AFB RESPONSE TO FCA CP25/18: TACKLING NON-FINANCIAL MISCONDUCT IN FINANCIAL SERVICES

The Association of Foreign Banks (AFB) notes the publication by the FCA of CP25/18 'Tackling non-financial misconduct in financial services'.

AFB represents non-UK headquartered banks operating in the UK. With around 170 members from across the world, it represents 75% of the UK's foreign banking market. Its members (operating via branches and subsidiaries) employ of 110,000 people across the UK.

AFB members support the FCA's proposed approach and the objectives highlighted in CP25/18. However, we believe some aspects of the proposed requirements should be revised to ensure that they are more practical and operate efficiently. We have set out specific comments in our responses to the consultation paper questions below.

Question 1: To what extent do you agree that the new Handbook guidance in COCON and FIT is needed to help firms apply FCA rules?

AFB members agree that new Handbook guidance in COCON and FIT is needed to help firms apply the FCA's rules consistently.

AFB members believe that more specific guidance on non-financial misconduct examples would be a welcome addition to the guidance, particularly in COCON (see responses to Question 2 and 3 below). Currently there are a number of financial misconduct examples but the examples for non-financial misconduct are not as comprehensive.

Question 2: To what extent do you agree the draft COCON guidance would help you to apply our rules?

Overall, the AFB members welcome the addition of further clarity in COCON on the scope of non-financial misconduct to help apply the FCA's rules and provide both legal and regulatory certainty.

See our response below to Question 3 which contains comments on the guidance that, if actioned, would further assist members in applying the FCA's rules.

Question 3: Do you have any comments on the draft COCON guidance?

A. Specific guidance on individual conduct rules

COCON 4.1.1G provides a non-exhaustive list of examples of conduct that would be in breach of Individual Conduct Rule 1. Similarly, COCON 4.1.3G provides a non-exhaustive list of examples of conduct that would be in breach of Individual Conduct Rule 2. The lists are heavily focussed on financial misconduct.

These lists tend to be the first port of call for both firms and individuals when considering when specific conduct may be in breach of a conduct rule. Whilst the lists are expressed to be non-exhaustive, the absence of any scenario(s) relating to non-financial misconduct in this list may

lead to confusion, challenge, difficult judgment calls, and potential inconsistency in application and outcomes.

We recommend that the FCA update the guidance to include examples of non-financial misconduct within these lists. The lists should include clear scenarios, which will aid firms' decision making.

B. Breach of Conduct Rules & Disciplinary Action

In the flow chart on page 13 of CP25/18, the FCA has clarified that a Conduct Rule could be breached without the firm determining the need for disciplinary action. Such cases would be classified as non-reportable conduct rule breaches unless they meet the criteria of the Form D (SUP 10C.14.18R) or where the firm's threshold conditions have been breaches (SUP 15.3.1).

This flow chart, while clear, seems inconsistent with the FCA's "Our Response" box on page 21, where the FCA states that "some misconduct may not be serious enough to meet our regulatory threshold".

AFB members suggest that firms have to date interpreted and applied the Conduct Rules closer to the sentiment set out on page 21 (Our Response) of CP25/18, than the flowchart on page 13, and therefore have interpreted breaches of the Conduct Rules as having a direct relationship with formal disciplinary procedures, i.e. written warning or above, and/or reduction in variable compensation. In this sense, an investigation resulting in formal disciplinary action tends to be the starting point for firms in determining whether a Conduct Rule has been breached. Where no disciplinary action is required, it is unlikely to meet the regulatory threshold of a Conduct Rule breach, and we consider that firms would find it hard to consider an act / omission which may breach a Conduct Rule, which would not also result in a disciplinary action.

In response, AFB members suggest that the concept of unreportable Conduct Rule breaches is discontinued. As it stands, it is misaligned with current industry practices, adds ambiguity to the threshold for Conduct Rule breaches, and does not serve a clear purpose. This suggestion is further supported by the fact that:

(i) anything which is not considered a reportable Conduct Rule breach, can still be taken into consideration when assessing fitness and propriety for regulated role holders;

(ii) the concept of unreportable Conduct Rule breaches may lead to ambiguity regarding the application and threshold of fitness and propriety considerations;

(iii) unreportable Conduct Rule breaches are not to be disclosed on regulatory references; and

(iv) it may lead to ambiguity as to the treatment of Conduct Rules staff which are not subject to FIT with reference to the regulatory threshold for a Conduct Rule breach.

C. Private or personal life and COCON

AFB members view the table in COCON 1.3.7G (Private or personal life and COCON), which sets out some guidance as to scenarios in which non-financial misconduct may trigger COCON or otherwise, as helpful.

However, we consider that it would be useful if the FCA could supplement the table in COCON 1.3.7G to provide further guidance. In particular, in relation to the following:

- *"Misconduct by M in relation to a fellow member of the workforce at a social occasion organised by their firm"*. AFB members would welcome clarity on the factors firms should consider when determining whether a social occasion has been 'organised by their firm' e.g. (i) where the bill is paid for by the employer; and (ii) where drinks with colleagues at a venue outside of work in individuals' own personal capacity can be considered a "work event" for some individuals but not others e.g. for direct reports who feel an obligation to attend because the drinks have been organised by their manager but not those individuals who attend who have no reporting relationship with M
- *"M publishes material on a personal social media account (including sending it on a messaging app) held by M"*. AFB members would welcome clarity as to whether this example is intended to cover bullying or harassment of a colleague which takes place through a messaging service (such as WhatsApp)
- isolated workplace disagreements, including, specifically, where A has expressed lawful but controversial personal opinions in the workplace

In terms of one of the other existing scenarios in COCON 1.3.7G, *"M publishes material on a personal social media account (including sending it on a messaging app) held by M"*, we request that the FCA acknowledge that there are restrictions in some jurisdictions on the use of personal/social media content in misconduct investigations.

By way of example, the Garante per la Protezione dei Dati Personali case (in Italy) found in May 2025 that employers cannot lawfully use private social media or 3 closed-group messaging content in disciplinary proceedings - even when received passively - due to breaches of GDPR principles (lawfulness, purpose limitation, data minimisation). This may limit (some) international firms' ability to collect, retain or share such data for the purposes of assessing breaches of Individual Conduct Rule 1.

Additionally, the guidance at paragraph 3.35 on page 25 states that, if the decision to finalise the guidance is made, the FCA would make it clear that, in principle, a person can lawfully express their views on social media in their private or personal life, even if those views are controversial or offensive, or if work colleagues are upset by those views, without calling their fitness and propriety under FIT into question.

The above statement seems inconsistent with the sentiment of other guidance related to conduct outside of work and its relationship with FIT / assessments of fitness and propriety.

This inconsistency is more apparent if such views are seen as sexist or racist and/or where such views:

(i) are at risk of being repeated while the person is at work;

(ii) if known about, could impact the psychological safety / culture of a function / team, with knock on impacts on the effectiveness of systems and controls, and the ability of managers to discharge their duties in line with the current CP guidance; or

(iii) may undermine the firm's reputation, public confidence or the FCA's wider objectives.

The FCA does state that if a person's social media activity in their private life indicates a real risk the person will breach the requirements and standards of the regulatory system, then such activity will be relevant to their fitness and propriety, for example, where there are threats of violence or clear involvement in criminal activities. However, this is subjective, which may lead to an inconsistent approach across the industry, and it does not address the points above.

We would suggest that a table, similar to that set out in COCON 1.3.7G be developed with reference to instances when views expressed on social media may be considered against the criteria set out in FIT and the assessment of fitness and propriety.

D. Scope of application of the subjective test for COCON 1

AFB members note that misconduct may fall outside of the scope of Individual Conduct Rule 1 in certain circumstances. These are set out in proposed COCON 4.1.1D, which states that conduct only falls outside the scope of Individual Conduct Rule 1 if the conduct rules staff member "(a) thought that there was a good and proper reason for the conduct and that the conduct and its effect were proportionate to the intended aim of the conduct; or (b) did not intend to have a negative impact on the subject of the misconduct, did not know that they were doing so and was not reckless about the effect of their conduct."

It would be helpful if the FCA could clarify whether it intends for this clause to capture all non-serious/low level instances of non-financial misconduct, no matter how many times they occur, or whether this can only be relied upon by each individual once. We note in this regard that conduct that is "repeated or part of a pattern" is listed as a factor for determining severity under COCON 4.1.8EG. It would be helpful to clarify whether repeat conduct also impacts the objective assessment as to the reasonableness of a person's belief (COCON 4.1.1D(3)G).

AFB members also consider that the use of the terminology "good and proper reason" in COCON 4.1.1D lacks clarity, on the basis that "good and proper reason" is not a term that is well used or understood in this context. We would suggest that amending this to "appropriate reason" would convey the same sentiment and be more understandable for industry.

AFB members further note that the addition of the subjective and objective tests in 4.1.1D(2)G and 4.1.1D(3)G add a further level of complexity to determining where there has been non-financial misconduct falling within the scope of the rules, particularly without adequate examples of where conduct rules staff could validly consider that there was a good and proper reason for their conduct, or that it would not impact on the subject of the misconduct.

In addition, the draft guidance confirms that the new rule only applies to "serious" misconduct. In response to feedback from CP23/20, about the subjectivity of the term, COCON 4.1.8EG sets out factors that the FCA will consider when deciding whether the misconduct is serious enough to amount to a COCON breach. For example, whether the conduct is repeated behaviour, the

perpetrator's seniority and the impact of the conduct. One option would be for the subjective intention of the individual (COCON 4.1.1D(2)G) to be subsumed into the test for whether conduct is 'serious' in COCON 4.1.8EG to avoid confusion and difficulties in applying the test for breach of Individual Conduct Rule 1 in this context.

E. Test in COCON 2

AFB members note that the test for what constitutes a breach of Individual Conduct Rule 1 differs from that for Individual Conduct Rule 2. COCON 4.1.1D G states that the subjective test is based on a "belief…[that] should be reasonable". Conversely, COCON 4.1.8-AG states that a manager "will not be in breach of Individual Conduct Rule 2 if they have acted reasonably." There is however no subjective mental element applicable to breach of Individual Conduct Rule 2. It would be helpful if the FCA could clarify whether it considers this subjective mental element only to be relevant in the context of assessing integrity issues.

Further, in relation to breach of Individual Conduct Rule 2, clarificatory guidance is noted at COCON 4.1.8JG as to what call fall under the scope of COCON 1.1.7FR. It would appear that this applies equally to a breach of Individual Conduct Rule 1, so it is not clear why it is only listed under Individual Conduct Rule 2.

F. Severity of a breach of COCON 1 versus COCON 2

AFB members note that non-financial misconduct is likely to breach either Individual Conduct Rule 1 (Integrity) or Individual Conduct Rule 2 (Due care, skill diligence).

With regard to Individual Conduct Rule 1, consideration is given to actions/behaviour being deliberate or reckless. With this in mind, where an individual:

(i) thought there was good / proper reason for their conduct;

(ii) the conduct was proportionate to the intended aim; and/or

(iii) did not intend to have a negative impact, or did not know they were having such an impact (though noting that this must be reasonable belief under COCON 4.1.8KG(2)),

then their behaviour is unlikely to breach Individual Conduct Rule 1.

In instances where the above is true, CP25/18 suggests that the behaviour may breach Individual Conduct Rule 2 (Due care, skill diligence) with reference to COCON 4.1.8KG.

In providing the updated guidance the FCA is re-affirming the suggestion that a breach of Individual Conduct Rule 1 is a more serious breach of regulatory standards, given that it requires intent or at least an active mindset.

With this in mind, we would be grateful if the FCA could confirm whether firms should be weighing breaches of Individual Conduct Rule 1 more severely.

If more weighting is given to Individual Conduct Rule 1, it would be helpful if the FCA could provide its view on how and whether this will drive decisions on fitness and propriety as well as malus and clawback.

G. Lack of evidential provisions

We note that the proposed guidance is non-binding. Alongside this, members consider that the FCA's examples of compliant and non-compliant conduct should be provided in the Handbook as evidential provisions under s138C FSMA in order that they have evidential weight in interpreting the conduct rules themselves (as was previously the case for the examples of conduct given in the Handbook in respect of breaches of the APER Statements of Principles for Approved persons).

If the examples of compliant and non-compliant conduct are only included as Guidance, then (as per the FCA's Reader Guide: An Introduction to the Handbook, 2019) they are non-binding and would not be of evidential weight in determining whether or not a breach of a COCON rule had occurred. It would be more helpful for firms when using the COCON guidance to apply the FCA's rules as it would provide greater legal certainty.

H. Clarification of application of COCON 1.1.7FR to SMCR banking firms

AFB members request clearer guidance on the applicability of COCON 1.1.7FR to SMCR Banking Firms.

We appreciate that the core purpose of COCON 1.1.7FR is to extend the scope of COCON for non-banking firms (given the difference in the applicability of COCON for those firms). However, we note that COCON 1.1.7FR provides further clarity, which is not presently set out elsewhere in COCON, as to the nature of non-financial misconduct that the FCA is highlighting and that it considers may breach COCON.

In our view the wording of the proposed rues/guidance create a degree of confusion as to COCON 1.1.7FR's applicability to SMCR banking firms. In particular, whilst COCON 1.1.7FR states it does not apply to SMCR banking firms, COCON 4.1.1CG and COCON 4.1.1EG do apply to SMCR banking firms. COCON 4.1.1CG refers back to COCON 1.1.7FR.

It would be helpful for the FCA to clarify that the type of conduct described in COCON 1.1.7FR is applicable to staff at SMCR banking firms (such that a separate standard of conduct for non-banking firms is not being inadvertently created). Alternatively, or in addition, the type of conduct described in COCON 1.1.7FR could be referenced in the 'Specific guidance on individual conduct rules' at COCON 4.1.1G and/or 4.1.3G (which apply to all firms).

I. Scope of the definition of non-financial misconduct in 1.1.7FR(4)

The description of non-financial misconduct set out in in 1.1.7F(4) refers to "*The kind of conduct to which this rule applies as referred to in (3) is unwanted conduct of the following kinds in relation to an individual referred to in (3) ('B')*:

(a) conduct that has the purpose or effect of:

(i) violating B's dignity; or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B; or

(b) conduct that is violent to B."

AFB members consider that certain elements of this description are subjective, and it is not clear how these should be assessed. Notably, it would be helpful to have further clarity and/or examples of what type of conduct may constitute creating an "intimidating, hostile, degrading, humiliating or offensive environment".

Further, the test for violation of dignity in COCON 4.1.8IG (which we note is based on s26(4) of the Equality Act) states that "two factors will be relevant", (1) "the perception of the subject of the misconduct" and (2) "whether it was reasonable for the conduct to have had that effect". AFB members note that this refers to "reasonableness" in a general sense, rather than a "reasonable person" standard. It is therefore not clear whose assessment of reasonableness is relevant here, which we consider to be an important part of this assessment. We would ask for clarity on this point in the guidance.

J. Inserting a reasonableness test to the guidance in COCON 4.1.8-B

The AFB members welcome the addition in COCON 4.1.8-B (1)(a) of the requirement that a manager "knows or should have known" of behaviour of the kind described in COCON 4.1.1AG or COCON 4.1.8BG. However, AFB members consider that the provision should be reworded to insert a standard of reasonableness, as follows: "knows or should reasonably have known". The introduction of this objective standard would prevent unreasonably onerous standards of knowledge being imposed on managers and senior individuals. The point made above regarding lack of clarity as to whose assessment of reasonableness is relevant would not apply in this instance, as the standard would be of a reasonable person in the manager's position.

K. Definitions

The AFB members consider that a definition of "manager" for the purposes of assessing breaches of Individual Conduct Rule 2 would be helpful, in order to confirm that this applies to an individual's direct reports only, or is broader in scope (i.e. if someone performs a management function, it also applies in respect of conduct involving their indirect reports).

The above is of particular importance for those members of AFB, who have functional managers which sit outside the UK, and may be under the SM&CR regime, alongside a local matrix manager, who, while not the formal line manager, has closer geographical proximity. The local manager would have more influence over the team culture and the triggering of processes linked to the prevention, detection and investigation aspects (in line with Individual Conduct Rule 2).

There is also no definition of the meaning of an "allegation" (COCON 4.1.8-C(2)G). The inclusion of some detail would help firms assess the level at which a claim of non-financial misconduct must reach in an internal disciplinary process in order to be caught within the scope of the rule.

Question 4: To what extent do you agree the draft FIT guidance would help you assess fitness and propriety?

Members of the AFB welcome the guidance in FIT. However, as with COCON above, we request that a broader list of non-exhaustive examples be included to assist in the application of the guidance for fitness and propriety assessments.

Question 5: Do you have any comments on the draft FIT guidance?

A. Assessment against FCA's statutory objectives

As mentioned in our response to CP 23/20, we note the difficulties for firms in discerning whether misconduct "may damage public confidence in the financial system and financial services industry" (FIT 1.3.17G(3)). We consider that the assessment of fitness and propriety to be undertaken by the FCA and by the relevant firm should be limited to an assessment of whether, in all of the circumstances, the individual is fit and proper to perform the relevant role at the firm. It should not be extended to a broader consideration of whether the individual's past conduct may be inconsistent with the FCA's statutory objectives.

B. Scope of FCA assessments of fitness and propriety

FIT 1.3.20G(5) notes that "[t]he FCA will not necessarily limit its assessments of fitness and propriety in the way described in (3)." It would be helpful for firms if the FCA could provide an example of when assessments of fitness and propriety may not be limited to:

(i) matters of the kind described in FIT 2.1.3G;

(ii) criminal convictions; or

(iii) findings of a court, tribunal, regulator, arbitrator, public enquiry or other body whose responsibility it is to make findings of the relevant kind, when assessing whether a "wrongdoing in [an individual's] private life [is] of a kind that is relevant to fitness and properness."

C. Additional guidance on bullying, harassment, victimisation or discrimination

Further, members of the AFB note that the additional proposed guidance in FIT 2.1.3 G regarding the matters that the FCA will have regard to (and firms should consider) in determining a person's honesty, integrity and reputation includes at 2.1.3 G various references to matters related to "bullying, harassment, victimisation or discrimination". These are not defined terms and we would suggest that to ensure consistency any such provisions in FIT refer back to specific types of non-financial misconduct and associated definitions included in COCON (e.g. conduct of the type described at COCON 1.1.7FR).

D. Clarity on when firms should take action

We welcome the guidance in FIT 1.3.20G regarding when firms should conduct fitness and propriety assessments. However, AFB members request further guidance on their obligations where a relevant law enforcement or other authority is conducting a parallel investigation. For example, where a firm reaches its own preliminary conclusions before the relevant authorities, would the FCA then expect the firm reach a final determination under FIT, or to await the formal outcome before doing so?

Members of the AFB also note that, while the guidance provided in FIT 1.3.20 G as to when a firm needs to look into the private life of its staff is helpful, it would benefit from the addition of the following wording at the end of the paragraph to further clarify its scope: "The FCA would not expect a firm to investigate matters relating to a member of staff's private life where those

allegations are trivial and therefore would not impact the member of staff's fitness and propriety under FIT."

E. Definitions

As above for COCON, there is no clear definition of "allegation". We consider that this would be helpful in determining the bar at which firms are required to assess alleged non-financial misconduct and its impact on individual fitness and propriety.

Question 6: Do you agree that the new Handbook guidance – if made – should come into effect at the same time as the new COCON rule (1 September 2026)?

AFB members consider that having the Handbook guidance in advance of 1 September 2026 (e.g. in March 2026) would better enable firms to understand whether their interpretations are appropriate. If not practicable, the guidance should come into effect on 1 September 2026 at the latest.

Question 7: If no, when do you think any new Handbook guidance should come into effect?

Please see our response to question 6 above.

Question 8: Do you have any comments on the costs and benefits of the guidance discussed in Chapter 3?

No comments.

In addition to the responses to the questions above, we would ask the FCA to consider the following general points.

A. Nuances for cross-jurisdictional firms

AFB members consider that the final guidance should acknowledge the shared governance and investigation frameworks typically in place at international firms (i.e. UK subsidiaries and branches of third-country firms) and the FCA's expectations in this regard, particularly where such investigations may be conducted by centralised Group functions and take place outside the UK.

B. Question G in Regulatory References

AFB members note and acknowledge the FCA's assertion that Question G is "*fundamental to the purpose of the regulatory reference and so we do not intend to amend it*". However, AFB members would welcome further examples as to matters that should be disclosed in responses to Question G, in particular where concerns about non-financial misconduct may have been raised in relation to roles at non-UK group entities and in circumstances where there is no formal finding of misconduct and/or a disciplinary outcome. Having these illustrative examples would assist in promoting consistency and fairness of disclosures.

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