

August 2019

FCA publishes final rules confirming amendments to the SMCR

Summary

On 26 July 2019, in Policy Statement 19/20 the FCA published its final rules confirming amendments made to the Senior Managers and Certification Regime ("SMCR"), together with near final rules for solo-regulated firms.¹

As foreshadowed by a consultation issued in January this year (see our previous client alert on the topic [here](#)), the FCA has confirmed that firms' Head of Legal does not require approval as a Senior Manager.

Other amendments/clarification provided by the final rules on the SMCR also include:

- clarification that the scope of the Client Dealing Function (CF30 under the Approved Persons Regime) will not apply to administrative roles;
- individuals in certain firms not required to be Senior Management Functions ("SMF") for the Systems and Controls roles will have to be Certified for that role; and
- Senior Manager Conduct Rule 4 ("SC4") will apply to non-approved Executive directors at certain firms.

Head of Legal

The FCA will proceed as previously consulted on this topic and not require firms' Head of Legal to be approved as a Senior Manager because the benefits that normally result from applying the Senior Managers Regime ("SMR") will be substantially reduced by the restrictions arising from legal privilege. The FCA explains that including the Head of Legal in the Certification Regime and applying the

Conduct Rules will deliver most of the benefits of including these individuals in the SMR without compromising the law of privilege.²

The FCA provides some additional guidance.

- It is not proposing to exclude lawyers from performing a SMF. Heads of Legal that do perform a SMF will have to be approved by the FCA for that particular SMF.
- In determining whether an individual is performing the role of Head of Legal firms should refer to the guidance in SYSC 27.8.26 through to SYSC 27.8.29, for example whether an administrative role is in scope.

Under the Certification Regime, firms must identify as Certified Staff anyone who supervises or manages a Certified Function who is otherwise out of scope of the SMCR. This means that the individual to whom the Head of Legal reports must be captured by the Certification Regime if they are not already performing a SMF as per SYSC 27.8.³ The justification for this is to ensure that there are clear lines of responsibility and accountability. The FCA does not envisage that other legal roles, in addition to the Head of Legal, will be subject to the SMF contained within the Certification Regime. Other individuals carrying out a legal role will not require Certification unless they are a Material Risk Taker, or are otherwise performing any other Certification Function.

² Whilst the FCA says that will be sufficient to drive up standards of conduct and ensure fitness and propriety of legal staff, such staff are separately regulated, including from a conduct perspective, by the Solicitors Regulation Authority.

³ SYSC 27.8.13R: "(1) The function of managing or supervising a certification employee, directly or indirectly, is an FCA certification function. (2) A function in (1) is not an FCA certification function for that firm if it is performed by an SMF manager of that firm."

¹ <https://www.fca.org.uk/publication/policy/ps19-20.pdf>

In terms of the procedure for the transfer of the Head of Legal to the Certification Regime, firms will not be required to undertake regulatory referencing or redo fit and proper assessments for these individuals as long as their job does not change.

Client Dealing Function

The FCA has amended its rules to exclude an individual from being classified as a Client Dealing Certification Function where they have no scope to choose, decide or reach a judgement on what should be done in a given situation, and whose tasks do not require them to exercise significant skill.

The amended rule has been drafted in a way that provides firms with the flexibility to exercise judgement on whether a role requires Certification. The relevant factors in making such a judgement include whether the role is simple or largely automated; and involves exercising discretion or judgement.

The FCA explained that it was not possible to provide an exhaustive definition of all the ways that an individual could be considered to be undertaking client dealing activities; that will depend on the firm's business and the way responsibilities have been allocated across its staff.

Application of SMCR to solo-regulated firms

The Policy Statement also includes the FCA's final rules for solo-regulated firms and those on its new Directory of individuals. The FCA draws attention to two of those rules in particular.

Application of the Certification Regime to systems and controls roles

For certain firms, the FCA have added guidance clarifying that an individual who holds a SMF and also performs a systems and controls role (CF28 under the Approved Person Regime) will have to be certified for that role under the Certification Regime as a Senior Management Certification Function.

This change only affects Core and Limited Scope firms under the regime for solo-regulated firms, i.e. where such individuals are not required to be approved as SMFs for the Systems and Controls role.⁴

As with a firm's Head of Legal, anyone who supervises or manages someone holding a Senior Management Certification Function will also have to be a member of Certified Staff and be identified as such.

Extension of SC4 to Executive Directors

The FCA is applying SC4 to all directors at UK Limited Scope firms, including Executive directors.⁵ The rationale for that change is that it is more often a firm's Executive directors who are more involved in the running of the business more fortunate.

The FCA further justifies this change as proportionate because SC4 would already apply to all NEDs of UK Limited Scope firms.

Dates

Following publication of the Policy Statement and the coming into force of the Bank of England and Financial Services Act 2016 (Commencement No 6 and Transitional Provisions) Regulations 2019, further dates for the implementation of the SMCR across *all* authorised firms have become clearer. A summary of the key dates to note are set out below.

⁴ This rule change will also impact small Non-Directive Firms and small run-off firms and Insurance Special Purpose Vehicles in the insurers regime.

⁵ SC4: "You must disclose appropriately any information of which the FCA or PRA would reasonably expect notice."

Date	Event
26 July 2019	<ul style="list-style-type: none"> Clarification on the status of Head of Legal and Client Dealing Function effective for banks and insurers.
September 2019	<ul style="list-style-type: none"> Banks and insurers to start submitting data on Directory persons.
9 December 2019	<ul style="list-style-type: none"> All other firms to start submitting data on Directory persons. Commencement of the SMCR for solo-regulated firms. Banks to have certified Heads of Legal and those they report to.
7th December 2020	<ul style="list-style-type: none"> Commencement of the SMCR for benchmark firms.
9th December 2020	<ul style="list-style-type: none"> Commencement of employee Certification provisions for solo-regulated firms.
7th December 2021	<ul style="list-style-type: none"> Commencement of employee Certification provisions for benchmark firms.

Conclusion

The changes to the SMCR and associated guidance provide welcome clarity for firms, particularly concerning the role of Head of Legal and the Client Dealing Function.

As the requirement for *all* authorised firms to implement the SMCR nears, solo-regulated firms should be well advanced in their preparations to facilitate that transition. The final FCA rules and guidance should assist with those preparations. Should you require further information or assistance in this regard, or any other of the matters covered in this alert, please do not hesitate to contact the authors using the contact details provided.

If you have any questions about the SM&CR please do not hesitate to contact Tony Woodcock or Alex Irvine.

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