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Diversity and Inclusion in the financial sector – working together to drive change

Response from the Employment Lawyers Association

~~30~~ 28 September 2021

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INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.

2. A Working Party, co-Chaired by Olivia Toulson and Charlie Thompson was set up by the Legislative and Policy Committee of ELA to respond to "*Diversity and Inclusion in the financial sector – working together to drive change*" (the "Discussion Paper"). Members of the Working Party are listed at the end of this paper.

3. The Working Party notes that the Discussion Paper seeks views on a wide range of issues, not all of which engage employment law and we have therefore focussed our attention on those questions which this sub-committee is best able to comment. Where we do not feel it is appropriate to comment, we have indicated this below.

4. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

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EXECUTIVE SUMMARY

5. ELA welcomes the regulators' commitment to create diverse and inclusive organisations that meet the needs of those who work in financial services. This is both necessary and important work. Although some initiatives within the sector have been successful, there is still much more to do. The Discussion Paper appears to focus on the benefits of diversity and inclusion in the context of better decision making and problem solving. We suggest that the benefits go further – not only in relation to fairness but also because the financial sector should be representative of wider society.

6. In summary:

   6.1. ELA supports, in principle, the proposal to embed diversity and inclusion further in the regulatory framework and to place a greater onus on firms to drive meaningful change. In particular, we support the requirement for firms to have a diversity and inclusion policy, to provide training to their workforce and to appoint a "diversity and inclusion champion" akin to the existing role of whistleblowing champion.

   6.2. However, the desire to drive that change at an increased pace risks a tokenistic approach, stereotyping of individuals and unlawful discrimination. In particular, legal and practical challenges arise from setting targets. We also note that the key measure of progress will be the data collected by organisations, much of which can only be collected directly from employees. Unless data of sufficient quality and quantity is provided voluntarily, it is likely to be misleading. We recommend that the regulators address these issues directly.

   6.3. As indicated in the Discussion Paper, proportionality is key. The regulators are responsible for a vast and diverse range of firms, so a "one-size-fits-all" approach will be inappropriate. Accordingly, the regulators should implement measures which do not unnecessarily conflict with firms' existing obligations and which do not place them under a disproportionate administrative burden, especially in the case of smaller firms.

QUESTION 1

What are your views on the terms we have used, how we have defined them and whether they are sufficiently broad and useful, now and in the future?

THE REGULATORS' FOCUS

7. The regulators state their focus is on "diversity of thought" (or "cognitive diversity"). They state this type of diversity is important for furthering their regulatory objectives.

8. The regulators state (paragraph 1.13) diversity of thought is:

    8.1. "bringing together a range of different styles of thinking among members of a group. Factors that could lead to diverse thinking could include, but not limited, to different perspectives, abilities, knowledge, attitudes, information styles, and demographic characteristics, or any combination of these"

9. The FCA summarises[1] its regulatory objectives as:

    9.1. "Our strategic objective is to make sure that the relevant markets function well. Our operational objectives are to:

        9.1.1. protect consumers – we secure an appropriate degree of protection for consumers

        9.1.2. protect financial markets – we protect and enhance the integrity of the UK financial system

        9.1.3. promote competition – we promote effective competition in the interests of consumers"

10. ELA has three comments.

11. First, the regulators indicate that the value of diversity of thought is in its contribution to "problem solving" (paragraph 1.14) and "decision making" (paragraph 1.21). It is accepted that better decision-making in financial services firms furthers the FCA's regulatory objectives. However, this narrow approach to the importance and significance of diversity excludes other widely

[1] https://www.fca.org.uk/about/the-fca (reflecting sections 1B to 1E of the Financial Services and Markets Act 2000).

accepted reasons for valuing diversity. For example, it is valuable that financial services firms are more representative of wider society:

11.1. as a matter of *fairness*, such that power is more equally distributed across society; and

11.2. as a matter of *representation*, such that financial services are seen by all to reflect wider society.

12. We suggest the regulators should reflect on whether the exclusion of such concepts from their approach to diversity is justified by the narrowness of their regulatory objectives, or whether in fact their wider duties (including the public sector equality duty) justify a wider approach.

13. Second (and related to the first point), it is our experience that diversity is not only concerned with the characteristics held in the aggregate by the members of a group. It also matters who holds particular positions. In other words, on the regulators' approach, it may be acceptable for the CEO of a financial services firm to "always" be white, male, old and from a wealthy background, so long as he is surrounded by a group which contains the requisite diversity of thought. Clearly, that analysis is flawed. We suggest the regulators recognise that it is not only diversity of the group that matters, but also diversity over time of who holds particular positions of power and influence.

14. Third, the relationship between diversity of thought and the "factors which could lead to diverse thinking" is not addressed directly in the Discussion Paper. Firms could draw the conclusion that the regulators believe that diversity of thought will arise so long as there is diversity within firms of the measurable characteristics set out in Appendix 2 of the Discussion Paper. Or to put it more practically, that firms will believe that its diversity obligations to the regulators will be satisfied by simply appointing persons with the requisite attributes to particular roles. In such a case, firms are likely to be stereotyping individuals with the requisite characteristics i.e. assuming that because a person has a particular characteristic, they will think in a particular way.

14.1. There is therefore a risk, in ELA's view, of firms adopting potentially discriminatory practices out of a concern to respond appropriately to the regulators' diversity expectations. ELA notes that this is not a risk which the regulators refer to in the Discussion Paper.

14.2. An illustration of this risk may be found in a recent Employment Tribunal decision.[2] In this case, the Employment Tribunal found that two white British men had been discriminated against in that they had been dismissed because they were male. This followed an internal presentation by its Executive Creative Director (attended by the CEO of the firm) in which it was said, following the publication of Gender Pay Gap information that the firm should "obliterate" its reputation for being full of "straight white men". This case highlights the fact that all discrimination is unlawful, including where the individuals discriminated against share characteristics which have historically been privileged. Clearly, a risk that firms may (perhaps unintentionally) behave unlawfully is a risk the regulators should consider, and one which is relevant to their regulatory objectives.

POSITIVE ACTION

15. The Equality Act 2010 prohibits unlawful discrimination relating to protected characteristics. There are, however, two provisions in the Act which permit "positive action":

15.1. Section 158 contains a general rule in relation to positive action. This can apply where an employer reasonably thinks that persons with a particular protected characteristic are disadvantaged, have different needs or are disproportionately under-represented. In those circumstances, the employer can take proportionate measures to enable or encourage persons with the relevant characteristic to overcome that disadvantage, to meet their needs, or to enable or encourage their increased participation. This provision encompasses an employer providing training and encouragement to under-represented groups and can also permit employers to take proportionate measures to overcome a perceived disadvantage or to meet specific needs based on a protected characteristic. This provision is of potentially very wide scope as to the activities which are lawful. It could, for example, cover such things as providing prayer facilities at work exclusively to meet the needs of a religious minority, or providing free English language lessons to non-English-speaking employees. Further detail can be found in Chapter 12 of the EHRC's Employment Code of Practice[3].

[2] *Bayfield and Jenner v Wunderman Thompson (UK) Ltd*: https://www.gov.uk/employment-tribunal-decisions/mr-c-bayfield-and-mr-c-jenner-v-wunderman-thompson-uk-ltd-and-others-2200540-slash-2019-and-2200546-slash-2019

[3] https://www.equalityhumanrights.com/en/publication-download/employment-statutory-code-practice

15.2. Section 159 is more specific. This provision can apply where an employer reasonably thinks that persons with a particular protected characteristic are disadvantaged or disproportionately under-represented. In those circumstances, the employer can treat a person with the relevant characteristic more favourably than others in recruitment or promotion, as long as the person with the relevant characteristic is "as qualified as" those others. In other words, it makes certain types of positive discrimination lawful. It is important to note that this provision only allows a “tie break” in favour of an under represented group where the relevant candidates are as qualified as each other. It does not allow the recruitment or promotion of a lesser qualified person just because they are from the under-represented group. Further detail can be found in the Government Equalities Office Guide to positive action in recruitment and promotion[4].

16. In our view, given the subject-matter of the Discussion Paper, these provisions deserve the attention of the regulators. They make lawful practical measures which would make a real difference in promoting diversity (including diversity of thought) in financial services firms. Given the points made above as to the risk of unlawful discrimination, it would also be helpful for firms to be clear as to the lawful boundaries of the steps that may be taken by firms to promote diversity. Clearly, uncertainty is likely to inhibit the taking of such lawful steps, which would be to the detriment of the regulators’ stated objectives.

SUMMARY

17. We suggest that the regulators should:

17.1. make clear their understanding of the relationship between diversity of thought and the factors it suggests may promote the same. It may, for example, be that there is no direct relationship between an individual being appointed to a particular group and the impact on its diversity of thought; but that across financial services as a whole, there is more likely to be such a relationship. Such an emphasis may assist firms in not taking a tokenistic and/or unlawful approach to diversity in individual cases, leading to a focus on what the styles of thought in a particular firm in fact are; and

17.2. directly address the risk of stereotyping, unlawful discrimination and of the law relating to positive discrimination in any future policy proposals.

[4] https://www.gov.uk/government/publications/employers-quick-start-guide-to-positive-action-in-recruitment-and-promotion

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QUESTION 2

18. ELA has determined that this question does not engage matters of employment law and is therefore outside the scope of this response.

QUESTION 3

Do you agree that collecting and monitoring of diversity and inclusion data will help drive improvements in diversity and inclusion in the sector? What particular benefits or drawbacks do you see?

19. The collection and monitoring of diversity and inclusion data itself will not necessarily drive improvements in the sector on its own. It will be how the regulators use the data and what requirements they place on organisations in light of the data collected.

20. There is a risk that the regulators collecting and monitoring diversity and inclusion data may lead to potentially discriminatory practices by organisations keen to demonstrate the improvements that the regulators are hoping to drive (see above). Further, another issue for the regulators is that the provision of diversity and inclusion data is voluntary from individuals and therefore, other than gender data (that tends to be provided by the majority of individuals), information relating to other protected characteristics (for example certain types of disability) is not always provided by individuals and therefore, data provided may be incomplete and/or unrepresentative.

21. A further issue for the regulators to consider is whether any of the indicators that they intend to use will directly measure diversity of thinking – something which is a cornerstone of their proposals. Even if they can measure it, the aggregate nature of the data that they are likely to receive may potentially make the conclusions that can be drawn from such data very difficult.

QUESTION 4

Do you have a view on whether we should collect data across the protected characteristics and socio-economic background, or a sub-set?

22. Whilst more granular data may assist in the objectives of the regulators, it is questionable whether such data will be easily obtained from firms given that firms will need to obtain this data from individuals within their organisation. As mentioned above, obtaining information relating to protected characteristics from individuals is not straightforward and such data is not necessarily something that organisations currently request from their employees.

QUESTION 5

23. ELA has determined that this question does not engage matters of employment law and is therefore outside the scope of this response.

QUESTION 6

What are your views on our suggestions to approach scope and proportionality?

24. ELA welcomes the regulators' suggestion that they will take a proportionate approach, recognising that there is not a "one-size-fits-all" solution to diversity and inclusion and that certain measures may be more or less effective and appropriate depending on the size of firm.

25. We agree with the suggestion of applying categorisations/thresholds that are already familiar to firms. In our view, this would help to reduce the potential complexity for firms in understanding which requirements apply to them. On that basis, the approach in relation to solo-regulated SM&CR firms (for example) of applying requirements by reference to whether they are enhanced, core or limited scope firms, would be a logical one.

QUESTION 7

What factors should regulators take into account when assessing how to develop a proportionate approach?

26. For all firms, we suggest that the regulators consider whether an underpin based on a minimum number of employees is appropriate (at least for some of the requirements that the regulators may choose to impose). In this regard please also see our response to question 21. If such an underpin were to be applied, consideration would need to be given to factors such as:

    26.1. Would the minimum employee numbers be calculated only by reference to the employees engaged directly by the firm, or would employees employed by the wider corporate group be taken into account (and, if so, within what geographical area)?

    26.2. Would employees engaged in branches of the firm be taken into account (and if so, within what geographical area)?

    26.3. How would the regulators define "employees" for this purpose, (recognising that FCA Handbook adopts a broad definition, which captures e.g. individuals placed at the disposal of a firm by a third party)? This broad definition may be less appropriate for calculating

thresholds for the purposes of diversity and inclusion requirements (or for use within the requirements themselves, given the potential limits on a firm's ability to gather diversity data about third parties' employees, for example).

27. The merits of applying certain requirements only to firms with a minimum number of employees include:

    27.1. recognising that, the smaller the firm, the less meaningful its diversity data might be, or the more prone to "spikes" it might be, given the potential for a very small number of leavers or joiners to disproportionately impact the results; and

    27.2. recognising that the administrative burden of some diversity and inclusion requirements may be disproportionately heavy for smaller firms, particularly given the typically smaller size of their support functions.

28. We note, however, that there are likely to be some requirements that are suitable for all firms, irrespective of the size of their employee population – e.g. to factor diversity into their pipeline planning, and to adopt a zero tolerance approach to discriminatory conduct.

QUESTION 8

Are there specific considerations that regulators should take into account for specific categories of firms?

29. We note that firms which are listed companies are already subject to a range of requirements and expectations in respect of diversity and inclusion – ranging from provisions within the Corporate Governance Code,[5] to the goals set in the Hampton-Alexander[6] and Parker[7] reviews, and the clear statements from institutional investors and proxy advisers as to their voting intentions if firms fail to meet appropriate diversity targets. That being the case, the regulators may wish to consider whether their ability to best effect meaningful change lies outside the listed company environment, and whether their focus should therefore be on non-listed firms. In any event, we would suggest that the regulators should make clear that nothing in their diversity and inclusion

[5] https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code
[6] https://ftsewomenleaders.com/wp-content/uploads/2021/03/Hampton-Alexander-Review-Report-2020_web.pdf
[7] https://www.gov.uk/government/publications/ethnic-diversity-of-uk-boards-the-parker-review

requirements is intended to supersede or conflict with pre-existing requirements such as those that apply to listed companies.

30. In relation to overseas firms operating through branches, we would suggest that there is merit in including them within the requirements set in relation to diversity and inclusion. We note that overseas firms operating through a branch structure are a relatively familiar feature in the UK market and those branches will often employ a very large number of employees, to whom it would seem appropriate that the regulators' diversity and inclusion requirements extend.

QUESTION 9

What are your views on the best approach to achieve diversity at Board level?

31. ELA welcomes the regulators' recognition that "tone from the top" is extremely important when seeking to improve diversity and inclusion throughout an organisation. Broader diversity and inclusion efforts will be significantly undermined without adequate progress within the most senior echelons of management. Achieving board level diversity is of paramount importance.

32. Similarly, ELA is of the view that there can be no "one-size-fits-all" approach in the methods firms deploy to improve diversity at board level. There are a number of ways for firms to tackle this issue, some of which are listed below. Whilst firms will generally engage a variety of these methods, recognising that they often complement each other, some methods will be appropriate for some firms and not others. As such, whilst ELA would welcome guidance from the regulators in terms of the types of methods firms might use in order to improve board level diversity, we also consider that it would be helpful and appropriate for the regulators to recognise that firms should have a significant degree of flexibility in determining which measures they opt to use, having regard to factors such as the size of their board, the existing position on board diversity, the nature of their business and any other board diversity requirements to which the firm is already subject to and complying with.

33. Examples of potential measures firms can deploy to increase board diversity include:

    33.1. use of (or increased use of) sponsorship as a means of empowering underrepresented groups below board level, which in turn can have a material impact on the creation of a better pipeline of talent;

    33.2. increased awareness (and better use) of the existing legal framework under the Equality Act 2010 which does permit firms to take positive action to improve workplace equality. Whilst ELA recognises the

limitations of such statutory provisions, we also consider there to be a lack of awareness and understanding around them (see paragraph 15 of this response);

33.3. encouraging nominations committees (or boards more generally where no nominations committee exists) to consider whether a wider talent pool is appropriate when long-listing board level candidates. Within the financial services sector (particularly post SMCR) there can be a tendency for executive level board candidates to come from comparable backgrounds (i.e. candidates who have previous board experience and/or significant experience in the financial services industry). Whilst there can be good reason(s) for this, having regard to factors such as the competence and capability aspects of the FIT test, there is an inherent risk that by taking a "like for like" approach to succession planning, firms are perpetuating existing blockers to increasing board diversity. ELA considers that firms will continue to assume that regulatory pre-approval will be more challenging in respect of candidates who do not have previous board and/or industry experience. The regulators have been clear that this is not necessarily the case and that the focus will be on relevant skills and experience. ELA considers that it would be helpful for the regulators to provide firms with additional clarity and comfort on this point;

33.4. a much reduced focus on leveraging personal networks for the purposes of filling vacant board positions;

33.5. working closely with executive search firms and ensuring that they understand (and are engaged in the delivery of) the firm's diversity agenda;

33.6. monitoring board level diversity data and creating targets around improvement (these may be documented in a board diversity policy) and clear accountability for the achievement of these targets; and

33.7. bolstering measures aimed at improving representation throughout the organisations, at all levels and across the employment life-cycle, in order to help ensure that there is a balanced talent pipeline available for future board appointments.

QUESTION 10

What are your views on mandating areas of responsibility for diversity and inclusion at Board level?

34. ELA strongly agrees that there should be clearly defined responsibility at board level for diversity and inclusion. In relation to board appointments/succession planning specifically, ELA agrees that many of the largest firms already allocate responsibility for considering diverse representation to the nominations committee. ELA considers that having such a committee can be a very effective way to ensure that issues of diversity, inclusion and representation are taken into account when looking at board appointments.

35. ELA also notes that many larger firms will be subject to (or increasingly aware of) factors such as shareholder activism, proxy adviser voting guidelines, the requirements of the Corporate Governance Code, the Parker Review, the Davies Review[8] and the Hampton-Alexander Review.

36. However, many smaller firms (in particular smaller solo-regulated firms) are less likely to be subject to or aware of these factors. For those firms there would be a clear benefit in the regulators mandating board level responsibility for diversity and inclusion. This would be subject to considerations around proportionality and the need to ensure that requirements have due regard to the size and nature of a firm's business.

37. ELA considers that it may be useful for firms to allocate oversight of diversity and inclusion to one board member. This could be achieved by way of a non-executive "diversity and inclusion champion"' who would carry out a role comparable to that of the whistle-blowers' champion under SYSC 18 of the current FCA Handbook.[9]

QUESTION 11

What are your views on the options explored regarding Senior Manager accountability for diversity and inclusion?

38. ELA agrees that there is a clear benefit in senior leaders being directly accountable for diversity and inclusion. This would create a more tangible and meaningful link between the SMCR and the regulators' agenda on promoting diversity and inclusion (including not only representation but also issues such as the promotion of psychological safety and the handling of non-financial misconduct).

39. In relation to dual regulated firms ELA agrees that the two existing prescribed responsibilities – PR(I) and PR(H) – are the clear starting point for accountability. However, the concept of "culture" is not only extremely broad but

[8] https://www.gov.uk/government/publications/women-on-boards-5-year-summary-davies-review
[9] https://www.handbook.fca.org.uk/handbook/SYSC/18/?view=chapter

is also often misunderstood (or at least subject to various different interpretations). ELA therefore agrees with the regulators' view that specifically stating that diversity and inclusion is a component part of culture more generally and allocating specific senior management function responsibility for diversity and inclusion, will be very helpful. We strongly agree that such a step would help to ensure that accountability for diversity and inclusion is coherent, clearly understood and that responsibility for it is not fragmented. ELA also agrees that there is a strong case for the creation of clear (i.e. specific) senior manager accountability for diversity and inclusion in solo regulated firms.

40. In both cases, we agree that a sensible way to create a tangible link between culture more generally and diversity and inclusion as a specific regulatory obligation would be to include diversity and inclusion centric actions/responsibilities in the statements of responsibilities of senior managers. ELA considers that by being more directive and explicit around diversity and inclusion as an aspect of SMCR, firms will be more likely to engage with diversity and inclusion as a regulatory priority, ensuring that these issues feature more prominently as part of the firm's wider assessment of risk factors.

QUESTION 12

What are your views on linking remuneration to diversity and inclusion metrics as part of non-financial performance assessment? Do you think this could be an effective way of driving progress?

41. We agree that linking remuneration to performance against diversity and inclusion metrics could play an important role in driving progress. However, a key question is how such performance is assessed.

42. In order to achieve substantive and long-term change, firms will need to have effective frameworks in place to monitor and evaluate progress against targets. In our view, this should address diversity and inclusion at all levels of seniority. Firms will need to take positive steps to ensure a diverse range of talent is attracted to work in the financial sector, and that all individuals receive an equal opportunity to progress within the business – including to the most senior positions.

43. We note the suggestion that the regulators: "could make explicit in our rules that a firm's remuneration policy should ensure that all types of remuneration, both fixed and variable, do not give rise to discriminatory practices". We strongly support this step.

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QUESTION 13

What are your views about whether all firms should have and publish a diversity and inclusion policy?

44. Whilst acknowledging the principle of proportionality, observed by the Discussion Paper, the answer to the question can be put directly and simply: "yes, all firms should publish a diversity and inclusion policy".

45. Such reporting, by publication, is to inform and, by that, promote progressive change and improvement. To advance these aims, there is benefit in the policy being readily accessible and having an appropriate degree of prominence. Importantly, publication of the policy pursuant to a regulatory standard will, also, provide assurance to firms, investors and employees.

QUESTION 14

Which elements of these types of policy, if any, should be mandatory?

46. Limited mandatory obligations might include the publication of:

    46.1. the diversity and inclusion policy as it relates to prescribed characteristics;

    46.2. the objectives of the diversity policy;

    46.3. the strategy for attaining the objectives, including how the policy has been implemented; and

    46.4. any prescribed statistical data and results for the defined reporting period.

47. The content of the policy, beyond any mandatory obligations, will be subject to requirements that have the quality of guidance.

48. The preamble to this question positions, clearly, the values and benefits of publishing diversity and inclusion policies to stakeholders. These benefits are uncontroversial. The Discussion Paper advances, also, the adopted and well understood principle of proportionality: the sophistication and complexity of the policy will reflect, paraphrasing, the size, nature and resources available to the firm.

CLEAR, CONCISE, UNBIASED

49. The purpose of a published diversity and inclusion policy is to promote both integrity and transparency. There is, therefore, value in the policy being clear, supported by plain language. Clarity may be best achieved by concision. In turn, the reporting of certain aspects of the policy set out in paragraph 46 should be fair, balanced and understandable. In other words, transparent and unbiased. These qualities, when drawn together, may require that the information (including any supporting narrative) is not misleading by omission of material information or by undue emphasis.

50. The publication of certain aspects of the policy should enable stakeholders to determine how well a firm has performed against its policy to promote and advance inclusion and diversity across its workforce, including identified categories of its workforce. This sustains an understanding of a firm's values, behaviours and culture, which, in turn, supports its success as an organisation.

REPORTING PAST AND FUTURE TRENDS

51. Reflecting other reporting standards, the information that is reported on should be information that is necessary to understand the current position and future (whether short, medium or long-term) performance of the policy against the objectives and strategy for achieving the objectives of the policy.

AN APPROACH THAT ALLOWS FOR A FIRM'S OWN STORY

52. The above are matters for guidance; they are not requirements that should be mandated. The guidance, by being non-prescriptive, would allow firms, appropriately, to explain their own diversity and inclusion story, which story will have characteristics unique to their structure, history and geography. We encourage narrative reporting which better provides context and structure to the published information. It will be for the firm to apply its own judgement to the narrative. This may require additional information, beyond that prescribed, recognising that the quality of such narrative promotes the evolution of a firm's diversity and inclusion strategy, including by fostering the interests of its current and prospective employees.

53. We anticipate that reporting on the policy will be firm specific.

OBJECTIVES INFORM STRATEGY AND VICE VERSA

54. The objectives adopted by a firm to support its pursuit of inclusion and diversity are critical to the understanding of the firm's policy. The same is true for the strategy and the development of the strategy that underpins the attainment of those objectives. By articulating its strategy, a firm better describes how it wishes to promote diversity and inclusion and the prospects of achieving that

aim. The objectives help stakeholders determine whether the strategy is appropriate.

STATISTICAL DATA

55. Statistical data places both strategy and objectives in context, measuring progress and the effectiveness of the policy. There may be value, but not such that it damages progressive reporting evolution, in encouraging firms to publish annual comparisons of data collected, in order to demonstrate progress. If this approach is adopted, it ought to be acknowledged that irrelevant historic information need not be published.

QUESTION 15

What are your views about the effectiveness and practicability of targets for employees who are not members of the Board?

56. Comparable statistical data may achieve the regulators' observed objectives, without the need for targets.

57. The reporting metrics will reflect the regulators' diversity and inclusion objectives. The relationship between reporting on an issue and the promotion and acceleration of positive change in respect of that issue is a broadly accepted orthodoxy. We suggest that the regulators should reflect on whether their expressed aims are achieved by focussing obligatory reporting on the board and senior management or should such reporting instead, mindful of proportionality principles, embrace a wider category of workers.

STATISTICS BUT NOT TARGETS

58. Statistical data, which need not necessarily be targets, is critical to the better understanding of a firm's progress towards meeting its objectives and strategy. The statistical data adopted to illustrate the attainment of objectives and the evolution of the strategy may be a matter for regulation and guidance or, alternatively, solely a matter of director determination. The former achieves uniformity and consistency in reporting. The latter compromises uniformity, instead advancing firm specific explanation.

RELEVANT DATA VARIABLES MAY BE LIMITED

59. However, in practice, the different statistical metrics and data assessments relevant to describing changing employee composition within a defined description or category of employees, over time, is likely to be limited. The data to be adopted should best illustrate, within a defined period, how many (or what

proportion of) employees holding a reportable characteristic are employed within a certain employee grouping. The data could also include the number of employees who chose not to respond or not to identify as holding a reportable characteristic. The number of employees holding a particular characteristic within a described group is an uncontroversial data set. The proportion of employees holding a given characteristic as against all employees within that employee group provides often a more relatable and descriptive figure, albeit there is importance in the actual numbers, also, being published.

60. The comparative data could, also, be evaluated and judged on a year-on-year basis, supported by a narrative personal to the firm, its particular circumstances and its progress in attaining its reported objectives by the pursuit of its strategy.

CONSISTENCY AND COMPARABILITY OF DATA, GIVING CLARITY

61. There should be consistency in a firm's reportable data sets, including data variables, and, ideally, as between firms. Such consistency will enable stakeholders to better understand, as described above, the attainment of objectives and the progress of strategy.

62. If firms are not required to report against prescribed data metrics, there is value in firms having nonetheless to provide an explanation as to any published statistical or quantitative information, if the source of the data or its calculation methods are not immediately understandable. To achieve understanding, comparability and consistency, any year-on-year changes to the source or calculation methods might be highlighted and explained.

63. The reporting of data, whether as a number or proportion of employees holding a particular characteristic within a defined group, provides clarity without the requirement for targets. The data may, to provide context and understanding, explain response numbers and discernible trends, including, as proposed above, the number of employees that chose not to respond or identify as holding a reportable characteristic.

WILL TARGETS, OTHERWISE, MAKE IT HARD FOR FIRMS TO TELL THEIR OWN STORY?

64. The setting of a defined target for a particular characteristic, measured at a particular time potentially risks ignoring the specific circumstances of a firm. These circumstances may be reflective of local community and societal factors and trends that influence the population demographics of the firm's workforce. The setting of a universal target for prescribed characteristics may lead to inclusion and diversity objectives for that particular characteristic that are

otherwise inappropriate to the circumstances of the firm, including those outside of its control.

THE REPORTING OBLIGATIONS MUST REFLECT THE REGULATORS' OBJECTIVES: HOW WILL PRESCRIBED REPORTING BEST ACHIEVE THE DESIRED CHANGE?

65. By the Discussion Paper, the regulators anticipate establishing policy that catalyses the improvement of diversity and inclusion across the firms that they regulate. Such policy reflects the regulators' own objectives as well as broader societal imperatives, which are described by the Discussion Paper. A correlation is drawn and expressed, within the Discussion Paper, between a more diverse and inclusive culture supporting innovation, risk management (including good conduct) and a healthy working environment. These advantages apply to every level of a firm and its workforce; they are not exclusive to one workforce demographic or level within that workforce, whether measured by seniority or otherwise.

66. There is a widely expressed view, including in support of gender pay gap reporting, that the reporting of relevant data (and with it transparency) on a particular matter accelerates change in respect of that matter. In effect, firms are held to account in respect of the subject being reported. The relationship between reporting on an issue and the promotion and acceleration of positive change in respect of that issue is a broadly accepted orthodoxy.

67. The regulators will review and consider (taking into account principles of proportionality, their own objectives and an expressed desire for rapid and substantive progress) whether an initiative promoting inclusion and diversity achieves their expressed aims, if it limits obligatory reporting to the board and senior management.

68. If the concern is about diversity and inclusion (and by extension culture and governance) at a board and senior level only, reporting might focus on these groups, bearing in mind, however, that effective succession means that employees that will ultimately fill these senior positions will be found from within the wider organisation. If this wider employee pool is diverse and inclusive, establishing diverse and inclusive senior teams is easier. Equally, if the objective is, for example, to encourage organisations to provide opportunities at all levels of the workforce for individuals within under-represented groups and in doing so reduce disparities (including societal disparities) in employment, the reporting metrics might be different, covering a wider population of the workforce.

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QUESTION 16

What are your views on regulatory requirements or expectations on targets for the senior management population and other employees? Should these targets focus on a minimum set of diversity characteristics?

69. In respect of the first half of this question, we refer to the response to question 15.

BALANCING PROPORTIONALITY AND EQUALITY OF ALL PROTECTED CHARACTERISTICS

70. Historically, legislative efforts to promote and advance inclusion and diversity through obligatory public reporting have focussed, predominantly, on gender with, more recently, an increasing focus on ethnicity. Other characteristics relevant to diversity have not been advanced in the same way; the conversations and discussions on these other protected characteristics are less pronounced. If the economic participation of people holding these less represented characteristics are to be supported and promoted, they should hold equal reporting focus and status. To do otherwise establishes, for good or ill, a hierarchy of characteristics. The regulator in setting and describing its policy to promote equality of participation and opportunity by reporting will be mindful of the principle of proportionality, balancing this against the imperative to create equality for all protected characteristics as defined under the Equality Act 2010.

DEMOGRAPHIC REPORTING MUST BALANCE DATA PROCESSING OBLIGATIONS

71. We do not repeat in detail but we are mindful of concerns expressed by the Government, when looking previously at statutory obligations related to ethnicity pay gap reporting, of poor response rates from employees – who may not wish to identify their race, the requirement for anonymity, and wider legal issues (including under data protection laws) in collecting and processing personal sensitive data. These concerns should be taken into account when determining reporting obligations, but they are not insurmountable. We refer, also, to the Information Commissioner's Office call for views on employment practices, covering data protection and equal opportunities monitoring – this topic is relevant to the processing of data associated with inclusion and diversity reporting. Any reporting obligations relating to inclusion and diversity, imposed by the regulator, must be mindful of the resources necessary for firms, in processing relevant information (which will be sensitive personal data), to satisfy their lawful processing obligations. These will include the anonymisation

of information and that the information collected is used only for the purpose communicated and is accurate and not excessive.

72. We refer to the answer to question 24 which addresses further the issue of which characteristics should be measured.

QUESTION 17

What kinds of training do you think would be effective in promoting diverse workforces and inclusive cultures?

73. Our view is that interactive training which enables, encourages and facilitates individuals and groups to discuss diversity and inclusion both inside and outside the workplace is the most effective. Although firms will almost certainly offer fairly standard anti-discrimination training and may offer unconscious bias training as part of their commitment to ensure equal opportunities, that training is often quite one-dimensional and non-interactive and we are aware of some concerns about the effectiveness of some unconscious bias training. In our experience, having interactive training with staff at all levels of organisations, not just senior management, can also be beneficial because it brings out diversity of thoughts, views and experiences.

QUESTIONS 18 and 19

74. ELA has determined that this question does not engage matters of employment law and is therefore outside the scope of this response.

QUESTION 20

What are your views on whether information disclosures are likely to deliver impact without imposing unnecessary burdens? Which information disclosures would deliver the biggest impact?

75. Although all protected characteristics are important, consideration could be given, at least in the first few years following the implementation of information disclosures, to limiting disclosures to certain specific protected characteristics, e.g., disability, gender, race and sexual orientation, to certain levels of seniority within firms, e.g., board, board minus 1 and board minus 2, and to specific information, e.g., percentage of persons with specific protected characteristics at those levels, change of percentages against the previous year/disclosure period and steps taken or planned to be taken to address any underrepresentation. Some Working Party members sounded caution against an initial focus on only a small number of protected characteristics as it risks

creating a hierarchy of characteristics and limits the ability to conduct intersectional analysis.

76. Careful consideration should also be given to implementing measures that ensure firms do not breach their data privacy obligations in the way they collect, process and disclose the information. Proportionality is important. Although information disclosures are unlikely to impose significant burdens on banks, smaller firms may not be collecting this type of information already and very small firms could end up disclosing personal/special category data about individuals which may mean that individuals refuse to provide the data.

QUESTION 21

How should our approach for information disclosure be adapted so that we can place a proportionate burden on firms?

77. Consideration could be given to a small employer exemption, e.g., firms with 10 or fewer employees particularly as disclosures of information about so few employees could well make them identifiable thereby creating data protection issues. As with the answer to question 20, consideration could also be given to limiting disclosures to certain protected characteristics, certain levels of seniority and to specific information so that data collection is not too onerous. A comply or explain regime could also apply so that if firms do not disclose the required information, they should explain why. For example, it may be that some employees refuse to provide data and this would adversely impact a firm's ability to comply with the information disclosure requirements.

78. Please also see our response to question 7.

QUESTION 22

What should we expect firms to disclose and what should we disclose ourselves from the data that we collect?

79. In our view, in scope firms (i.e., those for which there is no exemption) should be required to disclose specific information along the lines referred to in the answer to question 20. This information should be disclosed on the firm's website and retained on the website for a minimum period and the regulators may choose to disclose and comment on some or all of that information either individually or in an aggregated form on a separate website and in reports and other communications.

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QUESTION 23

What are your views on how we should achieve effective auditing of diversity and inclusion?

80. In our view, this question does not directly engage employment law issues and so our comments are limited.

81. We would note that the size and resources of regulated firms varies considerably and so any requirements in relation to internal audit requirements may not lend themselves to a "one-size-fits-all" approach.

82. We would anticipate that, if requirements are imposed relating to internal audit, claimants in discrimination proceedings will seek disclosure of such documents as a matter of course.

QUESTION 24

How can internal audit best assist firms to measure and monitor diversity and inclusion?

83. We note that the term "diversity" is used in a very wide sense in the Discussion Paper (as per paragraph 1.15). The goal is achieving "diversity of thought" which, as recognised in the Discussion Paper can be influenced by many factors, including demographic characteristics and these characteristics do not only include the nine protected characteristics defined in the Equality Act 2010 (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation), but can also include other factors, such as socio economic diversity, gender (including where it does not coincide with sex), and cultural background.

84. We suggest that care will be needed in defining what it is that should be measured. The nine protected characteristics recognised by the Equality Act 2010 are fairly well defined by the legislation and case law. However, defining what is meant by factors such as socio-economic diversity and cultural background may need further clarification.

85. Further, without careful definition and distinction from the protected characteristics firms may well face increased complaints from individuals confusing their rights under the Equality Act 2010 from more general concerns they may have about their treatment at work.

QUESTION 25

Do you agree that non-financial misconduct should be embedded into fitness and propriety assessments to support an inclusive culture across the sector?

86. In our experience, in relation to non-financial misconduct, the dividing line between what is a conduct issue (going to fitness and propriety) and what is "mere" misconduct is hard to draw and different organisations apply different standards. Accordingly, clarification is this area would be very welcome in order to provide for more consistency of approach.

87. There are potentially very serious consequences for individuals if they are considered by an employer to lack fitness and propriety. Firstly this could result in them losing their job. Secondly though, any mention of fitness and propriety issues in a Regulatory Reference (particularly Question G – "Are we aware of any other information that we reasonably consider to be relevant to your assessment of whether the individual is fit and proper?") could lead to an individual having great difficulty in finding a new job.

88. We note that the FIT guidance in the FCA Handbook contains a non-exhaustive list of factors to which firms should have regard in making fitness and propriety assessments.[10] However, all of the examples relate to financial misconduct and there is no express reference to any forms of non-financial misconduct. These should be expanded were non-financial misconduct to be embedded. Similarly, the non-exhaustive list of conduct that may amount to an integrity breach in terms of the Conduct Rules focuses purely on traditional forms of financial misconduct.

89. As is often the case before the employment tribunal, judgments as to whether an individual's fitness and propriety is compromised by non-financial misconduct is likely to be the question of some debate however, in our view, that does not mean it should not be pursued. It is notable that the Employment Appeal Tribunal has already found a firm entitled to dismiss an employee as no longer being fit and proper for his role following an adverse credibility finding at an Employment Tribunal.[11]

90. In circumstances in which the regulators propose to monitor, and firms are required to conduct internal audits and report on, issues relating to diversity, instances of findings of lack of fitness and propriety are likely to be amongst the metrics used. Accordingly, it is all the more desirable that firms adopt similar

[10] https://www.handbook.fca.org.uk/handbook/FIT/1/3.html
[11] *Radia v Jefferies International Ltd* UKEAT/0123/18/JOJ

standards such that it is potentially possible to benchmark in relation to diversity issues and culture.

91. To date, the focus of this issue has tended to be in relation to sexual misconduct. Accordingly, the protected characteristic (in the terms of the Equality Act 2010) most commonly referenced is sex. We assume that there is no intention for there to be a hierarchy of types of discrimination as far as fitness and propriety is concerned and so we would suggest that the guidance provided by the Regulators should provide examples across the nine protected characteristics defined in the Equality Act 2010 and also in respect of the wider aspects of diversity recognised by the regulators such as socio-economic diversity and cultural background

QUESTION 26

What are your views on the regulators further considering how a firm's proposed appointment would contribute to diversity in a way that supports the collective suitability of the Board and senior management?

92. There is potentially a risk in relation to recruitment and promotion decisions that, by favouring an under-represented group, this could amount to unlawful discrimination, contrary to the Equality Act 2010, against individuals with different protected characteristics. Both the regulator and the firm in question may be liable for discrimination in the event that an individual is not approved for reasons relating to their protected characteristics or the diversity of the Board/senior management body.

93. There are exceptions to this but these are narrow and firms will need to consider carefully the steps they take in order to adjust the diversity of their boards and senior management.

94. We refer to the consideration of positive action in our response to question 1 above (see paragraph 15 of this response). Whilst anecdotal reports of firms replacing "like for like" senior managers are noted in the Discussion Paper, it is equally important to make sure that selection is not based on positive discrimination unless it falls within one of the permitted exceptions.

QUESTION 27, 28 and 29

95. ELA has determined that these questions do not engage matters of employment law and are therefore outside the scope of this response.

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