more simply be attributed to one or more regulated entities for whom they act, the same cannot be said for specialist professional and administrative staff, for back office and across most support staff. These functions tend to work for the group and provide services to multiple regulated and non-regulated entities across jurisdictions.

We note that the FCA has adopted a flexible mindset in this regard, and we underline that often, a better approach would be collect data across all UK regulated entities and branches and report a single output. It quickly becomes apparent that even under a single group entity application, many complexities quickly surface, such as the absence of peer group comparisons, cross-border activities and differential threshold triggers, which all hold significant competition implications, data challenges and the requirement for extensive guidance.

At issue here, however, is that any of the target benefits quickly diminish where such guidance is not deferred to international standard setting bodies as the per group comparative and competition aspects quickly fade,

ii. Non-Financial Misconduct

EVIA
Warnford Court
29 Throgmorton Street
London, EC2N 2AT

evia@evia.org.uk
www.evia.org.uk
+44 (0)20 7947 4900

Further clarification and case examples as to how the FCA statutory objectives should be considered as part of Fit and Proper assessments would be helpful, but at the same time the FCA should seek to mitigate the risk of existing draft guidance being ignored (see draft FIT 1.3.13G and 1.3.14G). It is apparent that this would not be immediately clear to those individuals within firms holding the responsibilities for assessing any non-financial misconduct in the context of fitness and proprietary thresholds, and so the existing draft guidance is at risk of being ignored.

Bearing in mind the discussion in the FCA webinar (30th October) that thresholds to scope, location and repetition be applied; should the proposals regarding conduct rules be implemented, we consider that the number of conduct rule breach findings would become more frequent. This would be particularly relevant in instances where there is a clear difference in position hierarchically, and so industry would again appreciate further guidance and case-examples as to how such conduct rule breach findings should be applied consistently and alongside existing employment processes. These would extend to grievance procedures.

Considering non-financial misconduct in the context of onboarding new employees, we note that such conduct rule breaches would need to be more focused on regulatory references and upon an employee's personal life. Bearing in mind the restrictions on activity scope and location outlined in the consultation and in the webinar; as well as repeated edge cases such as "afterparties", we would again require further clarity as to what should be considered as material and significant. For example, how should repeated non-criminal offences be taken to exceed a threshold, or where driving offences move from civil to criminal be considered in Fitness and Proprietary assessments?

iii. Firms Setting Targets

We have concerns that target setting will not drive the outcomes the D&I paper seeks to achieve. Since setting realistic targets will necessarily depend on obtaining relevant and accurate data from employees, the flaws identified in the data aggregation exercises discussed below will have a compounding impact on the aggregated data and upon the setting and evaluation of achieving targets.

The employees of our member firms' have been vocal in setting out that they would rather be rewarded on the basis of merit, as opposed to fulfilling a target; especially one-such that is not set by their business line. Firms are clear that setting such targets risks alienating good talent because any such people do not want to be hired because they tick a box. Again we note that this was raised in the FCA webinar (30th October), but it was not adequately addressed.

Moreover, based on the evidence of firms operating in the sector, we would strongly dispute the FCA assumption that the best blend of talent is necessarily reflects a perfectly balanced demographic and therefore challenge the advantages of setting targets. This is reflected in our detailed answers that seek for firms to operate their own disclosures, tailored to the best interests of the firm and its staff within its operational context.

iv. Data Reporting & Data Disclosure

EVIA
Warnford Court
29 Throgmorton Street
London, EC2N 2AT

evia@evia.org.uk
www.evia.org.uk
+44 (0)20 7947 4900

EVIA European Venues & Intermediaries Association

For wholesale firms who operate across many jurisdictions and who tend have group structures that are sufficiently complex to require intragroup service and governance arrangements as well as cross-border outsourcing, the estimated expense of assessing, recording and reporting across the functional structures are unlikely to provide benefits to either the firm or to the industry segment. We therefore consider that any reporting metrics should be able to be designated at either legal entity level or at operating company level depending on the suitability. The reporting metrics should be voluntary, with structured disclosures constituting the primary output rather than regulatory reporting under mandate.

Firms will not be able to validate and verify assessed information and therefore could not take responsibility for either the completeness nor the accuracy of data provided by their employees. Firms have already identified a likelihood for a large proportion of employees to opt to use the option '*prefer not to say*', given that individuals are generally becoming increasingly wary of sharing personal information with third parties, including their own employers or contractors. We note that the FCA could have drawn attention to overarching cultural shift away from the disclosure of personal data to corporations and to government institutions both over concerns around security and privacy, and in recognition of the provision of the General Data Protection Regulation.

Other concerns addressed neither in DP21/1 and CP23/20, nor in the industry webinar are the risks pertaining to the requirement for a firm to electronically store, remotely access and update large amounts of personal data. As active participants in the FCA "TACIG" cybersecurity taskforce, the proposals here would go against current cybersecurity best practice, and we would ask that the FCA set out effective mitigations before taking the proposals any further. Moreover, in operating trading venues under MiFID2, firms have proactively sought ways to both pseudonymise and physically distance any client personal identification data records ["PIId"] for these very reasons.

Whilst the proposals set out by the FCA in CP23/20 and the feedback to DP 21/1 do address, 'Data protection considerations' and reflect discussions with the UK ICO regarding the perimeter of GDPR, it places more personal data processing and storage risks within the firms in order to generate the anonymised and pseudonymised onwards data transmission and poses a challenge for firmwide communications. Where firms are not able to produce full and accurate sets of data because of the privacy concerns of staff, the residual data is likely to retain bias, especially away from more senior and overseas staff who would be more likely not to report.

y extension, we are particularly concerned with the potential inference the FCA may draw on any firm's "inclusivity" should employees elect to 'prefer not to say'. It appears inevitable that the FCA would conflate employees opting for the right to not disclose their personal data as being indicative of an employer's lack of inclusivity. Rather, there are many and varied reasons why an employee would prefer not to disclose, and these actually are likely positively correlated with a more international and varied body of staff.

We recognise a risk that where the published data is unrepresentative, prospective candidates may view them as unattractive and be deterred from working at that employer. Consequently, such reporting may have an unintended, and the exact opposite effects from propagating diversity. We would advocate simpler and standardised disclosures with the regulatory framework for wholesale firms to solely focus on the premise that firms should welcome all, regardless of predetermined characteristics, targets or prescribed reporting.

EVIA
Warnford Court
29 Throgmorton Street
London, EC2N 2AT

evia@evia.org.uk
www.evia.org.uk
+44 (0)20 7947 4900

EVIA European Venues & Intermediaries Association

A recent report by Norton Rose Fulbright highlights the extent to which these types of proposals are not mirrored across the G20 countries, and nor do they come under accepted global standards. We would appreciate further clarity as to what the FCA intends to do with this data and how it intends to deploy the data within the supervisory oversight of firms. These were not set out in DP21/1 and CP23/20, and it remains a matter of conjecture as to whether the FCA intends to establish a transparent regulatory perimeter for D&I metrics or a preferred target model. Whilst urging that such topics are better approached via industry standard setting and best practices, we remain very concerned that the FCA will set relatively higher costs and requirements on Fixed Portfolio firms as well as those exceeding the quantitative employee threshold.

It is self-evident that typologies such a prescribed characteristics should first be agreed at international standard setting bodies and then set out as ISO standards prior to any regulatory inclusion. In the absence of such a framework, we would welcome further industry discourse around why the FCA has chosen some characteristics as mandatory, whilst some others as voluntary, and whether there should be legislative insurance against mission creep and style drift in the ongoing scope of any requirements.

v. Cost Benefit Analysis

Recognising that the cost-benefit analysis approach is an imperfect model and necessarily predicated on its initial assumptions; we caution that the FCA approach does not properly account for the cost of staff time that the proposals will demand across the breadth of firms; and we remain highly sceptical that the proposals would proportionately benefit the firm in achieving healthy diversity and inclusion. It is likely that these views stem from the underlying facet that the FCA has sought to apply retail and consumer facing duties across to wholesale firms without translating into a self-regulatory framework which would be the correct proportionality adaptation.

Answers to Questions

Q1: To what extent do you agree that our proposals should apply on a solo entity basis?

The approach to staff who work for entities but are centrally employed by a group service entity is not at all clear. In many cases staff will work across and between entities as well as for both subsidiaries and branches. In the absence of guidance, should firms adopt their own policies in how to approach their individual group wide arrangements?

We would understand that a group operating several entities as subsidiaries would count each entity against the threshold of 251 employees who are primarily based in London / UK. This would facilitate a degree of proportionality, and for that reason, as well as the application of the same approach across group entities', so the solo entity basis is preferable. Clearly firms should be able to decide themselves whether to apply the requirements on a solo entity basis or on an aggregated basis.

EVIA
Warnford Court
29 Throgmorton Street
London, EC2N 2AT

evia@evia.org.uk
www.evia.org.uk
+44 (0)20 7947 4900

EVIA European Venues & Intermediaries Association

We note that a significant number of solo entities in the membership would not be captured by the majority of the FCA requirements, as they have fewer than 251 employees based in the UK (averaged over a three-year period). We note also that these entities would not be captured, even if other UK solo entities within the same group would be in scope. Due to the explicit and the implicit costs involved, this brings in an unwelcome competitive advantage and distortion, not only between the UK and overseas, but also within the UK.

In respect of territorial scope, we understand that in-scope staff would have to be in a UK establishment of an overseas firm in a way that would also include branches as well as UK regulated subsidiaries. Therefore we would suppose that firms should make assumptions about where staff spend the majority of their time, and whether work is done for regulated group entities, to understand whether they are in scope, or count towards the firm's thresholds. Besides assumptions and models, issues of partial inclusion would raise process complexity.

The approach is not at all clear to staff who are contractors, self-employed or partners, rather than on full time and permanent contracts. In other aspects of regulation and supervision, such as the SMCR, self-employed staff are to be treated as "employees," but in the absence of employment contracts we would assume that the opposite approach is to be taken to D&I. Guidance should be provided.

Q2: To what extent do you agree with our proposed proportionality framework?

We don't agree with the proportionality framework. It adds considerable confusion and costs when a straightforward approach in line with the regulatory principles could be simply applied as a uniform disclosures approach.

Q3: Are there any divergences between our proposed regulatory framework and that of the PRA that would create practical challenges in implementation?

No. All our firms are solo regulated.

Q4: To what extent do you agree with our definitions of the terms specified?

In relation to the management body, we would much prefer the approach to use the extensive existing terms, including SMF functions and the mapping that firms have put in place for SMCR and IFPR. Another separate and overlapping regime appears to contravene the principles of effective regulation.

We understand that the FCA's definition of 'employees' includes contractors. This definition diverges from the definition used in the SMCR and some other rules and initiatives. As such it would benefit from clarification across the FCA Handbook that the definition of employee either does, or does-not, include some or all contractors and partners (as specified).

EVIA
Warnford Court
29 Throgmorton Street
London, EC2N 2AT

evia@evia.org.uk
www.evia.org.uk
+44 (0)20 7947 4900

EVIA European Venues & Intermediaries Association

Q5: To what extent do you agree with our proposals to expand the coverage of non-financial misconduct in FIT, COCON and COND?

We agree with the views made by respondents to the prior DP, that a clearer and more straightforward approach to how firms should categorise and treat non-financial misconduct is required. Firms note that individuals sanctioned in one employment may be immediately rehired by competing firms, despite measures under the SMCR approach to regulatory references. Therefore the additional guidance on the coverage of non-financial misconduct in COCON, FIT and COND is appreciated.

Please note our specific requests concerning NFM, especially for further clarification and case examples as to how the FCA statutory objectives should be considered as part of Fit and Proper assessments. Concisely, the FCA should seek to mitigate the risk of the draft guidance being ignored (see draft FIT 1.3.13G and 1.3.14G). This would not be immediately clear to those individuals within firms holding the responsibilities for assessing any non-financial misconduct in the context of fitness and proprietary thresholds, and so the draft guidance is at risk of being ignored.

The underlying scope of the behaviours could be better delineated. Whilst industry has generally interpreted FIT as applying to conduct outside the workplace, by contrast, COCON is solely applied to behaviour inside the workplace. The approach to extend the scope to outside the workplace and draw a threshold around the term, "serious" add complexity and opacity to the regulatory perimeter whilst also asking firms to make very subjective judgements.

Indeed, COCON factors remain overly subjective and we still struggle to understand how the FCA proposals align with the "Frensham Case" findings and the limitations set out by FCA in its letter to the UK Treasury Committee regarding this matter[1]. Given its profile, we might have hoped for a case study within the CP in that particular regard in order to provide a little more guidance to firms for a clearer understanding of what would, or would not be "serious."

As a rule, and most especially for firms operating in the wholesale markets, the FCA should not take an approach here any different to that in place across the other G20 countries. We note that neither the DP nor the CP makes an attempt at cross-border comparisons and fact-finding which we would see as a very first step, the development of IOSCO standards being the further pre-condition.

Q6: To what extent do you agree with our proposals on data reporting for firms with 250 or fewer employees, excluding Limited Scope SM&CR firms?

[1] Specifically, the letter notes that the FCA "*is not an alternative to criminal prosecution, a firm's internal disciplinary processes or for proceedings through the Employment Tribunal*".

EVIA
Warnford Court
29 Throgmorton Street
London, EC2N 2AT

evia@evia.org.uk
www.evia.org.uk
+44 (0)20 7947 4900

EVIA European Venues & Intermediaries Association

To refer again to our specific comments in respect of proposals applying at a solo-entity basis as well as our prior answer to question 1. Further guidance around the scope of a qualifying employee is required.

We suppose that a group operating several entities as subsidiaries would count each entity against the threshold of 251 employees who are primarily based in London / UK. This would facilitate a degree of proportionality, and for that reason, as well as the application of the same approach across group entities', so the solo entity basis is preferable. Clearly firms should be able to decide themselves whether to apply the requirements on a solo entity basis or on an aggregated basis.

We note that a significant number of solo entities in the membership would not be captured by the majority of the FCA requirements, as they have fewer than 251 employees based in the UK (averaged over a three-year period). We note also that these entities would not be captured, even if other UK solo entities within the same group would be in scope. Due to the explicit and the implicit costs involved, this brings in an unwelcome competitive advantage and distortion, not only between the UK and overseas, but also within the UK.

Q7: To what extent do you agree with our proposals on D&I strategies?

We support the concept of standardising and reinforcing firms' D&I policies into the concept and structured approach and adoption of a "D&I Strategy". However this should solely constitute Guidance rather than rules, a point clarified in the parallel PRA consultation. Overall this helps firms formalise their approach and so facilitating a measure of comparability for retail facing firms.

Our members are not retail facing firms and remain concerned that a one-size-fits-all approach for applying identical D&I policies, would be suitable or proportionate. Rather, such approaches are counterproductive because they seek to homogenise firms, their common approaches to outsourcing, and remove diversity in all its facets. A group strategy document should be sufficient to meet the FCA's requirements.

Q8: To what extent do you agree with our proposals on targets?

We disagree with the setting of targets. Even where firms are expected to set their own targets to address under-representation.

Targets can be misleading, diversionary, subject to data disclosures, to change or reinterpretation or generally outside the control of the firm. This is particularly true of wholesale international firms, and especially so in the absence of voluntary data under international standards and adoption across the G20 countries. Rather, firms should make comprehensive standardised and aggregated disclosures about their approach to businesses across a self-prescribed range of metrics.

EVIA
Warnford Court
29 Throgmorton Street
London, EC2N 2AT

evia@evia.org.uk
www.evia.org.uk
+44 (0)20 7947 4900

EVIA European Venues & Intermediaries Association

We remain puzzled as to whether the FCA seeks to set out a minimum perimeter of conduct and operations, or a target behaviour as commonly understood as an optimal set of metrics. We wonder how "geographical area" would be defined for international firms. Clearly any regulator is tasked with the former, rather than the latter, so it may be that where the FCA sets out an approach to targets, what is actually meant is threshold conditions. Clarity would be welcome.

As previously mentioned, any approach to either threshold conditions or targets should only be adopted along with international standards which would bring a clear methodology. For instance, how often firms would be expected to review and reset their targets. For firms to categorise staff according to fixed labels in accordance with targets would rather divert costs and energies into target compliance, rather than in becoming the best version of themselves. Neither the characteristics of people, nor of roles, nor of corporate organisations are simple or stable enough to label and apply to boxes and metrics.

The proposals appear to set the case that the regulator knows better how to staff and manage a firm than the management does. Even across the breadth of all the thousands of firms that the FCA oversees.

In conclusion, a better approach must be to adopt principles over targets and to champion and encourage firms' individualism and entrepreneurialism by requiring disclosures alone.

Q9: To what extent do you agree with the date of first submission and reporting frequency?

We disagree with the approach for firms to make annual regulatory reports that are different to any public disclosures, at least outside of directly retail facing firms. We therefore disagree with the date of first submission and reporting frequency.

In itself any disclosures regime should be self-prescribed in scope and format under a standards body such as the FMSB. There is no need to create a distinct D&I Regulatory Reporting structure that is additive over both the current prudential regulatory reporting requirements such as a firms' ICARA, and the public disclosure requirements.

In the place of a reporting approach, the FCA should rather require that any D&I disclosures made public should be included within the annual ICARA. This would provide space for firms to tailor their preferred approach under industry standards.

Q10: To what extent do you agree with the list of demographic characteristics we propose to include in our regulatory return?

Other than age, the list of demographic characteristics as proposed would appear to be difficult to measure in all employees, despite the fact that for many they could be simply fulfilled. These are pointless exercises that fail most of the principles of good regulation.

EVIA
Warnford Court
29 Throgmorton Street
London, EC2N 2AT

evia@evia.org.uk
www.evia.org.uk
+44 (0)20 7947 4900

- Members would not be able to report meaningfully on the ethnicity characteristics. Any such disclosures would hold neither data sufficiency, nor adequacy of delineation. The FCA should not be in a position to make assumptions about the culture of a firm, based on the number of people who choose certain ill-fitting options compared to the number of people, both within a firm and across the sector who would choose not to answer. At a minimum the FCA should replace with nationality as the replacement characteristic.
- Similarly collecting data on employees' religion would be at once both difficult and imprecise, posing challenges to all parties along the data chain.
- Can sexual orientation be both permanent and assigned into a box? Is it appropriate to share with an employer and tertiary regulators?
- We query the value of the term, '*disability or long-term health condition*' without reference to an underlying and globally accepted ISO standard. Does disability need to hold a formal medical certificate and evidence? Does it require medicine? Could mental health be categorised?

More generally, The FCA should not be in a position to make assumptions about the culture of a firm, based on the number of people who choose certain ill-fitting options compared to the number of people, both within a firm and across the sector who would choose not to answer. At any level of assessment the FCA proposals appear unattainable and intrusive. They should be made voluntary or removed.

Q11: To what extent do you agree that reporting should be mandatory for some demographic characteristics and voluntary for others?

We disagree.

For reasons set out above, reporting should only be in the form of self-prescribed disclosures in accordance with a standards body such as the FMSB , suitably aggregated, anonymised, and with any personal demographic characteristics being exclusively voluntary to both the firm and to its employees.

Q12: Do you think reporting should instead be mandatory for all demographic characteristics?

No.

Q13: To what extent do you agree with the list of inclusion questions we propose to include in our regulatory return?

We disagree.

EVIA
Warnford Court
29 Throgmorton Street
London, EC2N 2AT

evia@evia.org.uk
www.evia.org.uk
+44 (0)20 7947 4900

EVIA European Venues & Intermediaries Association

Reporting should only be in the form of public disclosures, and inclusion criteria and surveys should be aggregated, and summaries included in those metrics, therefore available to regulators, to customers, to potential employees and to the public alike.

Q14: To what extent do you agree with our proposals on disclosure?

No, we do not support public disclosures in the way suggested by the FCA. Rather these should be designed by the firm itself, under adherence to industry standards.

For instance, where none, or very few, employees disclose data, the firm would want to make that clear to a reader, rather than let any inference around the firm's culture or total proportionality be wrongly drawn.

Indeed, the public disclosure of data on UK employees only will be misleading for third parties with respect to the position of the group as a whole. UK entities are typically only a small proportion of all the offices globally, and there will be differences in the levels of diversity across these entities.

Q15: To what extent do you agree that disclosure should be mandatory for some demographic characteristics and voluntary for others?

Any public disclosures should be voluntary, and industry standardisation of the form and format should be the target outcomes for D&I metrics. This is clearly very important to firms operating in wholesale and international markets for the reasons set out.

The proposed approaches for demographic characteristics are better than some of the more extensive approaches initially discussed, yet nonetheless they still appear intrusive and perhaps best applied on a comply or explain basis, rather than via a mandatory one.

We refer to our specific comments above that it remains more pragmatic that typologies such as prescribed characteristics should first be agreed at international standard setting bodies and then set out as ISO standards prior to any regulatory inclusion. At a national level, a body such as the FMSB should set the preferred form and formats

We would also welcome a more fulsome discussion as to why the FCA has not sought due process and also why it has chosen some characteristics as mandatory, some others as voluntary, and whether there should be legislative insurance against mission creep and style drift in the ongoing evolution of any requirements.

Q16: Do you think disclosure should instead be mandatory for all demographic characteristics?

No, disclosure should not be mandatory for all demographic characteristics. Firms should make their own assessments based upon the input from staff, otherwise would risk being forced to make assumptions or try to prove statements.

EVIA
Warnford Court
29 Throgmorton Street
London, EC2N 2AT

evia@evia.org.uk
www.evia.org.uk
+44 (0)20 7947 4900

EVIA European Venues & Intermediaries Association

We completely fail to comprehend how entirely voluntary data submissions from staff could be transformed into entirely mandatory reporting for the firm, yet still retain any relevance, comparability or meaning. Whilst '*big data*' is powerful, scant data could only be misleading. Rather, any basis for an approach to D&I needs to be founded in the voluntary concept that the creation and disclosure of standards is firmly in the interest of a firm such that it attracts and retains both staff and clients.

Q17: To what extent do you agree that a lack of D&I should be treated as a non-financial risk and addressed accordingly through a firm's governance structures?

We disagree with the statement that a lack of D&I should be treated as a non-financial risk, but rather would prefer to see it treated as a trait for adequate disclosure under firm governance policies and processes where it makes sense. D & I disclosures are not suitable for direct inputs into prudential metrics, although they could form an inclusion into the ICARA process more generally.

Any aggregated public disclosures could be assessed by a firm's governance structures, and also by its supervisors, its customers and its staff more broadly as they each see fit. By homogenising its approach to D&I, the FCA risks inverting the issue by requiring a bland conformity to an arbitrary template.

Such disclosures and the understanding of a firm's culture, its idiosyncrasies, bespoke service models, or niche excellence, would be a better way forward both for firms, and towards building internationally accepted global standards.

Q18: Do you have any comments on the cost benefit analysis?

None.

Ends.

EVIA
Warnford Court
29 Throgmorton Street
London, EC2N 2AT

evia@evia.org.uk
www.evia.org.uk
+44 (0)20 7947 4900