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Client Alert
News Flash

Latham & Watkins Financial Regulatory Practice

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Regulators Publish Final Rules on SMCR Extension

The FCA and the PRA have published their Policy Statements, setting out final rules on the SMCR regimes for insurers and FCA solo-regulated firms.

Key Points:

- The FCA has announced that the extended SMCR will apply to FCA solo-regulated firms from 9 December 2019.
- The rules will apply largely as consulted on, but with some helpful changes.
- The FCA is also consulting on creating a new public register to ensure that information regarding Certified Staff is publicly available to firms and consumers.

The regulators have published their Policy Statements providing feedback to last year's consultations on the extended Senior Managers and Certification Regime (SMCR), and setting out their final rules. FCA PS18/14 sets out the final rules for FCA solo-regulated firms, while FCA PS18/15 and PRA PS15/18 set out the final rules for insurers.

The FCA also announced the commencement date for the regime for FCA solo-regulated firms, which is to be 9 December 2019. Previously, the FCA had indicated that it expected the commencement date to be around mid to late 2019, so firms will welcome this extra time to prepare.

The FCA has also published final guidance for insurers and solo-regulated firms on the duty of responsibility under the SMCR (PS18/16), and a new consultation on introducing a public register of individuals working in financial services (CP18/19).

This *Client Alert* outlines some key highlights from the papers.

FCA Rules for Solo-Regulated Firms

FCA PS18/14 sets out the FCA's regime for FCA solo-regulated firms. Although the FCA expresses the rules as being "near-final", this is because the rules are subject to commencement regulations that need to be made by HM Treasury. The FCA states that it does not expect to make any significant changes to the near-final rules.

The FCA received a large number of responses to its SMCR consultations — 225 responses in total. **The FCA largely is implementing the proposals as consulted on**, but notes that it has made some changes in light of the feedback received. These mainly relate to the operation and scope of the tier system under the extended regime — whereby the FCA intends to ensure proportionality by dividing affected firms into three different tiers and applying a tailored version of the regime to each tier.

In particular, the FCA has:

- Removed one of the Prescribed Responsibilities for Core firms, which would have required a Senior Manager to be responsible for informing the firm's governing body of their legal and regulatory obligations. Respondents commented that it would be inappropriate to assign this responsibility to one individual, given that often it is spread across different individuals. The FCA agreed with the concern and, on the basis that Senior Managers must already ensure that the business area for which they are accountable complies with the relevant requirements and is controlled effectively, felt that this was sufficient to balance out any risks resulting from removing the Prescribed Responsibility.

- Provided an "easy" process for firms to inform the FCA that they wish to apply a higher regime tier voluntarily. Firms might wish to do this if they anticipate qualifying for a higher tier in the near future, or to align with other firms in their group. The FCA acknowledged that it should be easier for firms to opt into the Enhanced regime in particular, and as a result has created a new form (Form O) for firms to use as part of the notification process. The FCA also observed that firms that choose to opt into the Enhanced regime (or move from the Limited Scope regime to the Core regime) must be ready to comply with all of the rules of the regime they are opting into three months after the Form O is submitted.

- Amended three of the criteria relating to qualification for the Enhanced regime, to smooth single-year anomalies. Respondents suggested that the proposed financial criteria (relating to assets under management, current total intermediary regulated business revenue, and annual regulated revenue) were too sensitive to single year anomalies, which may therefore bring firms into scope of the Enhanced regime when this would not be proportionate. The three financial criteria will now be calculated on a three-year rolling average basis, with slight variations where required due to the underlying reporting requirements.

- Lengthened the time period from six to 12 months for a firm to implement the Enhanced regime, once it has met the relevant criteria. Some respondents wanted to extend the transition period for firms moving into the Enhanced regime, to align it with the exit transition period. The FCA agreed with the feedback and has extended the transition period accordingly. The FCA also observed that a small number of firms may change regime tier during the transition to the SMCR. The regulator advises that if a firm considers this is likely to happen, the firm should contact the FCA as soon as possible.

The FCA has published a Guide to the SMCR for FCA solo-regulated firms, which affected firms may wish to use as a starting point during the implementation process. This Guide provides a helpful high-level overview of how the SMCR works, what firms will need to do under the new regime, and how firms will be transitioned over to the SMCR. As with any significant piece of regulatory reform, the devil will often be in the detail, and therefore the Guide should not be regarded as all-encompassing. For example, firms will need to give a great deal of consideration — during the planning and implementation phase — to ensure that their processes and systems are sufficiently "future-proofed" for on-going SMCR compliance post-implementation. In practice, this is likely to involve ensuring that key process flows and action triggers are incorporated appropriately into relevant systems and infrastructure.

Guidance on the Duty of Responsibility

In December 2017, the FCA consulted on extending its existing guidance on the duty of responsibility to insurers and FCA solo-regulated firms. The FCA only proposed to make minor definitional changes to the existing guidance (which applies to banks and other firms already subject to the SMCR) to adapt it for these other firms. The FCA is proceeding with its proposals and the guidance will apply to relevant firms from the appropriate SMCR commencement date.

Public Register of Individuals

Concerns were raised that, under the SMCR, fewer individuals working in authorised firms will appear on the Financial Services Register. This is because only approved Senior Managers appear, while Certified Staff — staff in prescribed roles who are not approved by the appropriate regulator but who are certified by the firm itself — do not. This is already the case for banks subject to the SMCR — Senior Managers appear on the Register, but Certified Staff, such as those in customer-facing advisory roles, do not.

Apprehension about this approach has heightened in the context of the consultation on the extended SMCR, as many more individuals will disappear from the Financial Services Register when the regime commences. This will include individuals such as independent financial advisers, and consumer groups have argued that it is in the public interest for consumers to be able to look up and verify such individuals on a public register. A public register may also assist firms when carrying out due diligence on candidates for roles that fall within the Certification Regime.

Therefore, the FCA is proposing to introduce a directory that would include, among others, the following individuals:

- All Certified Staff under the SMCR
- Directors of the firm who are not approved Senior Managers under the SMCR

The FCA is proposing that firms would need to update the information held in relation to joiners, leavers, and when an individual's circumstances change, "without undue delay" — meaning just one business day from when an individual commences or leaves their role, or three business days for routine changes in circumstances. It would not be surprising if these proposed timing requirements result in feedback calling for a longer "grace" period.

Alongside this, the FCA is also proposing to make other changes to improve the functioning of the Financial Services Register, such as improving the search capabilities.

The FCA requests comments by 5 October 2018, and states that it plans to publish final rules "in the winter". Alongside the consultation, the FCA has published a prototype version of the directory (a link and password are available on the FCA website).

How Latham Can Help

Now that the rules are "near final" and the commencement date has been set, many firms will be ramping up their planning and implementation efforts.

Latham & Watkins has deep first-hand experience of advising in relation to all aspects of SMCR. Amongst other things, Latham can assist with:

- Interpretational guidance
- Implementation planning — utilising Latham's insight from, and experiences of, advising banks on their implementation of SMCR
- Reasonable steps guidance and training
- Policy formulation or review
- Issue-spotting
- Devising and delivering tailored (and practical) training
- "Tyre-kicking" — for example, Statements of Responsibilities, Handover Policies, *etc*.
- Senior Manager briefings
- Employment law considerations
- Advising on "future-proofing" systems and processes
- Transitioning

Latham would be delighted to discuss your firm's specific requirements.

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