



THE EXTENDED SENIOR MANAGERS AND CERTIFICATION REGIME

Navigating implementation

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CONTENTS

The Senior Managers and Certification Regime

INTRODUCTION	3
PRACTICAL CONSIDERATIONS	5
SPECIFIC ISSUES	10
IMPLEMENTATION CHALLENGES	16
THE HR ANGLE	17
SMCR PLANNING	19

INTRODUCTION

Recap of the regime

The original Senior Managers and Certification Regime (SMCR) came into effect in March 2016 for most PRA-authorised firms (banks, building societies, credit unions, and PRA-designated investment firms). Even before this date, the UK government had announced that it planned to extend the regime to all authorised firms. The FCA published its near-final rules in July 2018, and the regime for FCA solo-regulated firms will take effect on 9 December 2019. The extended SMCR will replace the existing Approved Persons Regime.

This guide offers a practical perspective on the extended SMCR for FCA solo-regulated firms, and can be used as a framework for implementation planning. A basic working knowledge of the regime is assumed – for an outline of the regime please see Latham’s separate guide on the extension to all authorised firms. The content is based on the FCA’s near-final rules, which may be subject to change. This guide does not cover the SMCR for insurers.

What does the regime look like?

The extended SMCR comprises of three elements:

- **The Senior Managers Regime** – an approval regime for individuals performing Senior Management Functions (SMFs). An SMF is (broadly) a function that involves (or might involve) a risk of serious consequences for the firm, or for business or other interests in the UK. Senior Managers must be pre-approved by the FCA and have written Statements of Responsibilities setting out the areas for which they are accountable.
- **The Certification Regime** – firms will be solely responsible for assessing the fitness and propriety of employees whose role or function could pose a risk of significant harm to the firm or its customers. Firms must certify that employees performing Certification Functions are fit and proper before they commence their role, and on at least an annual basis thereafter.
- **The Conduct Rules** – basic conduct standards applicable to most employees of the firm (save for purely administrative staff). The core five Individual Conduct Rules will apply to all Senior Managers, Certified Persons, and other employees within scope. Four further Senior Manager Conduct Rules will apply to Senior Managers only. Firms will need to train personnel on the Conduct Rules, and report certain breaches to the FCA on a periodic basis.

Classification

The FCA intends to apply the extended SMCR in a proportionate manner by dividing firms into three categories:

- **Limited Scope firms** – firms that currently benefit from a limited application of the Approved Persons Regime, such as sole traders, internally-managed AIFs, and limited permission consumer credit firms, will be subject to a reduced set of requirements.
- **Core firms** – firms that do not qualify as Limited Scope or Enhanced will be subject to the baseline regime, which is a pared-back version of the SMCR for banks.
- **Enhanced firms** – around 350 of the largest, most complex, or riskiest firms will be subject to additional requirements above the baseline Core regime, more akin to the requirements for banks.

Key features of the Core regime

- Requirement to seek pre-approval for individuals performing designated Senior Management Functions (SMFs)
- Requirement to allocate certain Prescribed Responsibilities to Senior Managers
- Requirement to produce Statements of Responsibilities for Senior Managers
- Duty of Responsibility for Senior Managers
- Need to certify employees within scope of the Certification Regime
- Need to assess fitness and propriety of Senior Managers and Certified Persons at least annually
- Application of Senior Manager Conduct Rules and Individual Conduct Rules to Senior Managers, and Individual Conduct Rules to most other employees of the firm
- New regulatory references regime

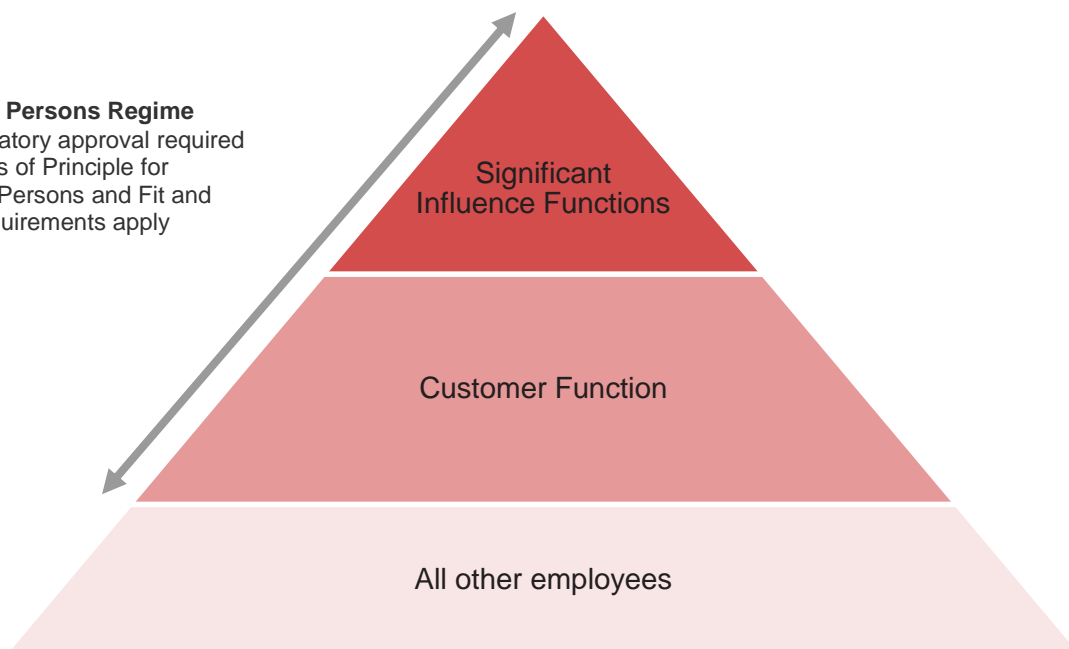
INTRODUCTION^{continued}

Recap of the regime

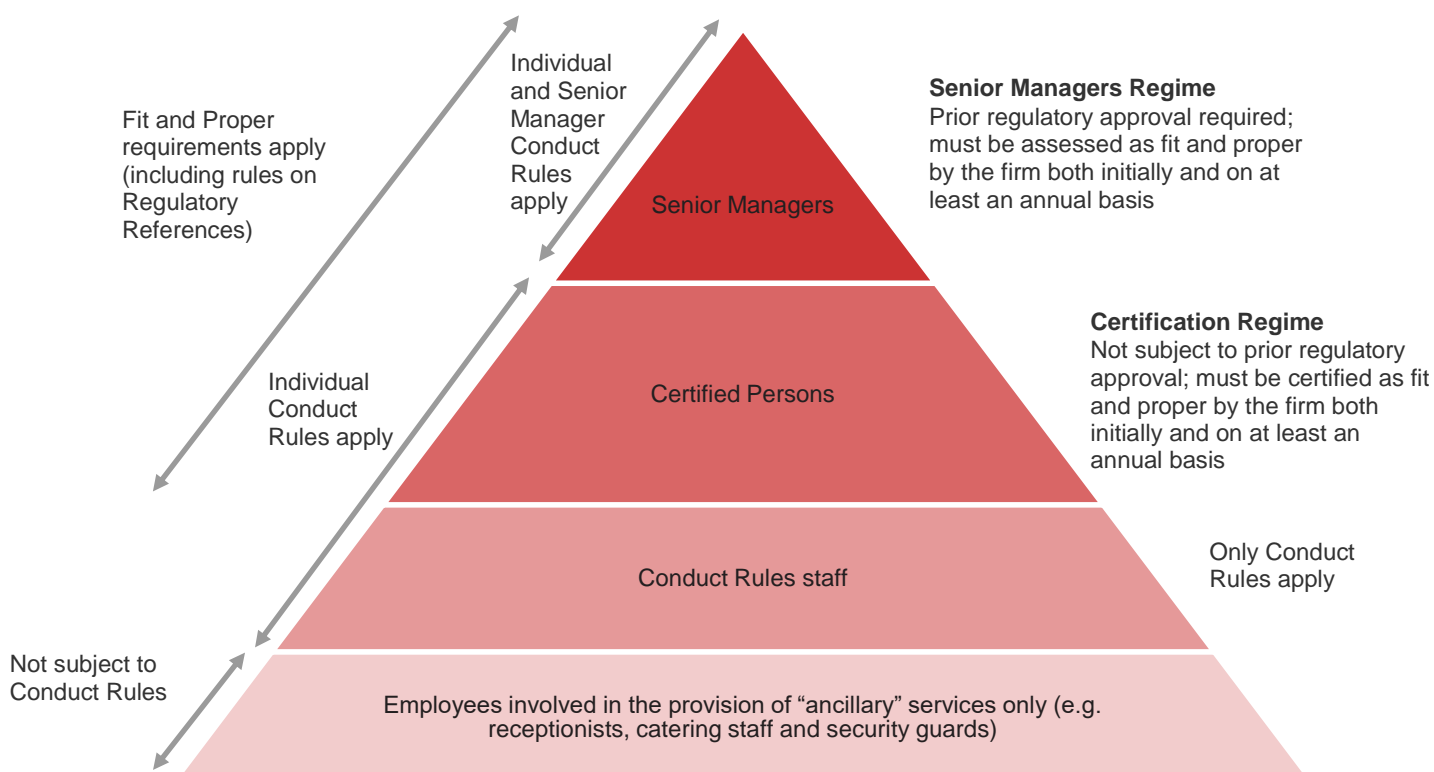
Current: Approved Persons Regime

Approved Persons Regime

Prior regulatory approval required
Statements of Principle for
Approved Persons and Fit and
Proper requirements apply



New: Senior Managers and Certification Regime



PRACTICAL CONSIDERATIONS

General questions on the regime

General

Who does the extension affect?

The extension affects all FCA solo-regulated firms that are authorised under the Financial Services and Markets Act 2000, and insurers (the regime for insurers is not dealt with in this guide). It also affects UK branches of both EEA and non-EEA firms. Branches will be subject to a modified, simpler version of the regime. Branches of EEA firms will be subject to the lightest touch variant (as under EU financial services legislation various matters are reserved to the home state regulator, limiting the requirements that may be imposed upon branches by the host state regulator).

The SMCR will not apply to other types of regulated financial services institutions that are not authorised under the Financial Services and Markets Act 2000, such as payment services firms.

When will the extended SMCR apply?

The SMCR will apply to FCA solo-regulated firms from 9 December 2019, subject to transitional arrangements. It will apply to insurers from 10 December 2018.

Approach to the SMCR

SMCR implementation should not be regarded as a one-off project. Given the genesis and aims of the SMCR, firms will be expected to use it as a tool to assist with wider (and expected) ongoing culture change programmes. Firms are encouraged to embrace the spirit of the regime and not to take a “tick-box” approach to implementation.

How is the regime applied?

The SMCR applies on a legal entity basis. This may prove to be something of a challenge for those many firms or groups of firms that are run by business line or on a functional basis.

Classification

Which firms will be subject to the Enhanced regime?

- Significant IFPRU firms
- CASS Large firms
- Asset managers with AUM of £50 billion or more (calculated as a three-year rolling average)
- Firms with total intermediary regulated business revenue of £35 million or more per annum (calculated as a three-year rolling average)
- Firms with annual revenue generated by regulated consumer credit lending of £100 million or more (calculated as a three-year rolling average)
- Mortgage lenders and administrators (that are not banks) with 10,000 or more regulated mortgages outstanding

Does the £50 billion or more AUM requirement apply on a legal entity or an aggregated basis?

The near-final rules stipulate that calculations must be made on a solo basis. This may well result in an outcome whereby certain entities within a group are within the Enhanced regime, whereas others are within the Core regime – notwithstanding that all (UK-managed) assets within the group are managed on a functional management basis. As a practical matter, such firms may consider that adopting the Enhanced regime across all of their UK regulated entities is the only feasible approach.

PRACTICAL CONSIDERATIONS^{continued}

General questions on the regime

What are the additional requirements for Enhanced firms?

- Additional Senior Management Functions
- Additional Prescribed Responsibilities
- Overall Responsibility requirement
- Responsibilities Maps
- Handover requirements

Can a firm be classified as Enhanced even if it does not fall within any of the specified categories?

In limited circumstances where a firm is large and complex, but does not meet any of the criteria for being an Enhanced firm, the FCA may require that firm to comply with the regime for Enhanced firms. This would be a case-by-case assessment; the FCA does not anticipate many firms being in this situation.

If a firm falls within the Core regime but considers that it is likely to fall within the Enhanced regime in future, or would rather comply with the Enhanced regime (perhaps to align with other group entities), it will be able to choose to apply the Enhanced regime by submitting a Form O. The opt-up will take effect three months after the firm submits the Form O. Firms should be aware, however, that if they wish to opt up formally, they will need to apply the Enhanced regime in its entirety (the FCA will not let firms pick and choose which elements to apply).

Also, firms wishing to apply the Enhanced regime voluntarily should be aware that, if they wish to move back down to the Core regime in future (provided that in the meantime they have not met any of the criteria for becoming an Enhanced firm), they will have to wait for one year after formally notifying the FCA of this intention before they can move back to the Core regime.

Can the FCA 'exempt' a firm from the Enhanced regime even though it meets the criteria for being an Enhanced firm?

Some firms will be exempt from the Enhanced regime under the rules, even if they meet one of the criteria. These include branches of overseas firms, certain full-scope UK AIFMs and bidders in emissions auctions that are exempt from MiFID. It should be noted that a firm with a waiver from parts of the Significant IFPRU requirements only will be in scope of the Enhanced regime, whereas a firm with a waiver from being a Significant IFPRU firm entirely will not be in scope.

A firm that does not benefit from an exemption can apply for a waiver if it does not consider that the regime for Enhanced firms should apply. However, it is expected that it would be difficult (and therefore unusual) for a firm to obtain such a waiver in practice.

Can firms move between different categories?

Yes, although the FCA wants to try to prevent firms moving between categories on a regular basis. The Enhanced regime will continue to apply to a firm for a period of one year once it stops meeting the relevant criteria (the exact timing of when this period commences depends on which criterion applies).

Once a Core firm meets one of the relevant criteria for the Enhanced regime, it will have one year before it has to comply with the Enhanced regime (again, the exact timing of when this period commences depends on which criterion applies).

PRACTICAL CONSIDERATIONS continued

General questions on the regime

Senior Managers

Who is caught by the Senior Managers Regime (SMR)?

The scope of the SMR depends very much on the type of firm and its structure.

There is no territorial limitation on the SMR, so the regime applies to anyone who performs an SMF, regardless of whether or not they are based in the UK.

As a general rule, firms are likely to have fewer approved Senior Managers under the SMR than Significant Influence Function holders under the current Approved Persons Regime. This is because responsibility is more concentrated, and vested in fewer individuals.

Can a Senior Manager hold more than one SMF?

Yes, subject to any relevant independence requirements. In such cases the individual must be approved for each SMF, although he or she need only have one Statement of Responsibilities (this must describe all responsibilities under each function).

What is the approach to NEDs?

Not all NEDs are within scope of the SMR. For Core firms, the only SMF ideally to be allocated to a NED is the Chairman function (SMF9). For Enhanced firms, there are a number of SMFs that should ideally be performed by NEDs.

NEDs that do not fall within the SMR are nevertheless subject to the Individual Conduct Rules and Senior Manager Conduct Rule 4, the fitness and propriety requirements and the rules on regulatory references. However, they will not be Certified Persons, as the Certification Regime applies only to employees.

Is the full set of Prescribed Responsibilities applicable to Enhanced firms the same as that applying to Senior Managers of banks?

No. There are some notable differences – including the absence of the two culture-related Prescribed Responsibilities applicable to banks. In PS18/14, the FCA states that it has not added in these Prescribed Responsibilities as it considers every individual in a firm to be accountable for the firm's culture. Therefore, the FCA sees culture as a collective responsibility. The FCA also notes that cultural improvements will be reinforced through the wide application of the Conduct Rules.

Must certain Prescribed Responsibilities be allocated to certain types of Senior Manager, depending upon their executive or non-executive status?

Yes. This is most relevant for Enhanced firms, which will have more Prescribed Responsibilities to allocate and likely more Senior Managers who are NEDs. The FCA expects that most Prescribed Responsibilities will be allocated to an Executive Director or Partner, but the specific responsibilities for Enhanced firms relating to safeguarding and oversight of internal audit, compliance and risk should be allocated to a Senior Manager who is a NED, or a partner without management responsibilities, where possible.

Can a Prescribed Responsibility be divided or shared?

The FCA expects that each Prescribed Responsibility normally will be held by only one person. Senior Managers will only be able to divide or share a Prescribed Responsibility exceptionally, and where the firm can show that this is appropriate and justifiable. This may be the case, for example, where there is a job share arrangement in place, as part of a handover process where two people are working together, or where a particular area of the firm is run by two Senior Managers. The firm will need to confirm that the sharing of the Prescribed Responsibility does not leave a gap, and explain the arrangements in the relevant Statements of Responsibilities. Generally, where a Prescribed Responsibility is shared, both Senior Managers would be responsible jointly for the whole.

PRACTICAL CONSIDERATIONS continued

General questions on the regime

What is the new handover procedures requirement?

Enhanced firms must take all reasonable steps to ensure that a person taking a Senior Manager role has all the information and materials (s)he could reasonably expect to do his or her job effectively. In practice, it is likely that the firm will require the predecessor to prepare a handover note. Additionally, an Enhanced firm must have a policy explaining how it complies with this requirement, and maintain adequate records of the steps that it has taken.

Certification

What is the territorial scope of the Certification Regime?

For UK firms, the Certification Regime is limited to employees of the firm performing a Certification Function who are either based in the UK or, if based outside the UK, are dealing with (*i.e.* have contact with) UK clients. The only exception is in relation to Material Risk Takers under the Remuneration Codes – in respect of whom there is no territorial limit.

For branches of EEA and non-EEA firms, the Certification Regime only applies to employees who are based in the UK.

Conduct Rules

To what activities do the Individual Conduct Rules and Senior Manager Conduct Rules apply?

The rules apply to an individual's activities in relation to the firm's regulated and unregulated financial services activities (including any related ancillary activities). Incidentally, this is narrower than the requirements under the banking regime, where the Individual Conduct Rules and Senior Manager Conduct Rules apply to everything someone does on behalf of the bank – whether or not within the scope of regulation or linked to financial services.

To help individuals understand the proper standards of market conduct in relation to unregulated financial services activities, the FCA plans formally to recognise industry codes of conduct that it considers articulate these standards. Compliance with these codes will not be mandatory, but adherence may help an individual show that he or she was in compliance with the Conduct Rule that requires individuals to observe proper standards of market conduct.

What are the breach notification requirements under the extended SMCR?

Firms must notify the FCA when disciplinary action (broadly defined, and including the issuing of a formal written warning, the suspension or dismissal of the individual, or the reduction or recovery of the individual's remuneration) has been taken against a person as a result of a breach of the Individual Conduct Rules or Senior Manager Conduct Rules. For Senior Managers, this notification must be made within seven days of the firm becoming aware of the matter. For others (Certified Persons and other Conduct Rules staff), the notification must be made annually.

Firms must, however, remain cognisant of their separate obligations under Principle 11. Therefore, although a firm may wait until the annual notification exercise to notify the FCA of a breach by a Certified Person, there may be circumstances in which the firm will need to make an earlier notification to the FCA under Principle 11.

Are there any training requirements?

Yes. Firms must make individuals who are subject to the Conduct Rules aware that this is the case, and take all reasonable steps to ensure that they understand how the rules apply to them and their role. In practice, this is likely to be through tailored computer-based training, which ideally would include an assessment component. This training may be supplemented by face-to-face training for Senior Managers.

PRACTICAL CONSIDERATIONS^{continued}

General questions on the regime

Transition

Will we need to reapply for the approval of current Approved Persons who will become Senior Managers?

In most circumstances this will not be necessary. The FCA plans to use a process of “conversion” to allow existing Approved Persons to perform equivalent Senior Management Functions without further approval. For Core and Limited Scope firms, this process will be automatic and will not require any action on the part of the firm, except in relation to directors who will be performing the Chair function (SMF9) under the SMCR (as the FCA does not hold information as to who currently performs this function within relevant firms).

Enhanced firms will be required to submit a conversion notification, along with Statements of Responsibilities and a Responsibilities Map, in order to convert individuals.

New approvals will only be required if an individual will be performing a different role under the SMCR, and their current Controlled Function does not map onto an equivalent SMF. The FCA has provided a definitive list of which functions map across; direct conversion will not be possible if a role is unmapped. For example, a non-executive director could not convert into the Executive Director function (SMF3). In such cases, the firm must submit an application for a new approval in relation to that individual.

What happens if we need to get new individuals approved between now and commencement?

The appropriate steps will depend on the nature of the appointment and how much time is left before commencement. As a general point, firms should aim to deal with planned changes well in advance of the SMCR commencement date, to avoid any delays or complications.

Although SMCR forms will be available prior to commencement, approvals for applications using these forms will only take effect from commencement. Therefore, if approval is required earlier, firms should submit the current Approved Persons forms, and ensure that the individual is eligible for conversion to the appropriate SMF. This should be done in good time before commencement if possible, as “in-flight” applications will be converted into SMCR applications at commencement, making the process slightly more complex.

The FCA also is encouraging firms to consider now whether all current Approved Persons are in the correct positions, and to make any necessary adjustments so that the conversion process will be as smooth as possible. In particular, the FCA encourages firms to consider whether individuals currently approved to perform the CF4 Partner function do in fact require approval.

SPECIFIC ISSUES

Thoughts on more complex questions

Below is a series of more detailed Questions and Answers on the extended SMCR, looking at more specific issues. While all determinations necessarily will need to be on a case-by-case, fact-specific basis, the answers below nevertheless can be used as a sensible starting point.

Question	Answer
For firms set up as an LLP, they may well have partners who are not responsible for running the firm. Would such partners need to be approved as Senior Managers?	<p>If the degree of a partner's involvement in managing the firm is insufficient to meet the overarching definition of "Senior Management Function", then he or she will not need to be approved as a Senior Manager.</p> <p>A Senior Management Function must require the individual to be responsible for managing one or more aspects of the firm's affairs in relation to a regulated activity carried on by the firm, where those aspects involve, or might involve, a risk of serious consequences for the firm, or for business or other interests in the UK.</p> <p>For example, "purely silent partners" will not need to be approved. Similarly, where a firm has a large number of partners at a junior level with no substantive involvement in the management of the firm or authority to act on its behalf, those partners should not require approval.</p> <p>The FCA is encouraging firms to consider whether partners currently approved under the CF4 Partner function will require approval under the SMCR, before they move to the new regime. It may well be that some do not meet the above definition (and they may not in fact meet the CF4 definition at present). If approval is not required, the firm should cancel the approvals of relevant individuals prior to commencement (if a Core firm), or leave them out of their conversion notification (if an Enhanced firm).</p>
In an LLP, can people who are not partners be brought within scope of the regime?	<p>Yes. Under the Core regime, this would be through the FCA Handbook definition of "partner" (any person appointed to direct the partnership's affairs, including a person: (i) occupying the position of a partner (by whatever name called); and (ii) in accordance with whose directions or instructions (not being advice given in a professional capacity) the partners are accustomed to act).</p> <p>Additionally, under the Enhanced regime, other people could potentially be brought in scope by the SMF18 (Other Overall Responsibility) or SMF7 (Group Entity Senior Manager) functions.</p>
How will Senior Managers be identified in situations where a firm operates an executive committee at group (holding company) level but such executives may not necessarily be directors at the regulated entity level?	<p><u>Enhanced firms</u></p> <p>In the case of Enhanced firms, SMF7 (Group Entity Senior Manager) is designed to draw into scope individuals situated in other group (often parent) entities who exercise significant influence on the management or conduct of the affairs of the regulated entity.</p> <p>There is some helpful indicative guidance at SUP10C.5B.3G - 8G in the near-final rules.</p> <p>SMF7 is more likely to apply to individuals who are directly responsible for implementing the group's strategy in the firm. Therefore, if an individual based elsewhere in the group: (a) is directly responsible for taking decisions about how the firm should conduct its regulated activities; and (b) has not delegated this responsibility to a Senior Manager</p>

SPECIFIC ISSUES continued

Thoughts on more complex questions

Question	Answer
	<p>based in the firm, it is likely that he or she will require approval as an SMF7.</p> <p>SUP10C.5B.5G(4) may be especially helpful in a number of cases: <i>“If however the firm’s governing body has sufficient discretion in how it applies and responds to proposals coming from group committees or individuals based in parent entities, approval [for SMF7] would generally not be required. In this case, the individual will be carrying on a group-level function rather than performing a function on behalf of the firm”.</i></p> <p>Therefore, where a firm has in place the requisite Senior Managers based in the firm, and those Senior Managers are effective and have sufficient control over the firm, the FCA would not ordinarily expect the firm to have one or more SMF7s.</p> <p>It is clear that a key consideration when assessing the need to designate an SMF7 is the degree of control, discretion and general autonomy enjoyed by the board/governing body of the firm. Where such genuine independence can be demonstrated – most obviously, through board minutes and papers, as well as reporting lines – there ought to be a strong argument that no SMF7 appointments are necessary.</p> <p><u>Core firms</u></p> <p>For Core firms, such individuals could be caught as “extended” SMF3 (executive director) – on the basis that “director” is defined as: <i>“a person occupying the position of a director (by whatever name called); and/or a person in accordance with whose directions or instructions the directors [of the regulated entity] are accustomed to act.”</i></p> <p>The above guidance relating to Enhanced firms can similarly be applied to any “extended” SMF3 determination.</p>
Is the legal function caught and how have other financial institutions already subject to the SMCR such as banks dealt with this issue?	<p>The Head of the Legal Function will be a Certified Person if they are not otherwise a Senior Manager (as they will fall within the definition of a “Material Risk Taker”).</p> <p>Other members of Legal will be Conduct Rules staff – unless they happen to fall within any of the other Certification categories. The question of whether the person with overall responsibility for the management of the legal function (in many cases, the GC) needs to be approved as a Senior Manager is still open. The FCA plans to consult further on this issue and to make final rules before the commencement of the extended regime.</p>
If a group has some legal entities that are Core firms and some that are Enhanced firms should the group realistically just apply the Enhanced regime across all entities?	<p>Some firms in this situation may well propose to adopt this ‘highest common denominator’ approach – especially if, for example, all UK-managed assets are managed on a functional management basis.</p> <p>However, this is ultimately a matter of individual preference. Firms should be aware, however, that if they formally opt-up to the Enhanced regime they must comply with the Enhanced regime in full (they cannot cherry-pick). Also, firms that have opted-up must wait at least one year before they can move back down to the Core regime, so firms should consider carefully whether it is desirable to opt-up before doing so.</p>

SPECIFIC ISSUES continued

Thoughts on more complex questions

Question	Answer
Will the lack of a Responsibilities Map / allocation of overall responsibility limit the FCA's ability to take action against Senior Managers in Core firms?	<p>Documents such as the Responsibilities Map are designed to help the regulator understand the way a firm is run and who is accountable for what. However, such documents are not conclusive, and are simply one piece of evidence for the FCA to take into account.</p> <p>The FCA will still of course be able to rely upon Statements of Responsibilities, which arguably equip the regulator with enough detail about who is accountable for what within the firm. Therefore, it may be that in many/most future enforcement cases, the FCA will have sufficient evidence to take action simply by virtue of a Senior Manager's Statement of Responsibilities.</p> <p>Although Core firms are not required to allocate overall responsibility for every activity, business area and management function, they should ensure that there are no gaps in accountability. If the FCA were to find a gap while investigating an issue, rather than this preventing the FCA from taking action there is a risk that the FCA might successfully be able to take action against the most appropriate Senior Manager.</p>
Evidence - what is your best guess of a standard to be met by Senior Managers and can you give an example scenario?	<p>Any individual facing a regulatory challenge will need to be able to adduce sufficient evidence (ideally, contemporaneous documentary evidence) that he or she took the requisite reasonable steps in the particular circumstances. What will be "sufficient" will ultimately depend on the specific scenario.</p> <p>By way of example, if a Senior Manager is being pursued by the FCA for an alleged breach of Senior Manager Conduct Rule 3 (reasonable steps to effectively oversee a delegate), it would undoubtedly be helpful for the Senior Manager concerned to be able to point to contemporaneous notes/summaries of meetings and/or communications with delegates – in order to evidence the fact that the Senior Manager's oversight of the delegate actually occurred and was effective.</p> <p>This would not necessarily mean verbatim transcripts of all such correspondence/meetings (unlikely to be workable in practice) – but something more like a bullet point email follow-up from the Senior Manager to the delegate, summarising the topics/issues discussed, action points, timelines and accountabilities.</p>
Is it correct that the person currently performing the CF10a role (CASS operational oversight function) will not need to be a Senior Manager?	<p>Under the SMCR, the CASS oversight function will be a Certification Function, not an SMF. This is because the FCA believes that the person performing day-to-day CASS oversight activities will not necessarily always be a Senior Manager.</p> <p>There is also a Prescribed Responsibility relating to compliance with CASS, which must be allocated to a Senior Manager. Therefore, the FCA envisages that the person with day-to-day responsibility for compliance with CASS would be a Certified Person, and the most senior individual with responsibility for overseeing the firm's compliance with CASS would be allocated the CASS Prescribed Responsibility.</p> <p>The FCA acknowledges that in some firms this may be one and the same person. In this case, they must be an approved Senior Manager, and must be allocated the CASS Prescribed Responsibility and the CASS operational oversight function.</p> <p>In such circumstances the FCA expects that the individual would not be allocated any</p>

SPECIFIC ISSUES continued

Thoughts on more complex questions

Question	Answer
	other Prescribed Responsibilities, to allow him or her to focus sufficient time and attention on CASS compliance matters.
Must SMF9 (Chair) be assigned to a NED?	<p>The FCA has made clear that this SMF may be performed by an individual in an executive or non-executive role. It is up to the firm to decide what is most appropriate.</p> <p>However, firms wishing to appoint an executive director as Chair should note that SMF9 does not encompass SMF3 (Executive Director). Therefore, if a firm wishes to have an executive director as Chair, he or she must be approved to perform both SMF3 and SMF9.</p>
The Prescribed Responsibility relating to an AFM's value for money assessments, independent director representation and acting in clients' best interests appears to be rather onerous.	<p>This Prescribed Responsibility is, on its face, rather wide-ranging and all-encompassing – in particular, the best interests requirement. This Prescribed Responsibility is one of the remedies from the FCA's Asset Management Market Study and the FCA views it as an important consumer protection measure.</p> <p>We suspect that this Prescribed Responsibility will be the subject of much discussion and debate – not least because of the relative ease with which the broad value for money and best interests requirements could inadvertently be breached in practice.</p> <p>The FCA has indicated that it expects this Prescribed Responsibility to be allocated to the Chair (SMF9), if the firm has one. If a firm does not have a Chair, this Prescribed Responsibility should be allocated to another appropriate Senior Manager. The FCA has also indicated that one individual should be responsible for all three elements of the Prescribed Responsibility – it does not think it is appropriate to sub-divide them.</p>
Many of the Prescribed Responsibilities seem to fall to the Compliance Officer and will be difficult to allocate elsewhere. Does this not put a disproportionate burden on the Compliance Officer, which is not the purpose of the SMCR?	<p>In theory, this should not be the case. However, in practice, we can see that this could – if not carefully managed – result in a disproportionate burden on the Compliance Officer (which is clearly not the purpose of the SMCR).</p> <p>The FCA has made clear that Prescribed Responsibilities should be allocated to the most senior individual accountable for the relevant matter. This will not necessarily be the Compliance Officer. Even if the Compliance Officer provides oversight in a particular area, for example checking that policies and procedures are being implemented throughout the firm, he or she will not necessarily be the person who holds ultimate responsibility for those policies and procedures.</p> <p>Firms should take care to allocate Prescribed Responsibilities appropriately, and think about who within the firm should bear ultimate responsibility.</p>
The responsibilities and roles do not appear to be investment related, <i>i.e.</i> there is no CIO function. Is this correct?	<p>Many firms have found it surprising that the CIO function does not feature as a specific SMF. That said, SMF18 (Other Overall Responsibility function) will be relevant here for Enhanced firms.</p> <p>The FCA has explained that it does not want to overcomplicate the regime by introducing a lengthy list of SMFs, covering all possible roles. The FCA also does not want firms to feel that they have to use any particular governance or organisational structure. Therefore, it is introducing a streamlined set of SMFs.</p>

SPECIFIC ISSUES continued

Thoughts on more complex questions

Question	Answer
	For Enhanced firms, the FCA believes that SMF18 should capture a range of additional roles not caught by the main SMFs, without mandating those other roles. In the event that the CIO is not a Senior Manager (in particular, in Core firms), he or she would almost certainly fall within the Certification Regime.
The SMCR seems to be all about raising standards – as such, are there any new qualification requirements?	<p>The SMCR does not introduce any new formal qualification requirements, or amend existing qualification requirements (for example, those in the Training and Competence module in the FCA Handbook).</p> <p>However, under the SMCR there may be greater scrutiny as to whether or not an individual is appropriately qualified for a role. For Senior Manager candidates, the approval process will no longer be binary – the FCA may approve an individual subject to time limits or conditions. A typical condition might be requiring the individual to undertake certain training.</p> <p>Under the Certification Regime, as firms will be solely responsible for assessing fitness and propriety (an element of which is competence), it may be the case that firms wish to take a more robust approach to the qualification requirements that they impose internally.</p>
What happens in situations where an individual is performing both an SMF and a Certification Function? Will approval as a Senior Manager suffice?	<p>If an individual is performing both an SMF, and a separate Certification Function, he or she will need both to be approved as a Senior Manager by the FCA, and certified by the firm as fit and proper to perform the Certification Function.</p> <p>However, certification by the firm is not required if the Certification Function is encompassed within the individual's SMF. This is most likely to be the case in an Enhanced firm where an individual needs approval as SMF18 because he or she has overall responsibility for a particular business area.</p> <p>Although he or she may also be performing the Significant Management function under the Certification Regime in relation to that same business area, he or she would not need to be certified, as management of that business area would be encompassed within the role as SMF18.</p>
<p>The Client-dealing Certification Function extends to employees who "have contact with" clients. This could be potentially very wide reaching and onerous – especially, for example, in the case of an individual performing clerical-type activities, which involve a small degree of client contact.</p> <p>Might there be any arguments to support a</p>	<p>Quite possibly. First, the individual actually must fall within scope of the Client-dealing function. The definition requires the individual to be performing one or more specified activities, most of which will require the individual to be involved in carrying on (or performing a function related to, or in a manner substantially connected with) a particular regulated activity, such as managing investments.</p> <p>If, on the face of it, the individual does appear to meet the definition, a further factual assessment needs to be made as to whether the individual in question satisfies the two-limbed definition of "employee" (as the obligation to certify only applies in respect of employees).</p> <p>This is a person who: (i) personally provides, or is under an obligation personally to provide, services to the firm in question under an arrangement made between the firm and the person providing the services or another person; and (ii) is subject to (or to the right to) supervision, direction or control by the firm as to the manner in which those services are</p>

SPECIFIC ISSUES^{continued}

Thoughts on more complex questions

Question	Answer
conclusion that not every employee who has any degree of client contact needs to be certified?	<p>provided.</p> <p>Additionally, the Client-dealing function will only apply where the individual's role involves (or might involve) a risk of significant harm to the firm or its clients. If the individual is performing only administrative activities it may well be possible to conclude that (s)he is not performing a "significant harm function" and therefore does not require certification.</p>
The transitional arrangements for Core firms provide that firms do not need to submit Statements of Responsibilities for individuals who will be converted automatically into equivalent SMFs. Does this mean that such individuals do not need a Statement of Responsibilities?	<p>This concession means that firms do not need to submit Statements of Responsibilities to the FCA in relation to Approved Persons in Core firms who will go through the automatic conversion process. This is meant to smooth the process by ensuring that Core firms have to submit minimal documentation to the FCA prior to commencement.</p> <p>However, the concession is only in relation to submitting Statements of Responsibilities to the regulator, not from producing and maintaining them. Therefore, firms still need to have these documents ready and signed off in time for commencement, and will need to be ready to provide them to the FCA if requested.</p> <p>If there is a significant change to a Statement of Responsibilities relating to an individual who has been converted (and whose Statement of Responsibilities therefore has not been submitted to the FCA), the firm will also still be required to submit the updated version to the FCA. Therefore, unless a Senior Manager's role remains completely static, the firm will need to submit the Statement of Responsibilities to the FCA eventually.</p>
How will Brexit impact the SMCR?	<p>The most obvious potential impact will be with respect to the EEA branch regime. The FCA has not indicated how this might change (presumably because it will depend on the outcome of negotiations), but has noted in PS18/14 that the regime may need to be amended in future as a result of Brexit.</p> <p>Otherwise, as a purely domestic piece regulatory initiative, the SMCR is unlikely to be substantively impacted by Brexit.</p>

IMPLEMENTATION CHALLENGES

Some examples of potential issues to be faced by firms implementing the regime

Key Implementation Risks/Issues

- Ensuring that the implementation project is run on a coordinated basis between key stakeholder functions
- Lack of appropriate oversight and control for the implementation project
- Poor planning, resulting in a failure to identify potential log-jams or issues in a timely manner
- Lack of foresight, resulting in practical implementation gaps
- Ensuring there is sufficient focus on having robust fitness and propriety processes and overall certification framework
- Keeping up with developments as the regime takes shape, to ensure end position meets regulatory expectations
- Inadequate appreciation of underlying work required for the training work stream
- Under-preparedness to address the potential concerns of those becoming Senior Managers
- Regarding SMCR as a one-off project, with little ongoing focus

Senior Managers

- Determining relevant SMFs
- Determining in respect of which activities/areas responsibility is to be allocated amongst Senior Managers
- Allocating responsibilities between different Senior Managers
- Deciding whether there may need to be any offshore Senior Managers
- Addressing the potential concerns of those becoming Senior Managers, for example access to records (including post-departure) indemnity insurance, and oversight frameworks
- Determining how to demonstrate fitness and propriety on an annual basis (also relevant to certification)
- Deciding whether bespoke solutions to management information requests could be accommodated, in particular for international businesses where control over data may not always be within the gift of the UK
- Determining whether it will be appropriate to allocate any shared responsibilities

Certification

- Identifying who is in scope of the Certification Regime
- Determining who should be responsible for certifying which staff
- Deciding what information should be gathered from employees when they are recruited
- Deciding whether appraisals need to be carried out on the same or a different basis (to take into account the new responsibility for the person certifying the staff), and whether appraisals being completed should be a pre-requisite to bonuses or promotion, etc.

Conduct Rules

- Dedicating sufficient resources to educating individuals on the regime and providing suitable training, both initially and on an ongoing basis
- Deciding whether to include the Conduct Rules as global standards for all employees, or only apply them to individuals who are technically within scope
- Formulating appropriate procedures for reporting breaches to the FCA

THE HR ANGLE

HR “touch points”

Operational Considerations

- Establish role and remit of HR function within overall implementation project → resource / budget implications?
- Identification of potentially applicable SMFs
- Identification of relevant cohorts:
 - > Senior Managers, together with provisional allocation of SMF(s) and Prescribed Responsibilities (including any proposed shared or divided Prescribed Responsibilities)
 - > Certified Persons
 - > Conduct Rules staff
 - > Any potential “offshore” Senior Managers or Certified Persons
- Formulation of Statements of Responsibilities and preparation of Responsibilities Map (Enhanced firms only)
- Devise induction/on-boarding programme for Senior Managers (and Certified Persons)
- Training to HR staff on relevant issues – at outset, with periodic refreshers
- Wider SMCR familiarisation exercise for other key stakeholders?
- Determine conceptual approach to be taken where group contains mix of Core and Enhanced firms

Contractual Considerations

- Employment offer conditionality based on Fitness & Propriety and FCA approval (for Senior Manager candidates)
- Amend or re-paper existing contracts - consider:
 - > Ongoing obligation on individual to notify firm if any reason to doubt ongoing Fitness & Propriety
 - > Explicit references to:
 - Statement of Responsibilities (Senior Managers)
 - Conduct Rules (and Duty of Responsibility)
 - Fitness & Propriety requirements
 - Training obligations
 - Breach notification requirements
 - Handover obligations

Performance management/Fitness & Propriety Considerations

- Revisit approach to appraisal & performance management
 - > Link to Fitness & Propriety assessments
 - > Balanced ‘scorecards’?
- Re-evaluate Fitness & Propriety assessment framework
 - > Determine and ensure right ‘feeds’ into determination (including, for example, breaches)
 - > Ensure necessary coordination with other functions (e.g. Compliance and Business)
 - > Identify ultimate decision maker(s)
 - > Incorporate notification obligation triggers
- Routinely assess whether disciplinary action(s) and/or breach(es) → notification requirement?
- Identify what supporting evidence to be retained
- In relation to Training and Competence programme, consider:
 - > Tailored content
 - > Assessment component
 - > Monitoring/responsibility for oversight
 - > Non-compliance protocol
 - > Identifying qualification, training or competence requirements for Senior Managers and Certified Persons
 - > Producing practical guides for Senior Managers [and Certified Persons]

THE HR ANGLE^{continued}

HR “touch points”

Process/infrastructure considerations

- Determine process for reviewing background checks and references received
- Establish process for providing and updating references
- Formulate process for identifying in-scope staff that have been subject to disciplinary action
- Devise process for determining whether Conduct Rule breach where disciplinary action taken
- Consider IT system requirements (and specification) for:
 - > Fitness & Propriety assessment framework
 - > Record-keeping obligations
 - > Training – both delivery and record-keeping
 - > Extent to which existing infrastructure can be utilised
- System(s) to update regulatory references where new relevant information comes to light

Policies and Procedures

- Revisions to disciplinary procedures and performance management procedures?
- Formulate/review Fitness & Propriety certification policy
- Review employee handbook
- Consider Senior Manager on-boarding policy
- Revisions to whistle-blowing policy?
- Formulate breach notification policy, including rationale(s) for reporting/not reporting disciplinary action taken against Conduct Rules staff
- Formulate handover policy
- Devise regulatory reference protocol/policy
- Review (and revise) record retention policy
- Consider personal record-keeping protocol
- Formulate house policy approach to requests for access to information by departed Senior Managers
- Review training and competence policy
- Determine house approach to payment for legal representation for prospective Senior Managers
- Determine stance on Senior Manager indemnification
- Review scope of D&O policy

Departures

- Review approach to negotiated/bad leaver exits (including approach to settlement/compromise agreements) – to ensure consistency with SMCR and FCA expectations
- Re-allocation of Senior Manager responsibilities?
- Revisions to Statements of Responsibilities and Responsibilities Maps
- Allocate responsibility for handover administration and oversight
- Ascribe responsibility for regulatory notifications
- Ensure consistency of the following in response to a departure:
 - > Form C
 - > Reference
 - > Compromise agreement (if any)
 - > Other FCA notification(s) (if any)

SMCR PLANNING

How can we help?

Throughout the project

- Proactive issue-spotting and idea generation
- Industry benchmarking insight
- Constructive challenge
- Independent quality control and assurance

Initial Stage

Matter	Examples
Present introductory session(s) to Senior Management (plus any other key internal stakeholders) on the SMCR and its key elements	<ul style="list-style-type: none"> • Practically-focused and interactive familiarisation session(s) with opportunity for Q&A
Guidance on composition of internal project team and oversight/governance thereof	<ul style="list-style-type: none"> • Advice in relation to the institutional approach to the SMCR – from a governance and oversight perspective
Assistance with formulation of project implementation plan	<ul style="list-style-type: none"> • Identification of likely more onerous work-streams and potential log-jams

Implementation Phase

Matter	Examples
Interpretational/ <i>ad hoc</i> advice throughout	<ul style="list-style-type: none"> • Contractual/employment issues • Training obligations • Grandfathering • Completion of prescribed forms/templates (as necessary) • Guidance on application of 'proportionality' principle
Participation on project team	<ul style="list-style-type: none"> • If appropriate, we can sit on the project team – whether as a member or an advisory observer
Governance, risk and control frameworks	<ul style="list-style-type: none"> • Assessing the extent to which the SMCR requirements are likely to 'fit' into/be consistent with the existing risk, control and governance frameworks • Assistance with the determination and assessment of alternative approaches, if necessary • Guidance on adjustments required • Input into the determination of the philosophical approach to be adopted across the wider group if applicable (for example, whether to pursue a 'highest common denominator' strategy, where possible)
Implications for risk, control and governance frameworks	<ul style="list-style-type: none"> • Board and committee size and composition (including non-executive representation) • Terms of reference • Committee structure • Oversight mechanisms • Management information and flows • Approach to minutes • Record-keeping protocol

SMCR PLANNING continued

How can we help?

Advising on HR-related considerations	<ul style="list-style-type: none"> Contractual/employment law implications Regulatory reference protocol/policy Appraisal and performance management (including fitness and propriety inputs) and coordination with other functions (such as Compliance) Personal record-keeping protocol Requests for access to information by departed Senior Managers Breach notification framework Handover framework Stance on Senior Manager indemnification Revisions to disciplinary procedures Revisions to whistleblowing policy Approach to negotiated exits Approach to payment for legal representation for Senior Managers
Assistance with identification of relevant tier populations (e.g. Senior Managers, Certified Persons)	<ul style="list-style-type: none"> Determining which of the current SIF holders will need to become Senior Managers or Certified Persons Potential for any off-shore Senior Managers
Advice on the relevance/allocation of SMFs	<ul style="list-style-type: none"> Application (or not) of SMFs Shared SMFs Consider whether any SMF7s (Group Entity Senior Managers); or SMF18s (Other Overall Responsibility) if applicable
Assistance with the preparation of the Responsibilities Map (if applicable)	<ul style="list-style-type: none"> Consistency with Statements of Responsibilities and governance framework
Assistance with the preparation of Statements of Responsibilities	<ul style="list-style-type: none"> Prescribed (and other) responsibility mapping/allocation exercise Determining any additional responsibilities Identification of overlaps and duplication
Guidance relating to 'fitness and propriety' (F&P) requirements	<ul style="list-style-type: none"> Gap-analysis on existing F&P framework by reference to SMCR requirements Assurance on robustness of proposed F&P framework – including: <ul style="list-style-type: none"> Ensuring that F&P decisions are properly informed and made by reference to appropriate data 'feeds' (from, e.g., Compliance, HR and the business) Appropriateness of certifying individuals Link to breach (and general) notification and regulatory reference procedures
Specific advice relating to non-executive directors (both in and out of scope)	<ul style="list-style-type: none"> Relevant rules and guidance FCA expectations of NEDs Practical guidance on day-to-day conduct Demonstrable challenge Scenario-based workshops
Guidance on inter-functional interactions	<ul style="list-style-type: none"> Compliance - HR HR - business HR - IT Secretariat - HR Secretariat - Compliance

SMCR PLANNING continued

How can we help?

Assistance with the preparation of tailored scenario-based training content (as required under the SMCR)	<ul style="list-style-type: none"> • Identification of relevant 'cohorts' • Mode and method of training • Real-life scenarios • Embedded assessment component • Supplemental face-to-face sessions for Senior Managers • Assessing whether to combine with other training (e.g. conduct risk) • Frequency • Induction training
Specific advice on 'reasonable steps' for Senior Managers	<ul style="list-style-type: none"> • Advice on establishing a suitable support infrastructure – for instance, in relation to: <ul style="list-style-type: none"> – Record-keeping – Delegation – On-going awareness
Advice on interplay between on-going cultural focus and SMCR	<ul style="list-style-type: none"> • 'Dovetailing' where possible
Delivery of face-to-face tailored training workshops (including focus on 'reasonable steps')	<ul style="list-style-type: none"> • Scenario-based training and awareness workshops
Assistance with the revision/creation of policies and procedures (where required)	<ul style="list-style-type: none"> • Handover requirements • Record-keeping protocols • Access to information (including when Senior Manager has left) • Ethics/conduct code • Delegation policy • Breach/F&P reporting • Regulatory references (both providing and requesting) • Notification protocol • Annual certification policy • Training & awareness policy • Compliance monitoring/internal audit
Advice on indemnity and insurance arrangements	<ul style="list-style-type: none"> • Review adequacy of existing arrangements

Post-implementation

- Post-implementation review
- On-going ad hoc advice
- Refreshing training content
- Annual Senior Manager face-to-face training
- Periodic 'health checks' to ensure compliance with prevailing / evolving regulatory expectations
- Preparatory assistance ahead of any post-implementation visit by the FCA
- Assistance with post-visit response

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