

FCA Consults on Further Amendments to the SMCR

The FCA seeks to clarify the position of the Head of Legal and the scope of the Client Dealing Function.

Key Points:

- The FCA is proposing to exclude the Head of Legal from the scope of the Senior Managers Regime.
- The FCA is also proposing to exclude individuals performing purely administrative roles from the scope of the Client Dealing Function.

The key proposals in [CP19/4](#) will be relevant to firms already subject to the Senior Managers and Certification Regime (SMCR), as well as firms that will come within the extended regime from 9 December 2019.

The Head of Legal

The FCA is proposing to exclude the Head of Legal from the Senior Managers Regime. This is relevant to banks, most insurers, and Enhanced firms under the extended regime (that is, firms to which the Overall Responsibility requirement applies).

The FCA previously indicated that the legal function was caught by the regime, but that due to the uncertainty surrounding this issue any firms who had determined in good faith to exclude the Head of Legal from the regime could continue with their approach while the FCA considered the matter further. The FCA published a Discussion Paper in September 2016, to consider whether or not the Head of Legal should be captured within SMF18 (Other Overall Responsibility Function).

The FCA reports that it received 33 responses to the Discussion Paper, with 24 respondents of the view that Head of Legal should be excluded from the Senior Managers Regime. A key argument put forward was the concern around legal professional privilege. Respondents were anxious that the Duty of Responsibility would put firms under pressure to waive privilege, in order to assist their Head of Legal to demonstrate that he or she had taken reasonable steps and so had discharged his or her own regulator duties. Many respondents also argued that positioning the Head of Legal as a Senior Manager would undermine the independence of the role. The FCA acknowledges that including such individuals within the Senior Managers Regime could limit the provision of full and frank legal advice to the firm.

Many firms that are already subject to the regime will have chosen not to include their Head of Legal within the scope of the Senior Managers Regime. However, firms should note that, if not a Senior Manager, the Head of Legal will fall within the Certification Regime — either as a Material Risk Taker or because they are performing the Significant Management Function. If their Head of Legal is already an approved Senior Manager because they also perform another Senior Management Function, such as Head of Compliance, then that individual will of course need to remain approved as a Senior Manager. Further, although the FCA proposes to allow firms to allocate overall responsibility for the legal function to someone who is not an approved Senior Manager, responsibility for the management of the legal function does need to be allocated to a Senior Manager, and so one of the existing Senior Managers will need to be responsible for the legal department.

The Client Dealing Function

As [announced in November last year](#), the FCA is seeking to clarify the scope of the Client Dealing Function, as a result of confusion regarding the extent to which it captures employees performing purely administrative roles. This issue is relevant to all firms currently subject to the SMCR, as well as firms that will be subject to the SMCR from 9 December 2019.

As currently worded, the Client Dealing Function includes individuals “taking part in” certain regulated activities, which many firms have read as including individuals in very low-risk roles. The FCA acknowledges that this could capture a wide range of individuals, and that it would be disproportionate to apply the regime to employees who pose very little risk of harm to consumers or the firm.

The FCA proposes to amend the description of the Client Dealing Function, so that it excludes individuals with 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 technical skill. Firms would therefore have scope to apply their judgement in deciding which individuals need to be certified. The FCA proposes that firms would need to consider matters such as whether the role: (i) is simple or largely automated; and (ii) involves exercising discretion or judgement, in deciding which roles require certification.

This qualification will only apply in respect of the following activities:

3. If the firm does any of the following activities:

- a) dealing, as principal or as agent; or*
- b) arranging (bringing about) deals in investments;*

taking part in those activities is included.

4. If the firm is acting in the capacity of an investment manager the following are included:

- a) taking part in that activity; and*
- b) carrying on functions connected to this.*

The proposed amendments clarify that there is no need to qualify the functions described in part (b) of the following activities:

1. *The following activities:*

- a) advising on investments other than a non-investment insurance contract; or*
- b) performing other functions related to this, such as dealing and arranging.*

2. *The following activities:*

- a) giving advice in connection with corporate finance business; or*
- b) performing other functions related to this.*

In the FCA's view, an individual must also be carrying out the functions in part (a) for the function to apply, and the functions in part (a) of both do require judgment and skill.

These proposals will be welcomed by firms that have been grappling with the potentially very broad reach of this function.

Other Proposals

The FCA is proposing to add new guidance to clarify that individuals within Core and Limited Scope firms will need to apply the Certification Regime to individuals currently performing Systems and Controls functions under the Approved Persons Regime, in situations where they may not otherwise be caught. The FCA is proposing to add new guidance to the effect that an individual within a Core or Limited Scope firm who is in effect performing one of the systems and controls Senior Management Functions (which only apply to Enhanced firms) should be considered to be performing the Significant Management Function under the Certification Regime. If the individual is an approved Senior Manager (for example, an executive director), they will only need to be certified in relation to the systems and controls part of their role if this differs significantly from what is encompassed within their role as a Senior Manager. The FCA views this as clarificatory in nature, and does not believe it will bring additional individuals within scope.

The FCA is also proposing a change in relation to the criteria for becoming an Enhanced firm. The FCA is aware that some firms it intended to capture within the intermediary category are not caught, as certain retail intermediaries do not submit the relevant regulatory return for them to be assessed against the revenue criterion. Therefore, the FCA proposes to adjust the criteria to ensure that all retail intermediaries are assessed against the intermediary revenue criterion. The FCA estimates that this will bring around 39 extra firms into scope of the Enhanced Regime.

Next Steps

The FCA requests responses to CP19/4 by 23 April 2019. The FCA states that it plans to publish its final rules and guidance in a Policy Statement in Q3 2019. The proposed changes would take effect either shortly after the Policy Statement is published, or on 9 December 2019.

The FCA helpfully indicates that firms currently subject to the SMCR can continue to rely on the statements on the FCA's website in relation to the Legal Function and the Client Dealing Function until the relevant changes come into force.

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