

## EXTENSION OF THE SENIOR MANAGERS AND CERTIFICATION REGIMES: PRIVATE FUND MANAGERS

The FCA has published near final rules on the extension of the senior managers and certification regimes (SMCR) to FCA solo-regulated financial services firms. It has also published a Guide to the SMCR regime which is expected to come into effect on **9 December 2019**. Now that the rules are in near final form, firms should consider what changes to training, employment documents and processes and compliance policies and procedures need to be made over the next 9 months. This briefing will help firms understand what they need to do to ensure a smooth transition to the SMCR regime.

### Key issues

- Key features of the Extended SMCR Regime
- Timetable
- Is my firm affected?
- Who will be a senior manager?
- Who will be a certified person?
- Who will be covered by the conduct rules?
- What preparatory steps should be taken and when?

### KEY FEATURES OF THE EXTENDED SMCR REGIME

A 'core regime' will apply to all firms (other than limited scope firms) and an 'enhanced regime' to approximately 350 larger and complex firms.

#### Core Regime

- Regulatory pre-approval for senior managers (but not some non-executive directors)
- Statements of responsibility for senior managers
- Personal accountability for senior managers
- Annual firm certification of individuals in 'Certified Function' roles
- A requirement to obtain regulatory references for senior managers, certified persons and non-executive directors
- New Conduct Rules for almost every person working in financial services
- New notification, training and record-keeping obligations
- New FCA Directory reporting and updating obligations

#### Enhanced Regime

- Additional Senior Manager functions and prescribed responsibilities
- Management Responsibilities Map and requirement to allocate "Overall Responsibility" to a senior manager for every activity, business area and management function of the firm
- Handover procedures relating to incoming senior managers

### Is my firm affected?

Yes, if your firm is regulated under the Financial Services and Markets Act 2000 and offers financial services; and in particular if it is subject to the current Approved Persons Regime (APER). Different firms will be subject to different SMCR requirements (see diagram below).

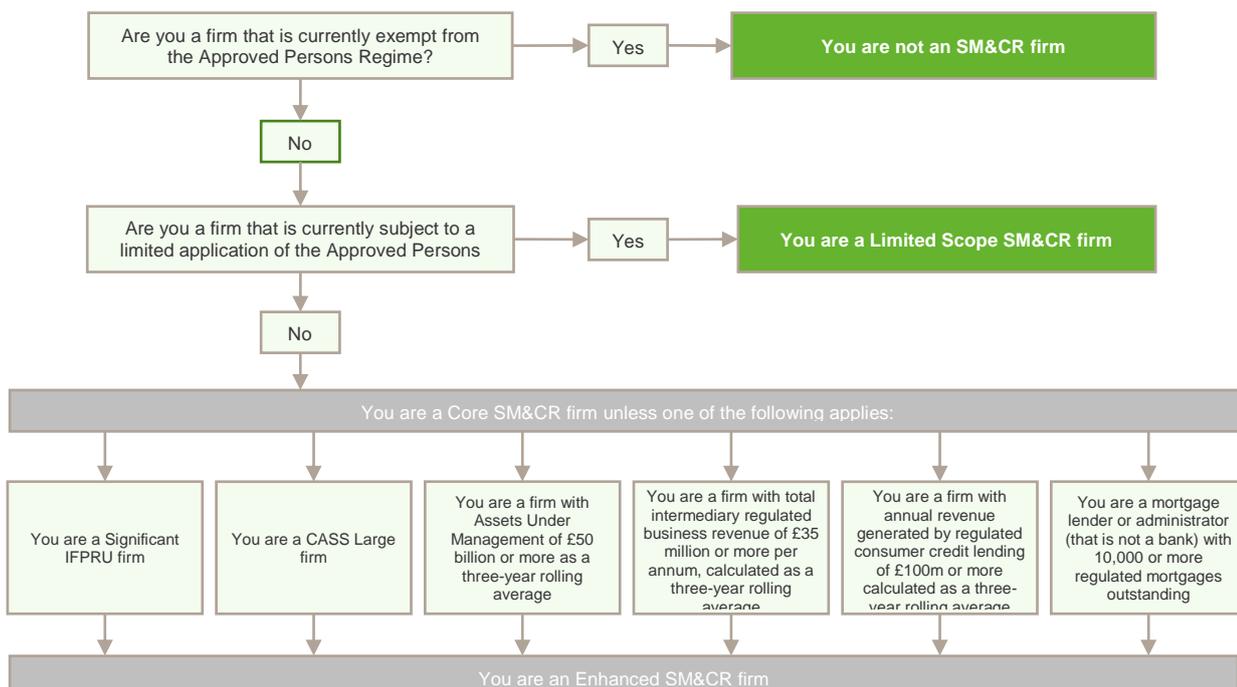
The FCA near final rules have amended three of the financial criteria (see diagram) for determining whether a firm falls into the "Enhanced" category by providing for a three year rolling average in order to smooth out single year anomalies.

All in scope firms will be subject to the 'core regime' of the extended SMCR (save for certain 'Limited Scope Firms'). Larger and more complex solo regulated firms meeting specified criteria will be subject to additional requirements under an 'enhanced regime'. Other large and complex firms that do not meet the criteria may still be required by the FCA to comply with the enhanced regime. In addition, firms may opt into the enhanced regime if they wish to adopt a consistent approach across different legal entities. The near final rules contain an easier process for "opting up". However; if a firm "opts up" it will be obliged to apply the relevant SMCR regime rules in their entirety; they cannot be applied selectively.

Firms will be contacted by the FCA ahead of implementation on 9 December 2019 with an indicative assessment of their SMCR status ("Enhanced", "Core", "Limited").

The SMCR will apply on a legal entity basis. If a regulated firm has an unregulated subsidiary or parent, the subsidiary or parent is not subject to the SMCR. However; individuals in the subsidiary or parent could be subject to the SMCR depending on their status and their relationship with the "in scope" firm.

| Timetable  |                             |
|--|-----------------------------|
| What?  | When?                       |
| ■ FCA Consultation on extended SMCR rules  | ■ 26 July – 3 November 2017 |
| ■ FCA Policy Statement, Guide and Near Final Rules   | ■ 4 July 2018               |
| ■ New forms available  | ■ From 9 September 2019     |
| ■ FCA published: (i) finalised guidance on Statements of Responsibility and Responsibilities Maps; and (ii) final rules on the Directory | ■ 8 March 2019              |
| ■ Firms to submit conversion notices   | ■ By 2 December 2019        |
| ■ Extended Senior Managers and Certification Regimes will come into operation  | ■ 9 December 2019           |



## WHAT ARE THE KEY ELEMENTS OF THE SMCR?

The SMCR will replace the current Approved Persons Regime for affected firms. All in scope firms (other than limited scope firms) will be subject to the Senior Managers Regime, a Certified Persons Regime and Conduct Rules.

### *Senior Managers*

- Firms in the Core and Enhanced SMCR will need to allocate six 'Senior Management Functions' (SMFs) (Chief Executive, Executive Director, Partner, Chair (Executive or Non-Executive), Compliance Oversight and Money Laundering Reporting Officer (MLRO)) to the extent they have individuals/are required to have individuals performing these roles. Anyone holding an SMF will be subject to pre-approval and supervision by the FCA (individuals currently holding these roles will not require approval under 'conversion' arrangements of the new regime). (There is a modified regime for incoming EEA and non-EEA branches).
- Certain responsibilities prescribed by the FCA will need to be allocated to senior managers.
- Each senior manager's individual role and responsibilities will need to be set out in a 'statement of responsibilities' (SoR) which must be submitted to the regulators with their approval application (subject to 'conversion' arrangements).
- A criminal records check will have to be undertaken in respect of each senior manager approval application.
- Senior managers will have a statutory 'Duty of Responsibility' and will potentially be accountable if they fail to take reasonable steps to prevent a breach by a firm in their area of responsibility as set out in their SoR.
- Enhanced firms will be subject to further SMF in addition to those referred to above and will be required to allocate additional Prescribed Responsibilities to their senior managers.
- Enhanced firms will be required to ensure there is a senior manager with overall responsibility for every activity, business area and management function that relates to the firm's regulated and unregulated financial services activities and related ancillary activities (the 'Overall Responsibility' requirement).
- Enhanced firms will have to prepare and maintain a Management Responsibilities Map showing the key roles within the firm, the people responsible for them, their responsibilities and lines of accountability. Management Responsibilities Maps must be drafted at firm, rather than group level.

### *Certification*

- Firms are required to identify certified persons who fulfil one or more 'Certification Functions'.
- Firms must ensure that senior managers, non-executive directors (who are not senior managers) and certified persons are at all times fit and proper, and must certify them as such at least annually.
- Firms will have a 12 month transitional period to assess fitness and propriety with initial certification to be completed by 9 December 2020.

### *Conduct Rules*

- Firms must also ensure that employees comply with certain 'Conduct Rules', in respect of which firms will have notification, training and record keeping obligations.
- Firms must allocate responsibility to a senior manager to ensure that the firm trains staff in the Conduct Rules and complies with the FCA's notification obligations in the event of breach.

## Who will be a Senior Manager?

There is no territorial limit on the Senior Managers Regime. It will apply to anyone performing an SMF whether based in or outside the UK.

## Who will be a Certified Person?

There are eight prescribed Certification Functions in relation to which relevant individuals will need to be certified, including all individuals who have been designated as 'material risk takers' (MRTs) for the purposes of the FCA's various Remuneration Codes. Most current approved persons below senior management level will become certified persons. In addition some roles that are currently not subject to approval may require certification.

The Certification Regime will only apply to Certification Functions based in the UK or where the individual spends more than 30 days in the UK a year, and to individuals who are based outside the UK who are dealing with UK clients. Note however that all MRT's will be subject to the Certification Regime wherever they are located. For branches the position is slightly different; the Certification Regime will only apply to Certification Functions based in the UK.

## Who do the Conduct Rules apply to and when?

The Conduct Rules will apply to senior managers, certified persons, non-executive directors (who are not senior managers) and all employees performing financial services roles in all solo-regulated firms. Ancillary staff such as security, catering and cleaning staff are exempt. Additional Conduct Rules will apply to senior managers. 'Employee' is broadly defined and includes contractors, temps and secondees.

Firms must train senior managers and certified persons on the Conduct Rules prior to the start of SMCR on 9 December 2019. They will then have 12 months to train other staff on the Conduct Rules.

Firms will be under an obligation to report Conduct Rule breaches to the FCA:

- within 7 days of concluding disciplinary action for senior manager breaches
- annually for other breaches

### Regulatory References

Firms will have to obtain regulatory references before appointing individuals to senior manager or certified function roles and to non-executive directors who will not be senior managers. However, firms will not need to get regulatory references for existing employees who grandfather across to the SMCR roles.

Firms should assess how the new regulatory reference requirements and criminal records check obligations fit into existing recruitment processes.

### Incoming EEA/Non EEA UK Branches

The Certification Regime and Conduct Rules will only apply to people based in the UK; they will not extend to individuals outside the UK even if they deal with UK clients.

A simplified Senior Managers Regime will apply to EEA and non EEA Branches. EEA branches will have two SMF's (EEA branch Senior Manager and MLRO). These SM's will require SoR's, however, the FCA's prescribed responsibilities will not apply. The Certification Regime and Conduct Rules will apply (subject to the territorial requirements outlined above).

Non EEA branches will have five SMF's and eight specific prescribed responsibilities will apply to them. The Certification Regime and Conduct Rules will apply (subject to the territorial requirements outlined above).

## WHAT PREPARATORY STEPS SHOULD BE TAKEN?

Firms that will be in scope need to consider:

- whether they come within the core or enhanced regime
- who should be on the implementation team
- what SMFs existing controlled functions will be mapped to
- which prescribed responsibilities apply to the firm
- which senior managers prescribed responsibilities should be allocated to
- how they will engage with senior managers and what processes they will adopt for agreeing their statements of responsibility
- how 'Certification' staff can be identified and certified annually
- how to ensure non-certified staff are not inadvertently performing certified functions
- which staff will be covered by the Conduct Rules and when
- how training should be updated and delivered
- whether changes to employment documents and processes will be required
- if changes to reference procedures and personal data retention are necessary
- what changes to settlement agreements and termination processes must be made
- which individuals will be covered in other group entities
- the practical implementation of the regime in relation to in-scope employees based overseas

Experience demonstrates the importance of engaging with senior managers early in the implementation process. Equally important is the provision of advice and assistance to SMs for example by producing a Senior Managers' Handbook and/or offering individual briefings so that they understand the impact of the SMCR regime on them personally.

## HOW CLIFFORD CHANCE CAN HELP

Clifford Chance Applied Solutions has developed an SMCR Manager compliance tool that can be configured to work through an individual firm's key SMCR requirements, with built-in tailored guidance. To request a demonstration please contact Jennifer Paybody.

**Clifford Chance has a team of about 30 lawyers from our employment, litigation and regulatory practices who have supported banks and insurers to implement the Banking and Insurance Senior Managers, Certified Persons and Regulatory Reference Regimes. We would be happy to speak to your firm about the lessons learned from the implementation of the Banking and Insurance Accountability Regimes.**

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