

Individual Accountability: Extending the Senior Managers & Certification Regime to all FCA firms

3rd November 2017

On behalf of their members, AFME and UK Finance welcome the opportunity to comment on FCA CP17/25 “*Extending the Senior Managers and Certification Regime to all FCA firms*”¹.

UK Finance is a new trade association which was formed on 1 July 2017 to represent the finance and banking industry operating in the UK. It represents around 300 firms in the UK providing credit, banking, markets and payment-related services. The new organisation brings together most of the activities previously carried out by the Asset Based Finance Association, the British Bankers’ Association, the Council of Mortgage Lenders, Financial Fraud Action UK, Payments UK and The UK Cards Association. UK Finance is listed on the EU Register of Interest Representatives, registration number 001247527634-93.

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society. AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.

Comments on FCA CP17/25

Q1: Does the proposed list of Senior Managers in the core regime cover the appropriate roles, i.e. the most senior decision makers within a firm?

We agree with the FCA’s proposal.

Q2: Are there any other roles that the FCA should consider specifying as SMFs? (You may wish to consider the list of proposed Senior Managers under the enhanced regime in section 8.16)

We have no additional roles to suggest as mandatory.

Q3: Are there any proposed Senior Managers that the FCA should consider excluding from the core regime?

We have no exclusions to suggest.

Q4: Do you agree with our approach to Senior Management Functions for Limited Scope Firms? If not, please explain why.

We have no comments in response to this question.

Q5: Do you agree with our proposed list of Prescribed Responsibilities? If not, please explain why.

We agree with the FCA’s proposal.

¹ <https://www.fca.org.uk/publication/consultation/cp17-25.pdf>

Q6: Do you agree with our proposed Prescribed Responsibility for AFMs as set out in CP17/18? If not, please explain why.

We have no comments in response to this question.

Q7: Do you agree with the functions we have proposed making Certification Functions? If not, please explain why.

We agree with the FCA's proposal.

Q8: Are there any other functions that we should make a Certification Function?

We have no additional functions to suggest at this time.

Q9: Do you think the identity of people performing Certification Functions should be made public by firms? If so, which Certification Functions should be made public?

AFME and UK Finance strongly suggest that there is no value in making such a list a requirement for firms.

Firstly, firm-specific lists would not be a true replacement of the FCA register, as they would not contain a full history of each employee, and would be administrated by each firm rather than by a central source, i.e. the record for an individual would not 'transfer' as they moved roles.

Secondly, firms' differing structures could mean that clients might interact with a Certified Person at one firm and a non-Certified Person at another firm to conduct the same business. There could also be confusion caused for clients if an employee's certified status is temporarily suspended, e.g. a due to disciplinary process or because the individual is on maternity leave.

Thirdly, the implementation of the SMCR places the burden on firms to certify that their staff are fit and proper to perform their roles, rather than the FCA. The knowledge that the firm is subject to SMCR should therefore be sufficient for a client, i.e. they should understand that it is the duty of the firm to provide suitable and qualified staff to meet their needs. Since there will no longer be a Register compiled centrally by the FCA, requiring each firm to produce their own list would, in our opinion, provide no additional assurance to the client.

Finally, consideration should be given to the additional administrative burden that would be placed on firms. The experience of our dual-regulated members to date is that the population of certified staff is significantly more dynamic than the former CF30 population. The list would therefore require constant updates, which would again be likely to cause confusion amongst clients, as there would be no continuous 'history' of any individual currently or formerly on the list. It is worth noting that the FCA register has already ceased for CF30's (now under certification regime) of those firms already under the regime. Currently there is a gap as financial advisors working for IFA's are on the FCA register and those working for banks are not. If the FCA register will cease for all certified staff this gap will disappear. However, on the other hand if the FCA register remains in place for these firms the gap mentioned above will remain and this will cause further confusion for customers.

For all of the above reasons, we therefore strongly suggest that the publication of a list is therefore not made a requirement.

Q10: Do you agree with our proposed territorial limitation for the Certification Regime? If not, please explain why.

We strongly urge the FCA to provide guidance on the FCA's expectations regarding 'dealing with a client in the UK', to ensure consistent application across the industry. This requirement is one of the key administrative costs for firms when applying the regime. Consistency in Handbook standards is required ahead of implementation to ensure consistency in both supervision of firms by the FCA and amongst industry peers, so that costs are not unfairly and disproportionately imposed on some firms over others.

We think it reasonable as a generalisation for firms to adopt the risk-based approach where appropriate (and always subject to the particular circumstances) that roles involving no direct contact with the customer are not captured. This might include, for example, staff members processing transactions in an offshore processing centre, staff members underwriting loans, administrative staff who send out client reports or letters, operational staff, and the like.

Q11: Do you agree with the approach we have proposed to allocating CASS responsibilities? If not, please explain why.

We agree with the FCA's proposal.

Q12: Do you agree with our proposed approach to rules and guidance on the fit and proper test? If not, please explain why.

We agree with the FCA's proposal.

Q13: Do you agree with our proposed requirements on criminal record checks? If not, please explain why.

We agree with the FCA's proposal, although we remain concerned about the limitation regarding the disclosure of spent convictions. Where a firm performs a criminal record check on an individual below senior management level, the firm will not be informed of spent convictions, even where the offence committed would be relevant to the firm's decision as to whether to hire the individual. We appreciate that this is not within the FCA's remit, but wish to reiterate our concerns.

Moreover, we note that the FCA has been clear in public roundtables/conferences during consultation that DBS/criminal checks would need to be *complete* before an employee started with a firm, rather than just have been *applied* for. We question, however, whether a new criminal record check requirement is necessary or proportionate for a 'Form E' application where an individual already holds an SMF for a firm, and is simply transferring internally to another role.

Q14: Do you agree with our proposed requirement of regulatory references? If not, please explain why.

We agree with the FCA's proposal; however, we know that there are often challenges in obtaining references from outside the UK, in particular where the other jurisdiction has strict data protection laws. We note that SYSC 22.2.1 requires the prospective employer only to take 'reasonable steps' in this regard; further guidance in this regard would be helpful.

There are also some other areas of uncertainty about the operation of the existing regime for dual-regulated firms which are only likely to increase as more firms come into scope. It would be helpful if the FCA could provide further guidance to all firms on its expectations for firms receiving references where they believe that the providing firm has not complied with its disclosure obligations.

Q15: Do you agree with our proposal to apply the Conduct Rules to financial services activities?

We agree with the FCA's proposal.

Q16: Do you agree with our proposal to apply the Conduct Rules to all employees who perform financial services, with the limited exclusions listed in section 7.14?

Please see our response to Q17 below.

Q17: If you disagree, please explain why, including (where appropriate) cost implications.

We request further clarity regarding the statement in paragraph 7.11 that the scope proposed in CP 17/25 is narrower than under the banking regime. While we appreciate that the FCA is attempting to balance the potential cost and benefit, for groups with entities spanning dual and solo-regulation, the distinction is likely to cause confusion, as it may be unclear in practice which activities the FCA is intending to exclude. We understand that the distinction is perhaps more relevant to firms where financial services is an ancillary activity – could the FCA therefore clarify that for financial services firms, the scope is, in practice, likely to be the same as for dual-regulated entities?

Q18: Do you agree with our proposal to link notification requirements for disciplinary action to breaches of the Conduct Rules?

We agree with the FCA's proposal.

Q19: Do you agree with our proposed frequency of Conduct Rules notifications? If not, please explain why.

We agree with the FCA's proposal.

Q20: Do you agree with our proposed approach of using the objective criteria set out above to identify firms for the enhanced regime? If not, please explain why and propose alternative approaches.

We believe that the FCA should reconsider its approach to designating certain firms as enhanced for the purposes of the regime – with further consultation as appropriate before any additional firms are brought into the enhanced regime.

The triggers chosen should ensure that the true risk, complexity and interconnectedness of firms is properly represented when deeming certain firms as riskier. Assets under management do not represent the actual assets of a firm and can change quickly in line with market movements. Therefore, the proposed 6-month transition from core to enhanced, then potentially back again (multiple times) because of these market movements is not helpful. Neither does size necessarily indicate a higher likelihood of poor culture. Indeed, some of the most recent and largest fines by the FCA for poor culture, conduct and abuse of customers have been with smaller firms, some of whom have which produced adverse outcomes for consumers through poor lending standards and affordability assessments.

In terms of alternatives, to promote consistency and achieve regulatory aims, the FCA should consider:

- Use of other triggers, or
- possibly, matching enhanced vs. core designation in Policy to fixed vs. flexible designation in Supervision.

We would be happy to discuss with you these and other options with a view to achieving a more proportionate approach.

Q21: Do you agree with our proposed approach to moving firms between core and enhanced? If not, please explain why.

We are concerned by the limit of 6 months for firms to move from core to enhanced. Given the additional requirements on enhanced firms, we suggest that a 12-month period is more appropriate, particularly where new Senior Managers, including Non-Executive Directors, will need to be identified, approved and trained and governance arrangements revised.

We also request clarity regarding the statement in paragraph 8.18 that firms will not need to re-apply for new approvals where there has been no change in the person's actual role. We assume that this statement applies to the initial grandfathering from the APR regime to the SMCR regime, as well as (once the SM&CR extension is fully implemented) to the situation where the individual is already approved for the relevant SMF in another dual-regulated or enhanced entity, and will be taking on that SMF in relation to the newly-enhanced firm.

Finally, paragraph 8.9 states that the FCA may require a core firm to join the enhanced regime, and that enhanced firms may apply to the FCA for a waiver if they think only the core regime should apply to them. Could the FCA clarify that it will also be acceptable for a core firm voluntarily to apply the enhanced regime, for example if they are part of a group of other enhanced entities?

Q22: Do you agree with our proposed Senior Management Functions for enhanced firms?

We agree with the FCA's proposal, although we note our previous comments in relation to the status of the legal department², and look forward to the forthcoming FCA consultation on the subject.

² Available at: <https://www.afme.eu/globalassets/downloads/consultation-responses/afme-bba-response-to-fca-dp16.4-legal-function.pdf> and <https://www.afme.eu/globalassets/downloads/consultation-responses/afme-cmp-20160510-letter-to-fca-on-applicability-of-the-smcr-to-head-of-legal.pdf>

We understand that the FCA refers to the UK Corporate Governance Code when it references “the person with particular responsibility for leading the assessment of the Chair’s performance” for SMF14, but we would appreciate guidance as to the FCA’s expectations for firms that are not subject to the Code.

Q23: Do you agree that this will ensure the most senior people in firms are covered by the Senior Managers Regime, regardless of organisational structure? If not, please explain why.

We agree with the FCA’s proposal.

Q24: Do you agree with our proposals for Prescribed Responsibilities in enhanced firms? If not, please explain why.

We would appreciate clarity that the Prescribed Responsibility for value for money, independent director representation and acting in investor best interests is only applicable to authorised fund managers.

Q25: Do you agree with our proposal to apply the Overall Responsibility requirement to enhanced firms? If not, please explain why.

We agree with the FCA’s proposal.

Q26: Do you agree with our proposal to apply Responsibilities Maps to enhanced firms? If not, please explain why.

We agree with the FCA’s proposal.

Q27: Do you agree with our proposal to apply handover procedures to enhanced firms? If not, please explain why.

We agree with the FCA’s proposal; however, we note that the application of these requirements is an ongoing area of concern for our members and their individual Senior Managers. In particular, handovers can be difficult when Senior Managers depart from a firm in a very short period, or under challenging circumstances. The departing Senior Manager may not be willing to provide a comprehensive handover, or conversely may decide to ‘over-escalate’ issues in order to perceive themselves as absolved of any responsibility. This remains a priority area for our members and any further guidance from the FCA would be appreciated.

Q28: Do you agree with our proposals for Senior Managers in EEA Branches?

We agree with the FCA’s proposal.

Q29: Do you agree with our proposals on the Certification Regime and Conduct Rules for EEA Branches?

We agree with the FCA’s proposal.

Q30: Do you agree with our proposals for Senior Managers in non-EEA branches? If you disagree, please explain why.

We agree with the FCA’s proposal.

Q31: Do you agree with our proposals for Prescribed Responsibilities in non-EEA branches? If you disagree, please explain why.

We agree with the FCA’s proposal.

Q32: Do you agree with our proposals on the Certification Regime and Conduct Rules for non-EEA Branches?

We agree with the FCA’s proposal.

Q33: Do you agree with our proposal to introduce a new Prescribed Responsibility for the Conduct Rules that will also apply to banking firms?

We agree with the FCA's proposal.

Q34: Do you agree with our changes to the 12-week rule? If not, please explain why.

We agree with the FCA's proposal. However, we request that the FCA considers also extending the application to Prescribed Responsibilities. Currently an individual can provide temporary cover for a Senior Manager but cannot be temporarily allocated the Prescribed Responsibilities associated with that role. This means that the 12-week rule does not really work as intended, i.e. to allow temporary cover to be provided for an SMF role. Given that prescribed responsibilities and overall responsibilities are of equal importance in ensuring good conduct and culture, it seems inconsistent to treat these differently. (We acknowledge that the PRA would need to make an equivalent change for this change to be fully effective in relation to RAPs, but if the FCA made this change no doubt the PRA might be persuaded to follow suit.)

Q35: Do you agree with our approach to applying the partner function to banking firms? If not, please explain why.

AFME and UK Finance have no comments in response to this question.

Q36: Based on the summary above and the full analysis www.fca.org.uk/publication/research/cba-extensionsenior-managers-certification-regime.pdf, do you agree with our approach and methodology for the cost-benefit analysis? If not, please explain why. If not, please explain why.

UK Finance and AFME have no comments in response to this question.

Q37: Based on the summary above and the full analysis www.fca.org.uk/publication/research/cba-extensionsenior-managers-certification-regime.pdf, do you agree with our findings and conclusions for the cost-benefit analysis? If not, please explain why.

AFME and UK Finance believe that the FCA should do more to quantify both tangible and intangible benefits, given costs are currently estimated by the FCA at £500m³, a figure which we believe may well represent a substantial under-estimate.

Additional comments

Outsourcing under the SMCR

We request that the FCA expand upon para 4.46, in particular, whether the responsibility for outsourced arrangements needs to be included on the SOR and/or require an additional Prescribed Responsibility – we are assuming not, unless otherwise advised.

Responsibility Maps

We suggest the FCA might provide a template responsibility map in the upcoming Technical Consultation Paper, similar to in CP15/22 for the banking rollout.

Legal entity structure

At the strategic level, clarification on the application of the regime to complex groups would also be helpful – for example, members' non-bank operations may cover a multiplicity of entities. We appreciate clarification given by the

³ <https://www.fca.org.uk/publication/research/cba-extension-senior-managers-certification-regime.pdf>

FCA during public hearings that the regime should apply at the legal entity level,^[1] rather than at the group level. We would appreciate confirmation in the Policy Statement.

Supervision & Enforcement

We emphasise the need for proportionality in the application of the regime (both supervision and enforcement) and well as in its policy design. Given public feedback from the banking roll-out, it would be helpful to have further guidance on how to apply the regime ahead of time to ensure consistency. In particular, written guidance to provide a documented benchmark outlining how the regime will be supervised would be very helpful and welcomed, given the importance of the reforms (such as reflected in the 3 star rating of the CP). We urge the FCA to release such guidance along with the final Policy Statement.

The FCA has publicly stated during the consultation phase for the extension at roundtables and conferences that it will follow the precedent set by the original SMCR for banks in interpreting the regime.^[1] In particular, the FCA has confirmed that there will be a distinction between ‘accountability’ for a function (where an SMF will be required to put in place proper measures to ensure accountability) and ‘responsibility’ for a function (whereby an SMF would bear the full weight for any failure on their watch, and not be able to discharge this despite best efforts). We understand that the FCA intends to regulate, supervise and enforce on the basis of the former interpretation.

It would be particularly helpful if the FCA considered public guidance on how the five Conduct Questions for Firms (as used by FCA Supervisors) will take account of these reforms, so our members can be clear for future inspections what is expected of them as firms trying to sustain the highest level of ethical conduct and positive culture.

Reasonable Steps

We believe that the FCA should mirror the guidance given in earlier PRA/FCA documents on what constitutes ‘reasonable steps’ for the purposes of implementation. In particular, Supervisory Statement 28/15 provides great clarity⁴ and appears appropriate as a benchmark in this regard.

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^[1] Public statements by FCA representatives, 27 September, Coventry SM&CR roundtable. <https://www.fca.org.uk/firms/senior-managers-certification-regime>

^[1] Ibid.

⁴ 2.77 In relation to ‘(a)’ and the steps that a Senior Manager actually took to avoid the contravention occurring or continuing, examples of the steps that might be considered to be reasonable actions, depending on the circumstances, could include: Strengthening individual accountability in banking May 2017 29