Response to Discussion Paper 21/2 from the Prudential Regulatory Authority, the Bank of England and the Financial Conduct Authority

Introduction

Legal Feminist is a collective of practising solicitors and barristers who are interested in feminist analysis of law, and legal analysis of feminism. Between us we have a wide range of specialist areas of law including financial services, employment, data protection and privacy, discrimination and human rights law. Our range of specialisms enables us to consider holistically the issues raised in the Discussion Paper (**DP**) and our collective experience enables us to comment on the practical implications of some of those issues. Our response to the DP comprises a general discussion of some of the issues raised followed by answers to some of the specific questions raised.

As feminists, we generally welcome initiatives aimed at promoting diversity and inclusion. However, we recognise that such initiatives engage a range of legal issues and therefore need to be carefully considered by specialists to avoid consequences that may ultimately have the opposite effect to that intended. None of the regulatory authorities authoring the DP (the Bank of England (**BoE**), the Prudential Regulatory Authority (**PRA**) and the Financial Conduct Authority (**FCA**) (together, the **Regulators**)) specialises in employment, data protection and privacy or human rights law. While there is precedent for regulatory intervention in matters of Environmental, Social and Governance, historic practice has tended towards entrenching rules or policies developed by groups with relevant expertise - for example in relation to the codification in the Listing Rules of the recommendations of the Task Force on Climate-related Financial Disclosures. We think there is a strong risk that well-intentioned interventions of the kind envisaged by the DP will engage legal risks and issues of privacy, conflicts of rights and discrimination. We urge the Regulators to reflect further before advancing the proposals in the DP and to consider building on the work of organisations such as the EHRC who have a balanced range of relevant expertise

Q1: 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?

1. As drafted, the DP conflates the two separate protected characteristics[1] of sex and gender reassignment. As well as referring to "gender" throughout the the DP, in contexts where most readers will suppose them to be referring, in polite terms, to "sex", Box 7 in the DP states:

   Box 7: Categories of possible questions for the pilot survey

   The aim of the pilot survey is to understand what data firms currently collect (or have plans to collect), and where possible, to see that information. It is to help inform our

[1] Throughout this response we adopt the term "protected characteristic" as used in the Equality Act 2010 (**EqA**).

understanding on what we may wish to collect in the future. This survey aims to capture both diversity and inclusion.

Availability of data
To understand the data firms may hold on senior management and the wider workforce on ***the nine protected characteristics*** *and socio-economic background.*

Data on certain groups
To understand the make-up across senior management and the wider workforce on certain characteristics such as ***gender (including trans and non-binary identities)****, ethnicity, sexual orientation, disability and socio-economic background.*

[...]

(Our emphasis).

Having referred to the nine protected characteristics in one paragraph, the Regulators go on to ignore the protected characteristic of sex entirely and to refer to a characteristic called "gender" that is not protected under the EqA. The relevant protected characteristics for these purposes are sex and gender reassignment and it is clear from the above that the Regulators intend to collect data on these characteristics on an aggregated basis. As we go on to explain, the conflation of these two protected characteristics not only diminishes the value of the data, but also has the effect of introducing self-identification of gender (**Self ID**) rather than the expected position, which is that individuals report their sex as registered at birth or the sex recorded on their Gender Recognition Certificate.

We disagree with the Self ID approach for a number of reasons:

<u>Policy considerations</u>

1.1. As noted in paragraph 2.14 of the DP, the Regulators are subject to the Public Sector Equality Duty (**PSED**) under the EqA. This means that the Regulators must have 'due regard' to the need to:

- *eliminate unlawful discrimination, harassment, victimisation and any other conduct that is prohibited by or under [the EqA]*
- *advance equality of opportunity between people who share a protected characteristic and those who do not share it and,*
- *foster good relations between people who share a protected characteristic and those who do not share it.*

Application of the PSED must be related to the protected characteristics in the EqA. Proposals that seek to conflate two protected characteristics (sex and gender reassignment) or introduce the concept of gender, which is not a protected characteristic at all, would fail to advance equality of opportunity between those who share one of those protected characteristics and those that do not. Taking the example of women - women share with each other the protected characteristic of sex; men who identify as women may share with each other the protected characteristic of gender reassignment but do not share the protected characteristic of sex with women. It might be argued (although we would not agree that this should be for all purposes) that man with a gender recognition certificate (**GRC**) would share the protected characteristic of sex with women. However, a GRC is not necessary to meet the criteria for the protected characteristic of gender reassignment. This is

what we mean when we say that, by casually blending sex and gender reassignment together, the Regulators introduce Self ID.

Proposals that seek to advance equality of opportunity between women and men cannot be successful where those proposals also apply to a subset of men. Furthermore the forced conflation of women with biological males with a trans identity is unlikely to foster good relations between those two categories. It would therefore be a breach of the Regulator's duties under the PSED to implement proposals to adopt alternative definitions.

1.2. Following the decision of the Employment Appeals Tribunal in *Forstater*[2], it is clear that gender critical beliefs (ie the belief that sex is material and immutable and a disbelief in an innate gender) are protected under the EqA. A firm conflating sex and gender reassignment and thus permitting self-identification of gender in its policies in response to policies or regulations envisaged in the DP, may well be discriminating against those with gender critical beliefs. We envisage that those holding orthodox religious views would similarly disbelieve in innate gender overwriting sex and would be discriminated against. Encouraging discrimination is inconsistent with the PSED.

1.3. The government has very recently conducted a consultation on proposed reform of the Gender Recognition Act, which included consideration of Self ID, to which thousands of public responses were received. Following the consultation, the government decided not to implement Self ID. We think it inappropriate for the Regulators to seek to implement Self ID in the financial services arena contrary to an evidence-based government policy decision.

1.4. As well as the legal and practical issues associated with Self ID, there are many people with other protected characteristics (including women, gay men and lesbian women and followers of certain religions) who disagree with Self ID. The Regulators should be slow to promote a viewpoint that favours one protected characteristic over others and indeed, in doing so, as we explain in paragraph 1.1, are likely to be in breach of their PSED. The risk of perceived partiality is heightened where there is the potential for conflict of interest arising from the participation by two of the three Regulators (the BoE and the FCA) in the Stonewall Diversity Champions Scheme (as disclosed in the DP) and from one of the Regulators (the FCA) employing as a senior executive Stonewall's Chair of Trustees (not disclosed in the DP)[3]. Stonewall, once admired for its successful campaigns to advance LGB rights, particularly in respect of gay marriage, is now known primarily for prioritising the interests of the trans community, and for its intransigent refusal to acknowledge the need to balance these interests with the rights of women and those of other protected characteristics. Against this backdrop, it is hard to avoid the inference that part of the purpose of conflating sex and gender reassignment in the DP is to substitute, by the back door, the law as Stonewall would prefer it to be for the law as it is.[4]

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[2] Maya Forstater v CGD Europe and Others UKEAT/0105/20/JOJ

[3] Stonewall's current Chair of Trustees is currently the Executive Director, Consumers and Competition at the FCA and until December 2020 was the Interim Executive Director of Strategy and Competition

[4] Paraphrasing Akua Reindorf at paragraph 243.11 of the UNIVERSITY OF ESSEX Review of the circumstances resulting in and arising from the cancellation of the Centre for Criminology seminar on Trans Rights, Imprisonment and the Criminal Justice System, scheduled to take place on 5 December 2019, and the arrangements for speaker invitations to the Holocaust Memorial Week event on the State of Antisemitism Today, scheduled for 30 January 2020 REPORT by Akua Reindorf

Quality of data

1.5. If one of the purposes of the proposals outlined in the Regulators' discussion paper is to collect data to support decision-making,[5] proposals to conflate sex and gender reassigment defeat that purpose. The effect of this is to aggregate data relating to two separate protected characteristics (sex and gender reassignment) and make it impossible to properly apply the PSED with regard to sex. Collecting data on a disaggregated basis in relation to each protected characteristic would ensure the Regulators are able to comply with the PSED, and provide better quality data for the purposes of their policy and rule-making.

1.6. Many of those with gender critical beliefs reject the concept of gender, believing that it is based on the imposition of stereotypes on each sex. Any requirement on firms to require those individuals to identify their "gender" is therefore likely to be discriminatory.

1.7. In paragraph 4.16 of the DP, the Regulators state their intention to seek to collect data on ethnicity according to the categories used in the UK census. We agree with this approach, not least because it facilitates the comparability of statistics collected by UK public bodies. Indeed, we note that this is considered best practice in the collation of diversity data[6]. We therefore do not understand why the Regulators do not adopt the same approach with respect to sex and gender reassignment - the UK Census collects data on sex and gender reassignment separately. Indeed, the distinction between the two categories was considered sufficiently important by the UK Courts to justify granting permission for a judicial review of the Office for National Statistics' (**ONS**) guidance on how to complete the Census, which appeared to permit participants to answer the sex question based on Self ID. The Court also made an interim order that the relevant part of the guidance be amended, following which the ONS agreed to change the guidance on a permanent basis[7].

1.8. The Regulators cite as an example of good practice, the diversity survey conducted by the Solicitors Regulation Authority (**SRA**). However, the DP fails to correctly represent the list of data captured in the SRA's survey. According to the DP, the SRA survey form "currently includes ethnicity, sexual orientation, gender, age, religion, and belief, disability, social mobility criteria and caring criteria". While the form does include these criteria, it also covers the protected characteristic of sex. Specifically, in 2021, the research undertaken by the ONS in preparation for the 2021 Census prompted the SRA to change certain questions in its survey of the solicitors' profession so that questions are asked separately about sex and gender[8]. While we think there are still improvements to be made to the way in which the SRA seeks to capture disaggregated data about sex and gender, we welcome the thoughtful approach adopted by the SRA this year. We suggest that, if the Regulators do propose to adopt the SRA model, they adopt it in its entirety and collect disaggregated data on sex and gender reassignment.

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[5] See paragraph 4 of the DP

[6] See, for example, section 4 of the Diversity Data Guide published by the Investment Association in collaboration with PricewaterhouseCoopers LLP, June 2021 https://insights.theia.org/story/ia-diversity-data-guide/

[7] The Queen on the application of Fair Play for Women Ltd vs (1) UK Statistics Authority (2) Minister for the Cabinet Office [2021] EWHC 940 (Admin)

[8] SRA | Q&A - General | Solicitors Regulation Authority

2. In light of the above considerations, the only reason for the Regulators to conflate the two protected characteristics of sex and gender reassignment in the DP is ideological. In view of that, we anticipate the Regulators' response to the points raised in this submission to be that "trans women are women, trans men are men and non binary identities are valid." This will not do. Regulators and financial services policy-makers must look beyond slogans to an analysis based both on the law and also on material reality. We are disappointed to find that the Regulators propose instead to use their powers to advance a controversial ideology and one which goes against the current law, as reaffirmed by the government following extensive consultation.

Q2: Are there any terms in the FCA Handbook, PRA Rulebook or Supervisory Statements or other regulatory policies (for any type of firm) that could be made more inclusive?

The term *Ombudsman* appears many times. This could be changed to Complaints Commissioner or similar.

The term *chairman* appears in the definitions of *Key Individual* and *member of the management body*. We suggest replacing this with *chair*, in line with current best practice.

We note that throughout the rules, the masculine pronoun is used as the default pronoun. As Caroline Criado Perez has explained in her book, *Invisible Women*, the "generic masculine" is read overwhelmingly as male and when it is used, people are more likely to estimate a profession as male-dominated[9]. We therefore propose that the FCA consider replacing references to "he" with (s)he or similar, or simply use she and he alternately.

Q3: 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?

In general we agree that collecting and monitoring of diversity and inclusion data will help drive improvements in diversity and inclusion in the sector. We refer to our response to Question 1 and the need to collect data on a disaggregated basis as between different protected characteristics. We think that data gathering and reporting will, of themselves, encourage firms to focus on diversity. The analysis of the raw data collected may enable the Regulators to analyse themes and trends and to draw conclusions that enable evidence-based policies to be shaped.

We do, however, think there is a real risk that, particularly in smaller firms, certain data will be capable of identifying particular individuals. Where these data relate to characteristics that are not immediately apparent - for example sexual and romantic orientation or certain types of disability, individuals may prefer this information to be kept private. While it will normally be possible to "prefer not to say", even this response may lead to inferences being drawn. A further possible consequence is that in smaller firms there is a tendency for all respondents to "prefer not to say", thus risking that data collected by Regulators is skewed towards larger firms.

Q4: Do you have a view on whether we should collect data across the protected characteristics and socio-economic background, or a sub-set?

In principle, D&I data should be collected across all protected characteristics on a disaggregated basis. In particular, the protected characteristic of disability is often overlooked.

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[9] "Invisible Women" by Caroline Criado Perez, published by Chatto & Windus, *Introduction.* In the paragraph quoted, Ms Criado Perez is in turn quoting other studies, as referenced in *Invisible Women.*

However, we refer to the privacy and related concerns raised in our answer to Question 3. We refer, in case of assistance to the Regulators, to the Diversity Data Guide published by the Investment Association in collaboration with PricewaterhouseCoopers LLP[10], which contains useful evidence-based guidance on collecting data for D&I purposes. Further, if the Regulators decide to collect socio-economic data, then this should be based on clear objective criteria (see for example the criteria used by organisations such as the Social Mobility Foundation).

Q5: What data could the regulators monitor to understand whether increased diversity and inclusion is supporting better decision making within firms and the development of products and services that better meet customers' needs?

We assume that the Regulators' current programmes would be the right starting point, supported by a cross-analysis of the data collected by protected characteristic. We refer once again to the need to ensure data is disaggregated. We note that it will always be difficult to distinguish correlation and causation but this preliminary analysis should be capable of drawing out themes and trends that bear further research.

Q6: What are your views on our suggestions to approach scope and proportionality?

No comment.

Q7: What factors should regulators take into account when assessing how to develop a proportionate approach?

The EqA includes the concept of proportionality which has in turn been developed through a body of case law. Rather than develop new factors, the Regulators should draw on these well-established principles.

Q8: Are there specific considerations that regulators should take into account for specific categories of firms?

We consider that the Regulators need to take a proportionate approach having regard to the size of firm. Larger firms have already developed substantial programmes in respect of D&I, albeit these have not yet achieved the degree of change that is needed. While we consider that there must be a minimum level for all firms (for example a D&I policy, bullying and harassment policy and whistleblowing policy, and an action plan to improve D&I) it is unrealistic to expect this to be at the same level for all sizes of firms, and it is equally important that the larger firms have ambitious/stretching plans and targets, and that this does not become a simple tick-box exercise whereby they develop a suite of policies but effect no real change.

Q9: What are your views on the best approach to achieve diversity at Board level?

This is an extremely broad question. It would be difficult to do justice here to the significant body of research and commentary on this topic, but our key comments are:

- In some instances, low Board turnover slows change. Firms need proper succession planning and to manage the balance between retaining experience and ensuring that new positions become available. Long term succession planning also ensures that there is time to conduct a full search for diverse candidates.

- This should be combined with pipeline planning so that talented individuals further down the pipeline can be identified, coached and given opportunities to obtain relevant experience at an early stage.

[10] *ibid.*

- Firms should also analyse their data to understand where the particular challenges are - for example where they are leaking talent. A recent report by McKinsey (Women in the Workplace 2021) highlighted for example that women, and in particular women of colour, are far less likely to progress. Firms need to interrogate the data in order to understand how this is affecting their own pipeline, consider what measures can be taken to overcome it and focus their internal resources and budget accordingly.

- Firms should consider carefully the relevant criteria/skills required, and ensure that they are not unduly restrictive and that they allow for those with relevant but potentially shorter experience or experience gained in different fields or contexts to be considered.

- Programmes to promote diversity should, needless to say, comply with the EqA. In particular, this means that programmes to promote inclusion should not breach the EqA by conflating protected characteristics, as would be the case, for example, if programmes for the promotion of participation by women included Self ID women.

Q10: What are your views on mandating areas of responsibility for diversity and inclusion at Board level?

Our view is that all members of the Board and Executive have a responsibility for diversity and inclusion, and there is a risk that by mandating the responsibility to one individual or body, this is perceived as a tick box exercise which ceases to be the responsibility of the broader leadership. We note that in the context of whistleblowing, there is a requirement to appoint a Whistleblowers' Champion with mandatory responsibilities and reporting, but flexibility as to how the whistleblowing function is operated. Our recommendation is that the Regulators develop a similar requirement and approach for D&I which would include mandatory reporting to the Board in respect of metrics, the firm's action plan and also issues such as number of bullying and harassment complaints.

Q11: What are your views on the options explored regarding Senior Manager accountability for diversity and inclusion?

No comment.

Q12: 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?

We agree that remuneration can be an effective way of embedding cultural change. The McKinsey Report, Women in the Workplace 2021, highlighted the positive benefits to organisations felt when managers and leaders act on wellbeing and D&I initiatives in their teams, but also highlighted that female leaders frequently bear a greater responsibility for this, and that this work often goes unnoticed. Linking remuneration to action in respect of D&I could go some way to re-balancing this and drive forward change. However, it will be important to ensure that this does not lead to firms falling back on box-ticking or participation in external programmes run by lobby groups to demonstrate "easy wins".

Remuneration considerations would need to encourage consideration of all relevant protected characteristics and to discourage the adoption of "bought-in" packages and policies that are not tailored to the firm's culture and/or favour particular protected characteristics. We note in this regard the explosion in "trans inclusion training" from single-issue lobby groups, which have resulted in businesses failing to take account of the rights of women, particularly women from ethnic minority groups and those with particular religious or philosophical beliefs.

Q13: What are your views about whether all firms should have and publish a diversity and inclusion policy?

We would generally support this provided this requirement could be implemented in a proportionate way for smaller firms.

Q14: Which elements of these types of policy, if any, should be mandatory?

All firms should have a whistleblowing policy, a harassment and bullying policy, and a diversity and inclusion policy which considers the needs of all protected characteristics. Subject to this, we suggest that firms should have maximum freedom to develop their own policies. This is more likely to lead to firms adopting policies that have been carefully thought through, rather than simply adopting off-the-shelf policies. It is equally important that the development of D&I policies does not become a box-ticking exercise. We consider that firms should develop a formal action plan in respect of D&I which should focus on the specific challenges identified in their own organisations (whether that is recruitment, progression or retention / leakage) and measures to address this.

Q15: What are your views about the effectiveness and practicability of targets for employees who are not members of the Board?

If targets are set, they should be disaggregated by protected characteristic and should not conflate, for example, sex and gender reassignment.

Q17: What kinds of training do you think would be effective in promoting diverse workforces and inclusive cultures?

It is critical that training is tailored to the specific needs of the firm. We suggest that the Regulators should highlight the benefits of training that is prepared and/or carefully considered by a range of internal stakeholders rather than wholly outsourced. Outsourced training should be sourced from reputable businesses with wide experience and qualifications. Firms should be advised to avoid training run by single-issue organisations which may not properly reflect the rights and needs of all the protected characteristics or the law. In addition, recommendations and action points should take specific account of the needs and resources of the relevant firm.

We note that online training in short bursts of 5-10 minutes tends to get a good take-up and can be very effective. However, for a real understanding of a nuanced issue such as bullying and harassment, in-person training or a combination may be more effective.

Q18: What kinds of training do you think would be effective for helping understanding of the diverse needs of customers?

No comment.

Q19: What are your views about developing expectations on product governance that specifically take into account consumers' protected characteristics, or other diversity characteristics?

We think that this may be an interesting area in which the Regulators could conduct further research but, pending the outcome of any such research, do not believe it would be appropriate to hypothesise about the extent to which protected characteristics or other diversity characteristics should be a factor in product governance. Otherwise, there is a risk of making generalisations about the needs and wants of people who share a protected characteristic which could even be unhelpful in unwittingly reinforcing stereotypes.

One of the best examples of a protected characteristic being relevant to product governance is the example of Islamic finance driving the development of Shariah-compliant funds, bank accounts and mortgages. This was developed by the market in response to evidenced demand.

Q20: 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?

The impact of the data collected will obviously depend considerably on response rates, which in part depends on the extent to which participants consider there to be a risk of disclosing identifying information. If the data collection exercise covers a relatively small group of people (e.g. Board and Senior Management, or a wider range of people but from a smaller firm), take-up may be limited and in addition, data will be more easily skewed by outlier responses.

As noted above, data that aggregates, or even conflates different protected characteristics is likely to be of lower quality and we strongly urge the Regulations to collect disaggregated data.

We agree that the SRA diversity survey is a useful model, provided the current SRA form is used.

Q21: How should our approach for information disclosure be adapted so that we can place a proportionate burden on firms?

The Regulators will need to consider carefully the increased risk of inadvertent identification of individuals.

Q22: What should we expect firms to disclose and what should we disclose ourselves from the data that we collect?

It is difficult to predict what data will be collected and therefore how it should be disclosed. Perhaps adopting the SRA approach of providing data that can be interrogated by users would be an approach to consider.

The Regulators should encourage firms to report a range of relevant information and to avoid cherry picking the data that places the firm in the best light.

We also note that although the SRA has collected and published data since 2012, law firms have made some progress, but not enough, and arguably the Gender Pay Gap Reporting requirements have triggered more focus on the part of law firms than the SRA publication. A possible lesson is that limiting publication to a small number of accessible metrics may be more effective.

Qq23 & 24

No comment.

Q25: Do you agree that non-financial misconduct should be embedded into fitness and propriety assessments to support an inclusive culture across the sector?

Yes, subject to fairness and due process. A firm with a high incidence of bullying and harassment and/or where individuals have found it difficult to raise these issues, and/or where colleagues have not intervened is unlikely to be a firm which values diversity, or which is truly inclusive. Nor is it likely to be a place of psychological safety, or a firm where

individuals feel able to speak up and challenge, both of which we consider to be a fundamental requirement for proper risk management. Against this context, we consider that in some circumstances, serious non-financial misconduct may amount to a conduct rule breach (and specifically the duty to act with integrity) and be relevant to an individual's integrity for the purposes of the fit and proper assessment.

This is particularly the case for senior individuals who need to understand how culture and tone are "set from the top".

Much will depend on a range of factors including whether the misconduct was serious or repeated, the seniority of the individual, who judges what amounts to "misconduct" and the relevant individual's understanding of the impact of his or her conduct and how it affects the culture of the firm. At present, the FCA has commented on misconduct such as sexual harassment as being potentially relevant to fitness and propriety, but there is a lack of guidance. As a result firms are sometimes unclear as to the FCA's expectations with regard to the fit and proper assessment, and to sanctions such as malus and forfeiture, leading to a lack of consistency between firms.

The issue has become further clouded by the decision of the Upper Tribunal in *Frencham*[11], which drew a distinction between personal and professional integrity in a case involving an individual convicted of the sexual offence of grooming a child. The Tribunal referred to comments in the Solicitors Disciplinary Tribunal in the case of *Beckwith*[12] to the effect that the duty to act with integrity "does not require professional people to be paragons of virtue" in their personal lives. The Tribunal upheld the decision to ban Frencham on the basis he had not been open and transparent with the FCA, but we are disappointed by the conclusion that the offence itself did not provide sufficient grounds. We do not consider it analogous to *Beckwith* (which did not involve an offence). We agree with the FCA's submission to the Tribunal that Frencham's breach of legal and ethical standards in his personal life is fundamentally incompatible with his role as a financial adviser as well as risking erosion of public confidence in the reputation of the financial services industry.

Dishonesty offences unrelated to work are clearly regarded as relevant to integrity for the purposes of the fit and proper assessment. We consider that similarly, serious non-financial misconduct outside the workplace is relevant to an individual's moral compass, and in turn to culture. Further, while the outcome does not necessarily affect firms' decisions in cases involving misconduct such as sexual harassment or bullying in the workplace, it highlights the urgent need for clarity in this area.

Q26: 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?

We would, in principle, support a requirement that firms consider and explain to their relevant regulator how a proposed appointment would support diversity. However any regulatory consideration and intervention must be proportionate and should not second-guess a firm's decision on the best candidate save where there are objective concerns as to an individual's suitability.

Q27: What are your views on providing guidance on how diversity and inclusion relates to the Threshold Conditions?

If the FCA see Diversity & Inclusion as relevant to the Threshold Conditions, then the provision of guidance is appropriate.

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[11] Jon Frensham v The Financial Conduct Authority [2021] UKUT 0222 (TCC)
[12] Ryan Beckwith v SRA [2020] EWHC 3231 (Admin)

It may however be appropriate to first collect and analyse the data before setting expectations as to the Threshold Conditions.

Q28: Do you have any suggestions on which aspects of our supervisory engagement with firms that you think could be improved to help deliver and support greater diversity and inclusion?

The Regulators are not, and should not seek to be, arbiters of Diversity & Inclusion and we urge the Regulators to reflect on the risk of using supervisory engagement to impose their own culture and values, which may or may not reflect law or best practice and may or may not be appropriate to every firm. We give the example of the BoE and FCA being Stonewall Diversity Champions, which, as we have said, suggests failure to consider the potential for conflict between the interests of different protected characteristics and results in inappropriate prioritisation of one protected characteristic over another. We consider therefore that the Regulators should be slow to include these issues in its supervisory engagement.

Q29: What impact do you think the options outlined in this chapter, alongside the FCA's proposals for a new Consumer Duty, would have on consumer outcomes?

For a variety of reasons, we are not convinced that the proposed new Consumer Duty is necessary or useful. Indeed, we think it has the potential to cause confusion unless its interaction with the FCA's Principles for Business and with other rules, such as the existing product governance rules, is clarified.

In relation to the options outlined in the DP, we think the critical task is for the Regulators to first collect high-quality, disaggregated data, and then to interrogate that data to enable them to draw conclusions about the possible impact on Consumer Duty. Like other questions in this DP, the phrasing of this one suggests that the Regulators are setting the outcome cart before the data horse.

If one were to hypothesise, one might hope that the proposals in the DP might lead to greater representation of a range of protected characteristics at a senior level and this diversity might have an effect on, for example, firms' risk appetite. However, there is a long way to go before that hypothesis can be tested.