

# **FCA PUBLISHES FINAL RULES ON STRENGTHENING ACCOUNTABILITY IN BANKING**

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On 4 February 2016, the FCA set out further final rules on the new Senior Managers Regime (*PS16/3: Strengthening Accountability in Banking - Feedback on CP15/22 (July 2015) and CP15/31 (October 2015); rules on extending the certification regime to wholesale market activities and interim rules on referencing*).

## INTRODUCTION

The publication follows the final rules, published in July 2015 for UK relevant authorised persons (**RAPs**) and December 2015 for Foreign Branches, which set out the FCA and PRA's approach for strengthening accountability in the banking sector. The Senior Managers Regime seeks to ensure that senior managers can be held accountable for any misconduct that falls within their areas of responsibilities, and the new certification regime and conduct rules aim to hold individuals working at all levels in banking to appropriate standards of conduct.

The policy statement confirmed that the new certification regime will now be extended to those performing two new functions - the "client-dealing" and the "algorithmic trading" functions. Firms have until 7 September 2016 to identify and train staff for these two new functions. This is three months longer than for all other Significant Harm Functions (**SHFs**). The requirement to have certificates for all those identified as SHFs (including the new 'algorithmic trading' and 'client dealing' functions) by 7 March 2017 will remain unaffected.

The policy statement provides feedback on a [consultation paper \(CP15/22\)](#), published in July 2015, regarding the extension of the Certification Regime to wholesale market activities and also provides initial feedback on a [consultation paper \(CP15/31\)](#), published in October 2015, in relation to regulatory references. Although the FCA wanted the final regulatory references rules to be in place for the start of the new Accountability Regime in March 2016, the responses to the paper raised a number of issues which will require further discussion before the final rules are made. As an interim measure, the FCA has decided to continue the current referencing requirements under the Approved Persons Regime for pre-approved roles. The FCA aims to publish its full policy statement on regulatory references in Summer 2016.

## SCOPE

In a previous issue of [Exchange - International](#) we reported on a joint consultation paper published by the FCA and the PRA ([FCA CP 14/13](#) / [PRA 14/14](#)), setting out proposals to strengthen accountability in the banking sector. As we outlined in our report, the proposals – which have now become rules – include the following:

- the Senior Managers Regime focuses on individuals who hold key roles and responsibilities in relevant firms. Under the new regime, these individuals continue to be pre-approved by regulators, and need to submit statements of responsibilities. Firms will also be legally required to ensure that they have procedures in place to assess their fitness and propriety before applying for approval and at least annually afterwards;
- the certification regime applies to other staff who could pose a risk of significant harm to the firm or any of its customers (for example, staff who give investment advice or submit to benchmarks). These staff will not be pre-approved by regulators and firms' preparations will need to include putting in place procedures for assessing for themselves the fitness and propriety of staff, for which they will be accountable to the regulators;
- the conduct rules set out a basic standard for behaviour that all those covered by the new regimes will be expected to meet. Firms' preparations will need to include ensuring that staff who will be subject to the new rules are aware of the conduct rules and how they apply to them.

## MAIN PROVISIONS

**30 day grace period:** In response to feedback on the FCA's consultation paper ([CP15/22](#)) a 30-day grace period, equivalent to that which already exists under the Approved Persons Regime, has been introduced for SHFs to allow for short term business moves. This grace period will apply to individuals based outside the UK performing a customer function within the UK for less than 30 days in any 12 month period, on the condition that the individual is supervised and that there is territorial limitation. The grace period does not apply to Risk Taker SHF for UK Relevant Authorised Persons.

**Scope of the algorithm trading SHF – removal of "materiality":** The algorithmic trading function covers persons whose function is to approve the deployment of an algorithm, and also persons who have significant responsibility for monitoring and deciding whether or not a trading algorithm is compliance with the firm's obligations. As a result of the consultation, after negative feedback received by firms, the FCA removed the concept of "materiality" in its final rules on the basis that

specifying a materiality threshold would not be meaningful given the complex nature of algorithms and the iterative nature of the development process. However, the FCA clarified that the intention is to only capture the most senior decision maker.

**Scope of the client-dealing SHF:** In order to address the inconsistency of the initial scope of the Certification Regime, the new 'client dealing' SHF will include:

- advising on investments other than a non-investment insurance contract and performing other functions related to this, such as dealing and arranging;
- dealing, as principal or agent, and arranging deals in investments;
- acting in the capacity of an investment manager and functions connected with this; and
- acting as a bidder's representative.

This is designed to capture activities with both clients (as defined in the FCA Glossary) and any other person who does not fall within that definition. In that context, the new function focuses instead on activities, to whoever they are conducted with. The FCA maintains all dealing or arranging activities regardless of who they are conducted with, in order to capture all contracts that may pose a risk of significant harm to the firm or its customers.

**Scope of the territorial scope of the Certification Regime and the Conduct rules:** In respect of the territorial scope, the FCA reconsidered its initial proposal to extend the scope to capture individuals dealing with anyone in the UK because this would in practice capture a wide range of staff outside of the UK. Therefore, the FCA's current position is to capture staff based in the UK, solely when they are dealing with a UK "client" (as defined in the FCA Handbook Glossary). However, this is an interim measure; the FCA plans to revisit territoriality after commencement to ensure that the regime adequately captures those individuals who could have significant impact on the FCA's objectives.

**Territorial limitation of MRTs:** The FCA confirmed its proposal to remove the territorial limitation for Material Risk Takers (MRTs) in UK firms. This means that all individuals identified as MRTs by UK firms would be caught by the Certification Regime regardless of their location or activities. This policy ensures consistency between the FCA's and the PRA's approach. However, the FCA did not continue with its proposal to remove the territorial limitation for MRTs in foreign branches

because to do so would be inconsistent with its [final rules](#) (set out in *PS15/30*) on foreign branches which only capture UK RAPs, i.e. staff based in the UK.

## NEXT STEPS

The rules come into effect on 7 March 2016. Firms will have until 7 September 2016 to apply these rules. The Conduct Rules will also apply to individuals outside the Senior Managers and Certification Regimes from 7 March 2017 and firms will have until then to issue certifications for individuals under the Certification Regime.

## REGULATORY REFERENCES

This wide package of accountability reforms also includes proposals for regulatory references for candidates applying for senior manager and significant harm functions under the certification regime in banks, building societies, credit unions, PRA-designated investment firms and insurers.

Although the FCA wanted the final regulatory references rules to be in place for the start of the new Accountability Regime in March 2016, the responses to the paper raised a number of issues which will require further discussion before the final rules are made. As an interim measure, the FCA has decided to continue the current referencing requirements under the Approved Persons Regime for pre-approved roles. The interim position ensures that the existing obligation to provide a reference will also apply at commencement of the Senior Managers and Certification Regimes (SM&CR). Under the SM&CR a number of individuals will no longer be performing a controlled function, and will instead be performing a SHF under the Conduct Rules. As a pragmatic solution in the short term, the FCA has not extended the interim measure to candidates of these roles, while considering the feedback received to *CPI5/31*.

The FCA aims to publish its full policy statement on regulatory references in Summer 2016.

**[DLA Piper has extensive experience in EU financial services law and regulation, including the regulatory framework of the Senior Managers Regime and accountability in banking.](#)**

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