

Extending the Senior Managers & Certification Regime: our response to the Consultation Paper

We highlight below the key points set out in our response to Consultation Paper (CP17/25) on the extension of the Senior Managers & Certification Regime (SMCR) to all FCA solo-regulated firms.

Submitted	10 November 2017
Applicable Law	UK , UK (England & Wales)
Topic	Asset Management Corporate & Governance Dispute Resolution - Financial Markets > Regulatory enforcement Capital Markets & Derivatives Employment, Pensions & Incentives > Regulatory Investment Bank Regulatory Private Funds Banking Commodity Trading & Finance FinTech Private Equity Insurance
Sector Focus	Asset Management and Investment Funds Financial Institutions
Contact	Andrea Finn, Penny Miller, Philip Bartlett, Emma Sutcliffe, Adam Blair, Julian Taylor, Peter Lockwood, Pollyanna Deane

Update

The FCA has now published more detailed proposals on the implementation of the regime. Further information is available [here](#).

The FCA published its Consultation Paper (CP17/25) on the extension of the Senior Managers & Certification Regime to all Financial Conduct Authority (FCA) solo-regulated firms on 26 July 2017. Having discussed the Consultation Paper with many FCA regulated clients and contacts across the industry, we have now submitted our response to the FCA and the consultation has closed. We highlight below the key points set out in our response and the ones to watch as the regime develops.

Please note that this article is focussed on our response to CP17/25 regarding the proposed regime for asset managers

and wider financial services firms rather than insurers.

General reaction

The general feedback to the proposed extension of the regime has been positive. Whilst implementation will undoubtedly have its challenges, many see it as an opportunity to put processes into place which will improve existing governance arrangements.

Timing for implementation and transitional arrangements

With the consultation now closed, the FCA expects to publish the final rules in Summer 2018. It is therefore expected that the extended SMCR will be applied to solo-regulated firms from late 2018/early 2019. However, it has been suggested that delaying implementation further into 2019 would be beneficial in order to implement the regime with as much certainty as possible, and in particular to benefit from feedback from the banking industry and from consultation regarding the position of General Counsel.

Once the date for implementation is set, many have called for a transitional period of 12 months to give firms time to align the certification process with their existing internal processes. This will likely be dealt with in the FCA's technical consultation paper expected later this year.

Proposed Senior Manager Functions for Core Firms

The proposed list of Senior Manager Functions (SMFs) in the core regime is generally considered to be appropriate. However, some firms who would fall within the core regime would like the flexibility to introduce an additional SMF where appropriate to their structure, such as an SMF24 (Chief Operations Function) where particular overall responsibilities are not held by a director or partner.

Whilst not directly addressed in the Consultation Paper, many have expressed the view that the General Counsel should not be a Senior Manager on the basis that this might create conflict between their obligations to the Board and the FCA. Confirmation is also sought that corporate members of LLPs cannot be Senior Managers.

Proposed prescribed responsibilities for Core Firms

Numerous would-be Core Firms were concerned that the prescribed responsibilities were so narrow in scope that they would largely fall to compliance and the CEO function. Guidance has been sought on how they might be allocated more broadly.

In contrast, it has been suggested that PR6 (Responsibility for ensuring the governing body is informed of its legal and regulatory obligations) should be deleted on the basis that it is too broad in scope in the context of a Core Firm, which by definition poses less risk of harm than an Enhanced Firm to which this PR does not apply.

Prescribed Responsibility for AFMs

There is significant uncertainty regarding PR7 (Responsibility for an AFM's value for money assessments, independent director representation and acting in investors' best interests), which applies to AFMs only. First, it seems at odds with the existing framework set out in the FCA Handbook. Second, it is unclear who the appropriate person to hold it should be: CP 17/18 states that it should be allocated to the chair of the AFM board, whilst CP 17/25 provides the flexibility to allocate it to the "Senior Manager who is most responsible for that issue". Clarification has been sought, and in particular

as to whether it amounts to the SMF9 (Chair) for AFMs and whether it should be a non-executive role (particularly where firms do not currently have NEDs).

There is further concern that prescribing responsibility for “an AFMs value for money assessments” creates an expectation that value for money is measurable in absolute terms and that a Senior Manager would be unable to assess whether it has been delivered as a matter of fact. Accordingly, it has been suggested that the focus of this responsibility should be on how the firm assesses value for money, namely what steps it has taken and what framework has been put into place. Also, where an ongoing assessment of value for money is required, many consider this unsuitable for a non-executive because the Senior Manager would need a deep knowledge of the business.

Proposed certification functions

We do not consider it necessary to have Material Risk Takers as a separate category of certification staff on the basis that individuals who pose the risk of causing significant harm are caught by other categories. The key concern is that the different thresholds for identifying Material Risk Takers for the different remuneration regimes (ie CRD, UCITS, AIFMD) may give rise to individuals moving in and out of certified status from year to year. If the FCA is minded to retain it, a mechanism should be built in such that firms need not issue a certificate until their own next certification process after the individual has been identified as a Material Risk Taker.

Whether certification functions should be made public

Responses to this proposal have been mixed. Many firms did not see the value in publishing lists of certification functions which would pose an inevitable administrative burden, while others were concerned at the loss of the approved person register on the FCA website. It has therefore been suggested that the FCA, or even an industry body, maintain a central register of those certified under the certification regime, which could be updated annually by firms following their internal certification process.

Applying Conduct Rules to financial services activities only

Most agree with applying the Conduct Rules more narrowly than under the banking regime to financial services activities only, but many firms would welcome some examples of regulated and unregulated financial services activities, as well as ancillary activities.

Criteria identifying Enhanced Firms

There is concern that the current thresholds for identifying Enhanced Firms will result in more firms being identified as enhanced than has been anticipated. Within the insurance industry, there is concern that the intermediary regulated business revenue threshold of £35m or more per annum will likely capture many more insurance intermediaries within the Enhanced regime than has been envisaged.

For asset management firms, it is believed that they could fall in or out of the Core or Enhanced regime depending on their structuring arrangements and therefore that they should all be designated as Core Firms because of the limited nature of the risks that they pose to market integrity.

Many also raised practical concerns in respect of group companies, particularly where companies within the same group would fall within the Core or Enhanced regimes. As a result, it was suggested that the classification be undertaken at group level rather than a company by company approach, and that obligations be set at group level ie a single responsibilities map at group level.

Further, under the current proposed Enhanced regime, a firm may meet criteria that results in them being categorised as an Enhanced firm, no matter how briefly the firm reaches the threshold. To counteract this, it has been suggested that a firm should only become enhanced if a relevant threshold has been consistently met for one year.

Our full response to the Consultation Paper is available [here](#). We will keep you updated as and when further information becomes available.

In the meantime, we are currently in the process of developing a toolkit to help firms to progress implementation in a cost effective way. The structure of that toolkit can be found [here](#) to give you an idea of what it will provide when fully developed. We expect to begin populating it shortly, finalising the content when we have the final rules.

For further information regarding the proposed extension of the regime, please visit our [SMCR Extension microsite](#).

This document (and any information accessed through links in this document) is provided for information purposes only and does not constitute legal advice. Professional legal advice should be obtained before taking or refraining from any action as a result of the contents of this document.

© Simmons & Simmons LLP 2018. All rights reserved. Registered in England & Wales Registered Number OC352713

elexica Limited, CityPoint, One Ropemaker Street, London EC2Y 9SS T: +44 20 7628 2020