Senior Managers and Certification Regime Questions and Answers

February 2016

AFME, the AFB and the BBA have prepared the below list of questions and answers on the Senior Managers and Certification Regime (SMCR). We believe it to be accurate as of February 2016, but it should not be relied upon and no responsibility is taken for any errors or omissions. Recipients should take their own legal advice on any point relating to the SMCR. In particular please note that the list has been provided to the regulators but not confirmed by them, also that further publications on SMCR are expected.

Areas in which the document has been updated since the last iteration are highlighted in yellow.

The questions have been arranged under the following headings:

- Certification Regime
- Senior Managers Regime
- Branches of EEA and non-EEA Firms
- Issues arising from FEMR, including regulatory references
- Other issues

Certification Regime

1. Application of the certification regime for EEA branches:

   - Is this only applicable to staff based in the UK?
     Answer: The population of individuals within the regime will depend on the organisational structure of the branch, but in principle the regime is intended to capture individuals providing services to the UK branch. These services could be provided from outside the UK.

   - What is the definition of a UK client? For corporates, is it place of incorporation that is the test? For individuals, residency, nationality or domicile? Does "dealing with" include any form of contact?
     Answer: In respect of an individual, the test is physical presence within the UK at the relevant time with neither domicile nor residence of the client relevant. The client must also be a client of the relevant legal entity. For a corporate the test is the client being incorporated in the UK at the time of contact. It is also noted that for the purposes of SMR the definition of client is wider than MiFID e.g. includes Eligible Counterparties.

   - Firms may book clients to a variety of branches within a group with the implication that a large number of staff would need to be certified globally. Is this the intention of the new rules? It

does seem to be inconsistent with the Feedback Statement (section 4.4, page 31) which states that conduct rules apply only to the branch.

Answer. There is a flow chart in PS 16/3 (page 17) which should enable firms to determine who will fall within the certification population.

In summary, for branches all employees based overseas are out of scope and all employees based in the UK are in scope.

For UK companies, all employees based in the UK are in scope. Employees based overseas are only in scope if they are dealing with a recipient in the UK and that recipient is a client as defined in the FCA glossary, which excludes some wholesale counterparts.

The definition of employee is the wide FSMA definition, not the narrow employment law definition.

- For EEA branches, would a colleague in Paris or Frankfurt be under scope of the senior managers and certification regime?
  Answer: If they are doing business, whether in Paris or Frankfurt, on behalf of the UK branch and dealing with UK clients, then they would be within scope of the regime, though not the certification rules. However, marginal cases may need to be considered.

2. Current population of CF29:

   - What is considered a significant business area?
     Answer: From the perspective of a branch of an EEA firm, a significant business unit would be one directly related to the business of the UK branch.

   - When those CF29 are staff of a different legal entity, how should firms apply the grandfathering process
     Answer: Persons approved in the CF29 function should be approved for the correct legal entity if not, that is of itself a breach. Once that breach is corrected they will be grandfathered.

   - Please explain the practicalities of the idea that there will be "no application of the certification regime where this would be inconsistent with the single market directives".
     Answer: From the perspective of a branch of an EEA firm, the certification regime would be directly related to the business of the UK branch and not the group as a whole. For EEA branches only it is noted that certified persons do not have to be supervised by a SM.

3. A firm has 2 business units: Corporate Finance (which is carrying out designated investment business (DIB)) and Structured Lending (not DIB). Corporate Finance, although carrying out DIB, does not meet the criteria set out in SUP 10C.8.4R, by contrast, Structured Lending meets several of the criteria. Which of these business units (if either) would be considered a significant business unit?
   Answer: Neither - the first business unit does not meet the criteria set out in SUP 10C.8.4R and the second does not conduct designated investment business.

4. Can the definition that is used to determine a 'material business unit' under EU regulation be used to define a significant business unit? EU Delegated Regulation 604/2015 - Article 3 (5)? (Relevant to the technical standards for determining which staff should be classified as material risk takers).
   Answer: The material risk taker population should be considered against the two key filters (a) Individuals that are a senior manager; and (b) the link to UK regulated activities. MRT's are

certified persons if employees, using the EU definition of MRT's. Where a member state gold-plates the EU definition, MRT's brought into scope by reason of the gold-plating are not certified persons.

5. Various sections of SUP e.g. 10C.3.6 refer to 'in relation to the carrying on by the firm of a regulated activity'. Does this mean only to the actual carrying on of regulated activities, or does it also refer to other activities that, although associated with regulated activities, are in themselves, not regulated?
   Answer: It is envisaged that 'in relation to the carrying on by the firm of a regulated activity' would be broadly drawn to include activities associated with regulated activities.

6. If a firm does not currently have any CF30's because it does not provide advice to customers and/or 'sell' them investment or similar products, and as such the firm is undertaking execution only business with UK clients, are staff dealing with client business certified persons? (Assuming the said staff would not be seen as a MRT).
   Answer: There is a flow chart in PS 16/3 (page 17) which should enable firms to determine who will fall within the certification population. If the activity is not a "relevant activity" (see SYSC 5.2.45R) then it is out of scope.

7. Please make clear that, when deciding whether someone will be in scope of the Certification Regime or Conduct Rules, the first test will be whether they meet the statutory definition of "employee" under FSMA. This is not clear in the FCA rules but is something said consistently by FCA policy team, so reflection in the written rules would be helpful.
   Answer: Confirmed.

8. In respect of CP15/22 the FCA's intention is only to capture those individuals in the front office (first line of defence) who are responsible for approving the deployment and monitoring of trading algorithms and not to capture individuals in the second/third line of defence or those who are for example, simply writing/coding the algorithms from an IT perspective.
   Answer: The FCA have clarified that they do not intend to capture those making changes to algorithms, but rather those who approve the changes, which is the most senior decision-taker. That person is unlikely to be in the 3rd line of defence but if (s) he is, (s) he is captured. It is noted that the regime is not intended to capture historical roll-out of algos but only starts from March 2016.

9. In respect of CP15/22 it would be helpful if the FCA could confirm our understanding that this function will not apply to persons based overseas who trade on the UK book are not 'employees' of a relevant authorised person?
   Answer: Such individuals will be outside the scope of the regime, but a senior manager in the relevant authorised person (i.e. a UK SMR) will remain responsible for the trade.

10. Will the FCA be introducing a 30 day exemption for visitors from overseas as referred to in our response to CP15/22?
    Answer: The FCA has introduced in PS16/3 an equivalent 30 day grace period for FCA Significant Harm Function (based on the drafting of the 30 day rule for the customer function). The 30 day grace period does not apply to the Material Risk Taker SHF for UK RAPs, as this function has no territorial limitation.

11. On branches of the UK entity based overseas – are people required to be certified if they are not dealing with customers located in the UK but are dealing with customers of the UK entity? The definition in 5.2.19 (2) "the person performing that function is dealing with a client of the firm in the United Kingdom" could be read two ways.
    Answer: Certification in this case relates only to activities for the UK Branch.

12. Can the PRA provide further clarity on the 'if applicable' roles that they are proposing (Chief Finance, Chief Risk, Head of IA & Group Entity) as there appears to be some confusion?
    Answer: This would apply to the most senior person carrying on this role in the UK Branch, who may not be the actual finance/risk/ professional but his/her line manager/branch manager.

13. When does the FCA plan on publishing guidance on the possible inclusion of the General Counsel/Head of Legal as an SMF? This is a significant issue for firms and has only just been mentioned by the FCA.
    Answer: The FCA has acknowledged that there is concern about the lack of clarity as to whether the head of legal function should be included as an SMF. If has confirmed that it plans to issue a consultation paper shortly, but that until final Guidance can be published, firms who have made a decision about this issue in good faith should not need to change their approach in the interim.

14. On the prescribed functions and how they should be applied (1) do all have to be allocated to at least one person? (2) do they expect some to be held by more than one person (even if there is a delegation in place)? And (3) are there any they would expect/insist the SMF19 hold?
    Answer: (1) Yes, (2) Technically, it is possible to share a responsibility across more than one individual however, in practice the FCA would look to the statement of responsibilities to determine who would maintain responsibility for any one area; (3) This is for the firm to decide based on their own internal arrangements.

Senior Managers Regime

1. Under SUP 10C.3.11 G (1) & (2) the FCA sets out criteria for a senior management function. Would it be correct to say that 'those aspects (i.e. aspects of the firm's affairs the SMF is managing) involve or might involve a risk of serious consequences to a) the firm b) the business or other interests in the UK' is, in essence, the definition of a significant business unit? Therefore, if an individual is responsible for managing certain aspects of a firm's affairs, but these are not the affairs of a significant business unit, then the individual would not be a SMF?
   Answer: The guidance on what constitutes a significant business unit is intentionally subjective – there are tests to apply. The head of business unit that does not meet these tests would not normally be a Senior Manager. However there will be someone designated as a Senior Manager who has overall responsibility. Significant Business Units are generally front office, revenue generating units undertaking regulated activities but there will be exceptions depending on how each firm is structured. For EEA branches SMF21 will capture business heads for their significant business units.

2. In CP 15/22 (para 2.33), the FCA has discussed the possibility of an individual being covered under SMF 7, when he/she may be based out of UK and can significantly influence the affairs of the firms. The discussion also cites specific example of a firm utilizing the services of the parent bank for provision of IT infrastructure/services and an individual having responsibility for management of information technology across subsidiaries. Foreign Banks usually rely heavily on the IT infrastructure/applications of their overseas parent banks. While the oversight of the IT functions may be with a local person designated as Head-IT, to provide oversight over local operations but may only have limited influence on the management of IT systems at the parent bank level. Typically, the IT arrangements would be covered under an outsourcing agreement. Given such a scenario would it be necessary for the UK bank to nominate someone from the parent bank as a Senior Manager or a Certification staff for the IT function or would the UK designated person assume the SMR position?
   Answer: Responsibility for the technology function is a topic firms frequently seek regulatory guidance on. Most firm put the operations function into SMF18. The FCA/PRA are working on

clarifying what can reasonably be expected regarding functions outsourced to parent entities. On a basic level, if a firm outsources a function then it must have a Senior Manager with oversight of that outsourcing, for example, if the internal audit function is outsourced then the Head of Internal Audit may have that responsibility. There is a link here to SYSC 8 - the principles are equally applicable to technology. This does not fall under the specified activities for EEA branches so is not applicable to them.

3. It would be useful to have a rough idea as to which prescribed responsibilities should typically be allocated to a SMF19 person.
   Answer: The responsibilities will be dependent on the size of branch and the number of Senior Managers it has. The basic principles are proportionality, and capturing all the required activities without concentrating responsibility too much and maintaining a reasonable span of control. In a very small branch the SMF19 could have a very large number of responsibilities assigned to him/her.

   Where there is more than one tier of SMFs, it is important to clarify in the statement of responsibility exactly what the head and sub-head of the business unit are responsible for. FCA will consider this issue further.

4. Does the MLRO (CF11) have to be classified as a senior manager or could his/her line manager (e.g. the Head of Compliance) have his/her SMF role expanded to include anti-money laundering while the existing MLRO would become a certified person? In many banks the MLRO does not sit on the Board or Exco and does not have genuine senior management power or knowledge, but has to refer up to his/her Exco member for resourcing and funding. As such, he/she is not a senior manager (using the ordinary, non-legalistic meaning thereof).
   Answer: The person with overall responsibility for money laundering reporting should be a SM e.g. they may be the person with overall responsibility for all financial crime areas. The specific MLRO role should be given to the most appropriate person, and their role should be articulated narrowly to cover only money laundering if they do not have overall responsibility in this area.
   For non-EEA branches, the Head of Compliance (SMF16) could have overall responsibility with the MLRO (SMF17) reporting in. If they report upwards to a line manager outside the UK that person would not automatically be in scope. The test is who has decision-making power for that branch. For EEA branches there is no responsibilities framework.

   On CASS, the FCA policy has evolved. There is a difference between CF10a and overall accountability under SMR. The CF10a must report upwards, whether they are junior or senior. Once SMR goes live, the CF10a function will become obsolete for firms in scope, but will continue to exist e.g. for asset managers.

   On whether financial crime responsibility should fall to the first or second line of defence, the FCA agrees that it may be split between individuals, but that this may be difficult for firms to properly demarcate in practice. The guiding principle should be that everyone should take reasonable steps to prevent it.

   While CASS falls under SMF18, financial crime does not. Financial Crime should be assigned to one or more of functions SMF1-17. It was noted that with the exception of CASS most prescribed responsibilities could go to any SMF.

5. If you are a Senior Manager for one aspect of your role, are you counted as a Senior Manager for all the functions that you perform?

Answer: Each SMR statement of responsibility covers 3 areas: (1) role-specific Senior Manager functions, (2) prescribed responsibility, and (3) overall responsibility for an activity. However these three areas could only make up a subset of an employee's job, which should be illustrated in the firm's governance map. The regulated activities which an employee performs but for which they are not a Senior Manager must be captured in the statement of responsibility of another Senior Manager. The employee could not be held responsible for breaches in these activities but would be expected to show the same integrity in performing all aspects of their job.

This also applies in situations where a certified person is asked to join a board of a subsidiary as an Executive or Non-Executive Director. They may be in scope of the SMR for that activity, however for the rest of their role they would still be regarded as a certified person. However, once an employee has been approved under SMR, there is no need for the firm also to certify them for those aspects of their role

6. The SMF 'significant harm' category may be an "empty box" for some firms, as many CF29s will be Senior Managers and the rest will be risk takers or client facing. Does the FCA have any plans to remove this?
   Answer: There are no plans to remove that category; however the regulators would welcome feedback on data from the industry how many staff are anticipated to fall into this category.

7. For 'new' SMFs (particularly applications made prior to Commencement seeking approval effective March 7) are handover materials or certificates required?

   Answer: The short answer is no. From a technical point of view the rules in SYSC 4.9 do not come into force until March 7. Even once the rules are in place they are based on 'reasonable steps' – the FCA accepts that it will not be possible in all cases to produce formal handover certificates, or at least not in the form firms adopt for most of their moves.

   The particular rules to look at are SYSC 4.9.4R, and SYSC 4.9.8 (4) G.

   Stepping back from the detail though, what is the policy intent? As SYSC 4.9.7G explains, the purpose is to help Senior Managers understand the requirements of their new role, and any current or outstanding issues that they are inheriting. So where a Senior Manager takes over from another Senior Manager, the FCA expects fully documented handover materials and the rules provide guidance on what the FCA expects these to contain. But where a Senior Manager role is genuinely 'new' or someone's role has not changed but it now meets the definition of an SMF (for example an area breaches the threshold for SMF 6) clearly the circumstances are different and the FCA expects firms to take reasonable steps given these circumstances.

Branches of EEA and Non EEA firms:

1. In branches of EEA incoming banks, it is not uncommon to currently have the Head of Compliance registered as a CF29 (significant management) and the MLRO as the CF11 (MLRO). Also it is common that the MLRO reports to the Head of Compliance. Under the new regime proposed for branches of EEA banks only the MLRO needs to be approved within the senior managers regime (SMF17) and not the person who would often be their manager, which would seem to go against the regulatory ambition of capturing staff with ultimate responsibility. Is there any room for approving instead the manager of the designated MLRO in such a case?
   Answer: see answer to Q4 under 'Senior Managers Regime' above

2. In FS15/3 the FCA seems to clarify that prescribed responsibilities need only be allocated in non-EEA branches. However, SUP4.7.7R states that the requirements apply to all Relevant

Authorised Persons, and the SMR Statements of Responsibilities form for EEA Relevant Authorised Persons includes the allocation of prescribed responsibilities matrix in section 3.2. There does not seem to be a carve out in either the rules or the form, so do prescribed responsibilities need to be allocated to the SMF17 and SMF21 function holders (which would seem inconsistent with the rest of the SMR for branches of EEA banks)?
Answer: there is no prescribed framework for EEA branches. In the statement of responsibility the section for describing the role is freeform.

3. For a branch of a Non-EEA bank that does not have a Chief Finance function (PRA SMF2); however, there is a local finance manager who is responsible "for the production and integrity of the branch's financial information and regulatory reporting". As required under paragraph 2.33, the branch are proposing to register the local finance manager for SMF22 (FCA SMF) with a PRA's prescribed responsibility. Would this be acceptable, i.e. FCA SMF holder with a PRA's prescribed responsibility?
Answer: if a person is performing a function akin to that of a Finance Director within the confines of a branch they would be classed as PRA SMF2 rather than SMF22. SMF22 is considered a "mop-up" function.

4. When reading across Policy Statement and Supervisory Statement, some members are still not sure about the relation between prescribed responsibilities and allocation of responsibilities to SMR. For a branch of a Non-EEA bank it would appear they have to allocate each prescribed responsibility to SMR, such as "za" and "zd" to GM (SMF19) and so on. The confusion rests with for example, "zl" (PRA specific, responsibility for the production and integrity of the branch's financial information and its regulatory reporting) is shared between GM (SMF19) and Compliance (SMF16), will "zl" be allocated to both of them? If so, will this SMF16 embedded with "zl" function be acceptable to FCA on application? Or, "zl" can only be allocated to PRA's SMF?
Answer: In non-EEA branches, most responsibilities can be allocated to any Senior Manager except CASS. Regarding financial reporting, while there is a general preference that the PRA responsibilities should be allocated to one individual, they could be shared, e.g. financial vs. risk reporting, provided the statements of responsibility are sufficiently clear.

5. Supervisory teams are indicating that firms have some discretion as to whether such individuals are brought into scope of the SMR, <u>even if the roles are pre-existing in the branch</u> (whether down to discussion with supervisors or an internal only decision), but this is not what the near final rules say. Clarity would be helpful and, as a starting point, a definition of each of those roles in relation to a branch (rather than UK entity) might be helpful.
Answer: Whether a person is currently certified under the old regime has no bearing on whether they are in scope under SMR – it is all based on allocation of responsibilities. The regulators are expecting firms to have fewer Senior Managers than SIFs. Overall FCA would expect fewer senior managers than under the current SIF regime: a typical firm could reduce from 80 SIFs to 15 SMs.

   However, firms are responsible for making sure that there are no areas of responsibility left unfilled, rather than aiming for a target number of Senior Managers. The regulators are cognisant of the complexities of individual firms' structures, and any firm with questions should contact their supervisors or the FCA Customer Contact Centre.

6. We would be grateful for further clarity on the SMF22 function i.e. if there is a financial controller in the UK but he does <u>not</u> hold the SMF2 function (which sits with the CFO in Head Office) would it be reasonable to add Finance responsibilities locally (for the UK branch only) using SMF22?
Answer: see answer to Q3.

7. The FCA's guidance states that the EBSM applies to individuals responsible for a significant business unit, i.e. an individual performing this role will be a "senior manager with significant responsibility for a significant business unit". Can the FCA please provide further guidance for branches of EEA banks on how to determine whether a business unit is significant if, whilst being one of the larger business groups locally, all the positions of that business unit are booked overseas, e.g. to the head office.
   Answer: The booking location is only one of the factors to consider, the unit must be significant in relation to the branch. It is possible to have no significant units, however if firms have permissions they are not using, SUP rules indicate that they should withdraw the permissions. Firms who are winding down branch operations may contact the FCA regarding waivers but there should be no expectation that these will be granted.

8. Will there be an exception granted in order to take into account variances within firms e.g. if it is near a key business threshold or is a chair of a key board committee which is not allocated?
   Answer: No as this would not meet the overall policy objective. The PRA has a 'consolidation rule', in that one SMF6 cannot report to another SMF6 and there are no exceptions to this rule. If the span of one employee's responsibility is too great, then the responsibilities should be split, rather than one of their line reports also assuming the SMF function. In cases where a direct line report carries a SMF function, the firm expect to be asked to justify this especially in the case of SMF18s as FCA are concerned about the potential for conflicts.

   Members of key board committees that are not prescribed Board committees will only be brought into scope if they meet the relevant criteria e.g. if they are SMF18s. The regulators are aware that uncertainty about whether certain committees will be brought into scope at a later date is not ideal although regulators will have a legitimate interest e.g. in Conduct risk or remediation committees. This will have to be considered on a firm-by-firm basis whilst also maintaining consistency. Firms expressed the need for certainty on this and FCA/PRA would consider further.

   Firms that have a global Remuneration Committee will not be required to create a UK-based Remuneration Committee, although a NED should be allocated responsibility for remuneration.

9. Are there any further updates on regulatory definitions, e.g. 'middle office'?
   Answer: There are no further updates planned. Firms are welcome to use these terms but are not obliged to do so. If specific terms are causing uncertainty, they should not be used in statements of responsibility.

10. With respect to the scope of the Senior Management Regime, if a branch does not actually carry out any regulated activities in the UK (but is merely under FCA supervision because of incoming EEA passport incl. "deposit taking"), does it require any SMFs other than the MLRO?
    Answer: A firm with a "services passport" (i.e. not deposit taking) would not, currently, be within scope of the regime. A firm with an "establishment passport", which would have deposit-taking permission, would be within scope of the regime. The firm should not maintain permissions for regulatory activities that they do not use and, therefore, this new regime can help clean up any inefficient maintenance of permissions by a firm.

11. The FCA and the PRA provide that banks need to rely on the definition of the material risk takers provided in EU regulation 604/2014. The regulation provide the de-minimise criteria for identification of Material risk takers based on qualitative and quantitative criteria. Banks are specifically required to cover the Head-Legal as a material risk taker under these guidelines. Typically, Banks rely on an internal legal team or an external legal counsel for mitigating/address/remove the legal risk. The internal team in turn could be relying on

external counsels in certain matters. The internal team works in an advisory/execution capacity. While the Legal function finalises all the agreements on behalf of the Bank, they may not be involved in the decision making process for commitment of any credit/market risk exposures. Infect they may not be even present in the committees approving the credit proposals. In the absence of decision making powers on non-legal issues, such as through authority to commit to credit/market risk exposures or membership in decision making committees of the organization, will the Head-Legal, an employee of the Bank, be covered as a Certification employee in accordance with the Article 3(9) of the EU regulation 604/2014.
Answer: The FCA clarified that there was an error in the supervisory documents regarding the above issue and, therefore, the policy documents should be followed by firms regarding MRTs. Those relevant individuals in EEA countries will be caught; however, the UK regime will not include any super-equivalent measures adopted by some EEA nations (e.g. the Netherlands) and therefore working from the EBA's qualitative and quantitative measures on identifying MRTs.

12. Application of the senior managers and certification regime for Non-EEA branches:

    - If staff are in a banks' London branch but are doing business for Sydney or New York are they under scope?
      Answer: Such staff will not be captured.

    - Can banks rely on another jurisdiction's checks in relation to SMCR?
      Answer: The FCA confirmed that firms could take such checks into account for their certification regime in the UK, but must evidence that they have taken reasonable steps to determine an individual as "fit and proper", for which guidance has been issued to firms.

    - Would the FCA expect the regional head to be registered as an SMF?
      Answer: The FCA confirmed that it should be the most senior individuals involved in implementing strategy for the UK entity that should be SMFs.

13. What is the difference between PRA responsibilities 'O' and 'P'?
    Answer: The CFO typically performs both functions but some firms, e.g. building societies, wanted to separate out their treasury management and capital allocation functions.

14. What would count as 'reasonable steps' for a SMF7, regarding 'influence'?
    Answer: In practice, influence is about making decisions, or being part of a decision making process e.g. assessing risks, analysing MI, seeking divergent views. If the person is just a sounding board or expresses an opinion then they are not classed as 'influencing'. The regulators recognise that decision making can involve escalation to non-UK management, which would not automatically bring that management in scope of SMR. Firms are encouraged to conduct historic case study analysis and scenario planning of how decisions are made within their firms.

15. When will the electronic version of Form A be available?
    Answer: Form A becomes available online at Commencement. Prior to that, the forms are available in paper form only.

Issues arising from FEMR, including regulatory references:

Transitional arrangements for regulatory references will be in place from 7 March 2016, as follows.

For the FCA, the existing rules stay in place pending consultation on the new measures.

For the PRA, when considering the appointment of an in-scope individual, PRA-regulated firms will be required to:

- *provide a reference to another regulated firm 'as soon as reasonably practicable' upon request containing 'all relevant information' of which it is aware. This more or less mirrors the current law (and therefore the FCA position) but the current law only applies in respect of Approved Persons. The PRA will ensure that it continues to apply to certain functions that will cease to be subject to regulatory pre-approval from 7 March 2016, such as notified NEDs, as well as encompassing all KFHs at insurers, and employees subject to certification under the PRA's Certification rules (i.e. a subset of material risk takers ('MRTs')).*

- *take reasonable steps to obtain appropriate references covering at least the past 5 years of service from that person's current and previous employers, and from organisations at which that person served as, or is currently, a NED. This is a new requirement which reflects a longstanding supervisory expectation that firms should undertake appropriate due diligence on candidates.*

Pending further consideration of the issues raised by respondents, the PRA's first tranche of rules in this PS does not at present include a requirement for regulatory references to be provided in a standard template; nor for these references to be updated if subsequent information about the individual's conduct or fitness and propriety subsequently comes to light.

It is intended that a regulatory reference should also be provided where a firm has outsourced the collection of that information to another (unregulated) third party, where the recipient firm has been made aware that the unregulated third party is acting on behalf of the firm providing the reference.

Firms will continue to owe a duty to their former employees and to the recipient firm to exercise due skill and care in the preparation of the reference. The reference should be accurate and based on documented fact. The firm may give frank and honest views, but only after taking reasonable care both as to factual content, and as to the opinions expressed, and verifying the information upon which they are based.

It is intended that the obligations to supply information in a regulatory reference should apply notwithstanding any agreement (for example a 'COT 3' Agreement settled by the Advisory, Conciliation and Arbitration Service (ACAS)) or any other arrangements entered into by a firm and an employee upon termination of the employee's employment. A firm is expected not to enter into any such arrangements or agreements that could conflict with its obligations in respect of the provision of regulatory references.

The rest of this section deals with the likely outcome following the next tranche of CPs due this year, BUT NOT FROM 7 MARCH.

1. What expectation does the FCA/PRA have on the collection of references where, for instance, an individual has had a period employed in a non-relevant authorised person (RAP)?
   Answer: Firms should ask for the reference in accordance with the rules. Provided the firm has made best effort, and has conducted its other due diligence, it is accepted that some references may not be received as requested. To some extent this is a time-limited problem, as the regime will be rolled out across all regulated firms.

2. In CP15/31 (PRA 36/15) at section 2.16 there is a requirement to 'revise' a regulatory reference after an employee has left the business. It will be in the interest of firms, and of fairness to the employee, to give the individual concerned the right of reply to any amendment. Has the FCA/PRA considered their expectations in this regard?
   Answer: The FCA understands that this problem is difficult to solve. Under the rules, if you would have written any part of a reference differently, you are obliged to amend it. However, the requirement is limited to confirmed breaches, rather than to suspicions, where a breach cannot be confirmed, it should not be reported.

The FCA notes that Box H, which is for 'any additional information' is akin to the current reference requirements. The mandatory disclosures therefore cover a subset of that existing requirement. Box H requires firms to make a judgment call on the other information available to them, which may include going back further than the mandatory 6 years.

The FCA understands firms' data protection concerns about passing on information about an employee whom the firm no longer employs. To clarify, the updated reference need only be provided to the firm which originally requested the reference. If the employee has since moved on from that second firm, the second firm should pass the updated reference to the third employer.

The FCA is particularly interested in the CBA – firms should provide information if it would be considered too expensive to develop systems for the projected benefit.

3. The proposed rules contemplate the giving and receiving of regulatory references across international borders, reflecting the international nature of the London's financial markets. This raises issues of data protection, where both the giver and receiver of a reference are RAPs and required to request and give a reference but the reference relates to employment in a RAP's overseas office where local data protection rules act as an impediment to the provision of a reference. This puts the reference giver in an impossible situation of having to choose between meeting FCA requirements yet contravening data protection laws. Has the FCA/PRA considered mandating such disclosure and creating a safe harbour in relation to data protection breaches?
   Answer: The FCA is very aware of data protection issues generally. However, references are all about the firm making a judgment that the prospective employee is fit and proper, according to their risk appetite. The reference requirements reflect what is already in COCON.

   The FCA cannot foresee any situation in which an employer could be aware of a breach in another jurisdiction but would be unable to obtain the necessary details of that breach to include it in a reference. Firms with examples of this are asked to provide them.

   In a case where the employer is unable to gain information from abroad in relation to a suspected breach, then it will be enough that the employer has done their due diligence on a best efforts basis.

4. We note the Guidance at 22.3.9 in relation to the disclosure of information beyond the mandatory minimum but believe it would be helpful if the FCA came up with some worked examples to shed further light on its expectations based on its own experience of reviewing Approved Persons applications. Has the FCA considered providing further guidance or examples?
   Answer: The disclosure of information above the mandatory minimum should be a judgment call for firms, e.g. whether to include information from over 6 years ago.

   The FCA will consider whether they could produce something similar to the specific references to the long form Form A.

5. Could the FCA provide further guidance on what information it is envisaged that firms should provide where an individual leaves the firm's employment whilst under investigation for a suspected but as yet unproven breach and the circumstances under which the information should be provided.
   Answer: The FCA is to revert with the answer to this question.

6. The new CP15/31 (PRA 36/15) places an obligation on firms to review references when a senior manager moves within a firm. Can you clarify the purpose of this requirement?
   When an employee moves roles within a firm, it is up to the firm to be satisfied with the reference on record. This could depend on the structure of the firm, and whether the employee is moving between two different parts of the business. An example might be when an employee is moving between significant functions e.g. MLRO to Executive Director and vice versa – firms cannot treat all SMFs as if they are the same.

7. In respect of the standard template provided (in Appendix 4) can you confirm the following:

   I. the extent of information required in respect of an individual's role and responsibilities as stated at point (C)(3) and (D) of the draft regulatory reference template.

   II. the type and extent of information required in setting out the facts which led a firm to conclude that an individual was in breach of any individual conduct requirements as stated at point (E) of the draft regulatory reference template.

   In particular we do not believe it is appropriate to require the firm giving the reference to disclose information about malus or clawback of variable remuneration in the description of its response to the finding of a regulatory breach or a determination that an individual was not fit and proper. We are mindful of confidentiality obligations to other employees, clients and third parties as well as the need to protect proprietary information and such disclosure would compromise such obligations.

   Answer: Provision of job summaries was a recommendation from FEMR, since job titles are generally not sufficient to understand a person's exact role. The FCA understands that job summaries are often not held centrally in this format, though this will change for Senior Managers in the new regime.

   Information about conduct breaches should be sufficient that the new employer knows, for example, the severity of the breach. For example, leaving a laptop out v. failing to do client due diligence.

   Information regarding malus and clawback should be disclosed in relation to misconduct alone, and not in relation to performance. By this distinction there should be no confidentiality issues.

8. Is it necessary to require a firm to ensure that adequate policies and procedures be in place? If firms are to provide regulatory references and to exercise due skill and care in doing so, in addition to the proposal to mandate specific disclosure requirements, firms will inherently need to take policy and procedural steps to fulfil these obligations.
   Answer: The FCA is of the opinion that policies and procedures go hand-in-hand with the obligations and that this requirement should therefore present no issue to firms.

9. Would regulators be open to granting transitional relief in relation to the new referencing rules? Members have expressed concern about the minimal time firms will have to prepare for these rules on the basis of a March 2016 roll out (given that final rules are not expected until January or February).
   Answer: See above for the transitional arrangements.

10. Why has the FCA asked for references for 6 years from the date of the request rather than 6 years from the employment date?
    Answer: The FCA did not want to references to reach too far back – if a reference was requested for 6 years back from date of employment, it could include information from up to

12 years. This would undoubtedly cause legal issues, and would be unfair on employees. However, if firms want to share more information, they are able to do so according to their judgement.

Other issues

1. Following the publication of the HMT paper, can you confirm that the position of notified NEDs (as individuals falling outside the scope of the SMR) remains unchanged?
   Answer: The position of NEDs will not change. However, firms should be aware that if the Bill grants the FCA new powers, it will be with the expectation that the FCA would put them to use. Therefore conduct rules may be made to apply to NEDs. Until the Bill receives royal assent, the FCA will not act in this area, but will merely make sure that it is not in breach of any European directives.

2. LSS8/13 states the following:

   Disapplication of certain remuneration rules for firms in particular proportionality levels

   31. The CRD can be interpreted such that it may not be necessary for certain firms to apply certain remuneration rules at all.

   32. In our view, it will normally be appropriate for a firm in proportionality level three to disapply under Remuneration 5.1 the following rules:
   retained shares or other instruments (Remuneration 15.15),
   deferral (Remuneration 15.17), and
   performance adjustment (Remuneration 15.20).

   33. However, firms should also note that some rules in the Remuneration Part set specific numerical criteria (such as on the minimum period of deferral, the minimum portion to be deferred and the minimum portion to be issued in shares). The following guidance applies where such rules apply to material risk-takers and are not capable of disapplication under the approach set out above. In such circumstances, we do not consider that Remuneration 5.1 permits a firm to apply lower numerical criteria. (For the avoidance of doubt, this guidance does not apply where a firm chooses to use deferral or issuance in shares more widely than required by the Remuneration Part.)

   Does this mean that, if we apply deferral, performance adjustment etc., we have to use the percentages that the PRA has set out or do we have some flexibility? Surely, it is better for us to use, say, 5 years deferral than none at all?
   Answer: Level 3 firms may disapply certain requirements on grounds of proportionality; however Level 1 and 2 firms may not.

   The EBA has now published its Guidelines on sound remuneration policies and its Opinion on the application of proportionality, which will apply as of 1 January 2017. In the meantime, national guidelines will continue to apply.

3. There seems to be some confusion amongst members concerning the inclusion of Research Analysts within the Certification Regime. Could the FCA provide an indicator of their views?
   Answer: It is not the intention of the Regime to specifically capture Research Analysts – the intention was to deal with inconsistent application of CF30. However, the FCA is aware of grey areas caused by client facing aspects of the role, and by the definition of 'investment advice' under MiFID. Feedback is requested in the consultation of the expansion of the 'dealing' definition. The FCA is targeting its January 2016 Board for the final rules on this extension.

4. What is the level of evidence required to demonstrate that firms have provided training to Certified Persons?
   Answer: The FCA has deliberately not specified this, as it should be a judgement for firms. However the initial approach will be to make sure that firms are adhering to the principle.

5. How can banks file complaints with the FCA if they feel their supervisor is not providing adequate information?
   Answer: The FCA and PRA are providing widespread training for their supervisors regarding the new regime. If any firm has details of supervisory staff that may have failed to meet standards, then they should inform the FCA through the established feedback mechanisms which are already in place for such issues.