

Senior Managers and Certification Regime (SMCR) Working Group Meeting

Date and Time	Thursday 18 th April 2019
Venue	At the offices of Eversheds Sutherland, 1 Wood Street, London, EC2V 7WS
Attendees	Attendees by phone
Simon Collins (Chairperson)	John Roberts – Threesixty Services
Peter Ewing - FCA	Paul Longmore – JustCRS
Jon Clare – Lysis Financial	Richard Farr – Telos Solutions
Julian Sampson – Fulcrum Compliance	Liz Coyle – SimplyBiz
Lorraine Bay – Moore Stephens	
Lucy Gallagher – Moore Stephens	
Nicki Houghton – Haven Risk Management	
Kajal Popat – Crowe Global Risk	

Apologies

Mark Greenwood – SimplyBiz
Sandy McGregor – SimplyBiz
Phil Dibb – JustCRS
Jeremy Smith – B-Compliant
Lorraine Mouat – TCC
Janice Laing – Compliance First

Simon opened the meeting by thanking Peter Ewing from the FCA for attending the meeting.

Q&A session with Peter Ewing, FCA

1. “Treatment of partners within the new regime.

Some LLPs have a number of Partners that are relatively junior and are most certainly not involved in direction of the Firm, have very limited voting rights, do not form part of the governing body (say Management Committee), and do not exercise significant control over the management of the Firm. As such it is clear to me that these partners are not performing a Significant Management Function as defined in section 59ZA of the Act (Senior management functions). This is clearly acknowledged by the FCA in CP17/25 and PS18/14.

However, some of these partners that would not be designated as SMF27 Partner may in fact be undertaking roles that should be caught by the Certification Regime. However, I was concerned by the statement on page 30 of PS 18/14 which states “We [the FCA] were also asked to consider applying the Certification Regime to non-SMF Partners. Under FSMA the Certification Regime can only apply to employees and we are therefore unable to do this because partners are unlikely to meet the definition of ‘employee’ in FSMA 63E (9). The definition can, however, cover secondees and contractors. If they are performing Certification roles they must be certified.”

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I am concerned that a number of firms might well take this to mean that non-SMF partners are de facto excluded from the Certification Regime on a narrow reading of the definition of employee. I am sure that this is not the FCA's intention.

An employee is defined in FSMA 63E(9) as a person "(a) who personally provides, or is under an obligation personally to provide, services to A under an arrangement made between A and the person providing the services or another person, and (b) is subject to (or to the right of) supervision, direction or control by A as to the manner in which those services are provided." On a wider reading of this definition would a partner not provide services under the LLP agreement therefore meeting the condition (a) and would be under the supervision and direction of the governing body (Management Committee) thereby meeting (b).

Would firms not be well advised to conservatively include partners in the Certification Regime that are undertaking activities that would be caught under the certification regime by adopting a wider interpretation of the definition of employee? This is on the basis that I am sure it is not the FCA's intention to exclude persons from the Certification Regime on a narrow technical interpretation of the definition of an employee."

Peter advised that this is a question that the FCA have been asked many times. Peter noted that the policy statement was directed only at ordinary partnerships, not LLPs. For LLPs it is quite possible that a member of the LLP could be in the certification regime.

The FCA will be updating the policy guide to make this clearer, this should be released soon (no firm date provided). In addition, a partner who is also currently a CF30 would be certified in that role.

2. *On transitional arrangements: on what date will FCA be writing to firms advising them of the individuals to be grandfathered into the new regime from APER?*

Once form 'K' has been released on connect, the functions will appear there. This will happen 3 months before the deadline.

If a firm does not have a chairperson, there are no new requirements to have one in place.

3. *Regarding Statements of Responsibility in Partnerships: what are FCA's expectations regarding sharing non-prescribed responsibilities where this is a requirement of the partnership deed? Could prescribed responsibilities be shared in these circumstances?*

As long as firms document this clearly, prescribed responsibilities can be shared.

4. *In general: how does the concept of individual responsibility, so clear in SMCR, reconcile with the collective responsibility of the Board? It is understood that it is not allowed for Statements of Responsibility to refer to collective responsibility held.*

All directors are responsible for the firm, SMCR should not change that.

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The governing body of the firm remains accountable for the company.

Where the FCA talk about individual responsibility, it is the 'individual' role that these people play within the firm as part of the board collective that FCA is interested in. As a senior manager, individuals are not only accountable for their role but also the general behaviour of other board members.

Peter advised that clear documentation of roles and responsibilities would be helpful.

5. Will a current corporate partner migrate from CF4 to CF27 or will it be representatives of the corporate partner who become the SMF27?

Corporate partners can be SMF27 if their role is involved in the management of the partnership. However, it may be appropriate for senior individuals within the corporate partner to become SMF27 again dependent on the role.

6. Have you any comments or observations where a limited scope firm wishes to appoint more SMFs than one SMF29?

If this was a shared role, there is no barrier to have more than one SMF29.

What firms cannot do is deploy other functions that do not apply to a limited scope firm.

For limited scope firms the FCA have deliberately applied a very minimal version of the regime. There is always the option for the firm to opt up to become a core or enhanced firm if they believe it is more appropriate.

7. For enhanced firms is the criteria of £35m or more of intermediary regulated business revenue intended to cover any form of intermediated revenue from retail clients, i.e. covering large Financial Advisory Intermediaries, mortgage and insurance brokers etc?

Yes, it is what is reported to the FCA. It covers all the above, but not consumer credit.

8. For firms that do not have audit or risk committees and do not have NEDs at the regulated entity level, do PRs j, k and l, still have to be allocated?

Yes, they do in an enhanced firm. There is no opt out.

There should be a level of independence, so a firm should find the most appropriate and independent person for these responsibilities, where for instance a firm does not have NEDs.

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9. An overview on how firms are engaging with SM&CR?

Peter advised that he is seeing a mixture of firms who have already made sure they have everything in place for SMCR and other firms who have not yet started to prepare for it. The FCA will continue to remind firms of the deadline and continue with their communication strategy.

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- The FCA has recently completed some research with a range of banks as to how SMCR is being embedded. The conclusion was that from the senior managers side, the FCA was reasonably pleased with the way the regime has been embedded.
- They have some concerns with the way “reasonable steps” are being evidenced.
- What the FCA did not see within this research was the way firms are thinking about how they can stop misconduct before it has chance to crystallise. The FCA think this would be the best way in which senior managers can protect themselves and demonstrate reasonable steps.
- The one area with the biggest weakness in implementation was conduct rules. The FCA found that many firms could not explain how staff were trained in the conduct rules in a way that was relevant to their roles. In general, senior managers struggled to explain what a breach of the conduct rules would be. The FCA want to emphasise how important the conduct rules are as part of the overall regime.
- Peter was asked several questions by the group that he has taken away with him and will feedback to Simon Collins.