AMI Q&A with the FCA: Senior Management and Certification Regime

Firm engagement

Is the FCA still planning to have further engagement with firms to sense check their implementation and readiness of SM&CR? If so, how and when?

The FCA Connect process has been developed to be straightforward and firms will have the support through the existing processes. It is unlikely that every application will be reviewed, instead the FCA supervision team will review a sample of firms' submissions as part of their ongoing oversight activities.

Given that Form O has been available since June, firms would have expected to be contacted by the FCA (as indicated on the FCA website) with confirmation of their assessment and allocation of a firm category. Is there any update on this?

The FCA communication to all firms is now complete. Any firm not in receipt of a note form the FCA setting out their firms' categorisation should advise the FCA Contact Hub and advise us on info@a-m-i.org.uk

Where a firm has Appointed Representatives (ARs), does the regulator think that these solo-regulated firms will bring these AR firms under the SM&CR or continue to use the APER rules in terms of their supervision and management.

There is no plan to move away from APER for ARs. FCA is not aware of any plans in the near future for legislation to be changed.

A SM1 may have certification regime in one strand and APER in another. FCA has acknowledged that this is the position that they will have to manage. Should a firm wish to keep these separated then this is acceptable, as it will be if the firm decides to bring all within the certification regime.

Senior Managers Regime

Non-Executive Directors (NEDs) will be allocated Senior Management Functions relevant to their responsibilities. However, these NEDs can be directors of a group company and not of the regulated firms within the group. Can the FCA confirm that this structure gives no absolution of their responsibility?

Where they are NEDs of a PLC then firms should consider SMF7. A Statement of Responsibility (SoR) should set their role out clearly and so likely to bring them into the regime. Committee SMF is only required if they chair a committee within the regulated firm: risk committee or audit committee. SMF7 is relevant if the NED has a direct influence on the regulated company.

In the published guidance on SORs and MAPs there is an illustration where this situation occurs. If a legal director is a NED then there is no requirement to be SMF unless they have another role in the regulated firm.

Chair of audit committee should be chair of audit committee for the regulated firm rather than holding company.

Core firms have a small number of SMFs to allocate and can't use SMF7 so the holding company NEDs aren't brought into regime.

Do not to make an effort to bring anyone else into the regime unless they clearly match the SMF definitions.

Responsibility Maps: if 3 of the 4 regulated firms in a group will have identical structures and statements of responsibility (SoRs), is it necessary to have a responsibility map for each of the 4 firms in this scenario?

Each regulated firm will need to have its own map, but you can copy the same map and submit it multiple times, clearly identifying the different firms.

Do the FCA have any examples or scenarios of when a Statement of Responsibility has been changed such that it triggers an FCA disclosure requirement?

FCA have set out some guidance on this in SUP10C.11.6, which gives a non-exhaustive list of examples of potential changes which would require a Form J submission. For example, it includes:

- variation of an individual's approval (including the removal or a condition or time limit)
- re-allocation of a Prescribed/Overall/Other Responsibility
- sharing of a responsibility that was previously allocated to one individual (or ceasing to share).

More generally, the Handbook states that a change is likely to be 'significant' if it reflects a significant change to the role an individual is doing at the firm, for example the importance or seniority of the role changes, if there is a change in the skills, experience or knowledge need by the individual to do the job.

FCA wouldn't want to see minor tweaks to wording; the change should be material to the responsibility. It's worth bearing in mind for Overall and Other Responsibilities which are free text, the Form J doesn't allow changes to wording previously provided. To update the wording of an existing Overall or Other Responsibility you have to withdraw it and re-submit it with the updated wording, so it's only worth doing for material changes that the FCA would want to know about.

Certification Regime

Certification criteria - based upon the work already undertaken with banks since SM&CR was introduced, what level of MI is being applied to demonstrate on-going certification?

The work done to date has not looked at this in depth so this a matter of judgement for firms. use common sense; too much information is as bad as too little.

Firms might want to consider:

- MI on references – How many have raised an issue and what happened as a result.
- Approach UK Finance and see what banks have been doing on this topic
- Banking Standards Board have published guidance that you may find useful 'Statement of Good Practice' The Certification Regime: Fitness and Propriety Assessment Principles.

A discussion on CPD levels as one measure identified that, unlike insurance and investment advisers, the FCA rules do not set mortgage advisers any minimum CPD levels. This may be something that the FCA could consult upon in the future.

If a firm were to receive a supervision request then it is likely that the request would include oversight of the MI that the firm collects and how it is used. Firms may wish to focus on looking at the aims and outcomes rather than just the rules. Firms could develop existing MI to give it a certification slant.

Certification in relation to those in initial training/not yet competent – can the FCA confirm the treatment for those advisers who may not be able to demonstrate that they have met the requirements of the certification regime as they remain in training, under direct supervision, has not achieved full CeMap. Basically, those who have not yet met the firm's T&C standards?

Rules on certification allow for grey areas and for suitable arrangements to be put in place whilst in training. Firms should consider whether the individual could be certified for what they are able to do? Signed off for fact-finding but not competent etc. T&C rules are not changing and it's these that are important. Therefore, a firm could have different levels of certification depending on where the individuals are in the journey e.g. a different checklist sitting behind each certificate that would be reviewed more often: every three or six months rather than annually. The main point is that it's a competent adviser in front of the firm's customers.

Certification in relation to those in initial training/not yet competent – further to the above question can the FCA confirm how these individuals would be recorded on the Directory?

See above.

Protection and GI only advisers - where advisers only provide advice on protection and general insurance products, does the FCA think that firms will bring these advisers under the SM&CR or continue with different processes to assess their competence?

Firms don't have to certify these individuals unless they are also giving mortgage and financial advice. The T&C rules will obviously still apply.

There are no plans to bring them into the SM&CR and no T&C rules requiring qualification but this would change if they were to be brought into the regime. This would be a big change in approach and so would be consulted upon.

How long do authorised firms have to certify existing staff identified as requiring certification and new entrants to a certified role?

People doing certification roles who join during the year should be identified as Certification Staff (and trained in the Conduct Rules), but they **don't need to be certified as F&P or have a certificate issued on recruitment** (SYSC TP7). Specifically, 7.2.4G of that chapter contains a table setting out how the Certification Regime applies during the transition period - row 2 of the table confirms that SYSC 27.2 (issuing certificates and fitness) does not apply during the transition period.

So, this means that firms have until 8th December 2020 to certify those in certification roles, this enables firms to develop their systems and oversight and avoids a big bang launch.

Regulating referencing

Should information come to light that would have changed the fitness and propriety declaration from that given at the time of the reference, do firms still have an obligation to notify the current employer based upon the information on the Directory and not just to the employer they left to join?

Yes. The Directory should make no difference to obligations to update references if something comes to light. Firms are already obligated to provide an updated reference and the Directory might be helpful as this will enable firms to see where people have gone so that they able to inform every subsequent firm.

Discrepancies between the reference received from previous employers and the information on the Directory. What do firms do if this situation occurs? Use information in the reference or that in the Directory?

If there is a significant discrepancy then it's the duty of the previous firm to update the Directory and give a regulatory reference. The reasonable thing to do is to go back to that employer (firm) to notify them of the discrepancy.

Be aware that there may be some gaps between Dec 2019 – 2020 as banks and building societies are only being required to record the individual's current roles on the Directory.

Prescribed responsibilities

What are the FCA's thoughts on sharing a PR?

FCA doesn't like dividing responsibilities but will accept it where firms have exhausted all other possibilities. The Statement of Responsibilities must be very clear for both individuals.

FCA has seen and not accepted examples of firms splitting financial crime. Firms are encouraged to keep financial crime with one individual, if possible, to ensure that there is adequate senior oversight. The point of this responsibility is that it is seen as an overarching responsibility and a cultural issue.

Should every senior manager have a prescribed responsibility?

No. This would be especially difficult in core firms as there are only a maximum of 5 PRs to allocate.

Where to go on examples of what are reportable breaches of conduct?

Guidance in FCA COCON giving quite a few examples to help firms. It is not possible to include every situation that might occur and there needs to be an element of judgement.

Think of rules as being a positive cultural lead and set of principles. Think more about training positives rather than the threat if something goes wrong and get staff to think more about what these mean to them in their role.

Most difficult seems to be the use of due care and diligence - was it a mistake or did people really not care? The conduct rules are not there to create fear or catch people who make mistakes, but firms will recognise deliberate wrongdoing or complete lack of care.

Reportability of the conduct rule breach only kicks in where the firm has taken disciplinary action and a written warning has been issued. Some things are not a breach i.e. poor attendance, persistent lateness; these are employment matters.

Self-employed advisers – where do they fit if at all?

Sole traders with no employees are largely outside the SMCR.

Where advisers are trading on their own as a limited company then still need to apply the provisions but in pragmatic way. Small companies or partnerships – have a conversation regarding competency, check everything is up to date, agree everything is ok and note the meeting as a record that can be shown if ever requested.

Where a DA has self-employed advisers working for the company then these advisers need to be considered as an employee for the purposes of the SMCR. They will be subject to the conduct rules and will need to be certified annually.

Networks with AR's and self-employed people that work for them as they are part of the regulated network, are they involved in the regime?

AR's and self-employed that work for them do not need to be trained in conduct rules and don't need to be certified as they are outside of the SM&CR. The individuals will however be on the Directory.

If an AR or AR adviser has breached a conduct rule - they're not subject to the certification regime and so are not subject to notification of the conduct breach, firms should however continue to use existing reporting if necessary.

Regulatory references – when do we need to start obtaining them?

From December 2019 for new recruits but not for existing employees.

In a network where the network undertakes training and competence for ARs, do the T&C managers / supervisors need to be certified?

No, as the ARs are outside of the regime and not certified individuals, then there is no requirement for the T&C manager / supervisor to be certified.

When do we have to commence adding data to the Directory?

The directory will be available for input from 9 December 2019; however, firms will have until December 2020 to deliver final content. As the Directory is still being developed and entries will not be visible, we suggest that firms delay any input until later in 2020. AMI has created guides for firms to help understand their obligations which can be found in the publications area. AMI will advise appropriate dates to commence activity in due course.