



Leading on Investments and Savings

**Response by TISA to
Consultation Paper CP17/40
and CP 17/42 on
Transitioning FCA firms and
individuals to the Senior
Managers & Certification
Regime and The Duty of
Responsibility**

February 2018



Response by TISA to Consultation Paper on Transitioning FCA firms and individuals to the Senior Managers & Certification Regime

About TISA

TISA is a unique, consumer-focused membership organisation. Our aim is to improve the financial wellbeing of UK consumers by aligning the interests of people, the financial services industry and the UK economy. We achieve this by delivering innovative, evidence-based proposals to government, policy makers and regulators.

TISA's growing membership comprises over 180 firms involved in the supply and distribution of savings and investment products and services. These members represent all sectors of the financial services industry, including asset managers, insurance companies, fund managers, distributors, building societies, investment managers, third party administrators, FinTech, consultants and advisers, software providers, financial advisers, pension providers, banks and stockbrokers.

Current themes of TISA policy work include:

- Brexit: developing proposals for government that will enable the savings and investments sector to prosper on a global scale
- Digitalisation: a digital identity for consumers of financial services, innovation, standards and data responsibilities
- ISA's: LISA, simplification of the regime
- Retirement saving: the Auto Enrolment review, self-employed and pension tax relief
- Housing: the use of property to supplement retirement income
- Guidance: developing a framework and services to make guidance more widely available
- Education: supporting the education of young people to make them aware of the impact of finance on their life.

TISA also provides support on a range of operational and technical issues targeted at improving infrastructure and processes, standards of good practice and the interpretation and implementation of new rules and regulations. TISA has a successful track record in working cooperatively with government, regulators, HMT, DWP and HMRC to improve industry effectiveness by reducing cost and risk and to enhance customer outcomes. This work currently includes: MiFID II, CASS, the UK Fund Settlement initiative and Payments Strategy Forum. TISA Exchange (TeX) is providing a model for transfers and re-registrations.



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Introduction

We support the overall aims of the policy behind extending the Senior Managers & Certification Regime ("SM&CR") to all FCA authorised firms ("Extension") and believe that individual accountability is needed in the financial services industry to drive positive change.

Our response is divided into three parts: Parts 1 and 2 concern CP 17/40 with Part 1 providing our general feedback, comments and concerns and Part 2 providing our response to the specific questions raised. Our response to CP 17/42 is in Part 3.

PART 1 – General Feedback, Comments and Concerns in relation to CP 17/40

Proportionality

We note the intention of the FCA is that the Extension should be implemented in a way which is proportionate, taking into account the varied nature of the 50,000 or so firms within scope of the Extension. At recent FCA briefings, we have understood the FCA's key messaging to be 'simple, clear and proportionate' in relation to SM&CR implementation.

Rulebook Structure

We consider that the current proposed amendments to SYSC and the transitional provisions are very complicated. This is exacerbated by the fact that the rules and guidance for all different types of firms are not separated out. For example, a Limited Scope firm needs to read through all of the rules that apply to banks, core and enhanced firms in order to determine whether they do or do not apply to them and what rules apply when. This issue could be mitigated by adopting separate SYSC rulebooks for Core, Enhanced and Limited Scope firms which would enable firms to be able to go directly to the applicable rules for them. An alternative solution would be to highlight the different requirements in different colours or text types as they apply to a certain category of firm. We believe this would significantly aid clarity for all firms.

Inconsistent messages

For Core and Limited Scope firms, we are concerned that the simple approach to transition may give a misleading message that there is not much for firms to do with many functions auto-converting over to SMFs. Even where conversion of many individuals can happen automatically there are still significant tasks for firms to undertake. There is a risk with that messaging that some firms may not take the change to SM&CR seriously and feel it is acceptable to do the very minimum thereby negating the potential benefits of cultural change, gap spotting, etc. This is not what we believe the FCA is trying to achieve. We suggest the FCA consider what checks it may perform once the regime is in place to confirm firms have implemented the regime properly and communicate that such checks will be undertaken so that the conversion process (which we understand exists for pragmatic reasons) does not undermine the very reasons for extending the SM&CR.

Head of Legal

Following the FCA discussion paper around 18 months ago, it would be helpful for firms to have clarity on role of lawyers under the SM&CR and how they should proceed in the meantime.



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Implementation Timeline and Approach

Timing of implementation

We appreciate that HM Treasury (“HMT”) will ultimately dictate the earliest implementation date of the Extension. However, as in our response to CP17/25, we would like to reiterate the fact that UK firms are currently facing an unprecedented level of regulatory change and uncertainty and that this is expected to continue with Brexit. We would request that the FCA factors this in to its discussions with HMT so as to ensure that any implementation proposals are structured to reduce, as much as possible, the additional regulatory burden being placed on firms. For example, ensuring that implementation of the Extension does not occur simultaneously with the implementation dates of other significant regulatory changes or very close to when the UK is expected to leave the EU.

Implementation will require significant time and resources to be spent on mapping, documentation (e.g. statements of responsibilities, MRMs, new procedures around conduct breaches, etc.), training and ensuring individual senior managers are content that they can comply with the duty of responsibility. From the past experience of Deposit Takers, implementation work may lead to firms identifying gaps or weaknesses which need to be addressed and potentially a change in culture. All of this, and culture in particular, takes time to embed. With this in mind we would suggest that an implementation date of late 2019 would be realistic and achievable.

Clarity on implementation date

Whilst acknowledging that the implementation date for the Extension is not the FCA’s decision to make, we request that the FCA impresses upon HMT the importance of giving firms certainty on the implementation date as soon as possible in order to allow firms to plan, budget and resource effectively within whatever timescale is decided upon. The current uncertainty is adding to the costs of those firms who have undertaken preparatory work as it is not clear when the implementation process should properly begin and what to prioritise given the number of regulatory projects also underway. The uncertainty is also making it difficult for some firms to get the required engagement.

Careful alignment of the Extension with other regulatory measures

We reiterate our previous response around the need for clarity for Extension firms about how the SM&CR is intended to fit with other measures such as MiFID II Knowledge and Competence requirements and templates under the ESMA Guidelines for assessing suitability of management. We feel it would be useful to have FCA guidance around how the SM&CR (and in particular requirements around keeping personal data for references) aligns with meeting the requirements of the General Data Protection Regulation.

Financial Services Register

We note that the FCA is reviewing feedback received in relation to CP 17/25 and considering its approach to the Financial Services Register which is welcome. Our members remain of the view that some form of central register for certified persons would be of benefit to the industry. One approach would be for the FCA to allow firms to upload details of their certified persons which could include wording from the FCA that they are not responsible for uploading this information. Alternatively, the FCA could continue to maintain the SMF register. Whichever approach is taken, we reiterate the importance of the Financial Services Register to our members.



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PART 2 - Response to individual consultation questions

Q1: Do you have any comments on our proposed transitional arrangements?

As noted above we encourage HMT to communicate the start date of the new regime at the earliest opportunity to provide firms with certainty. We feel date towards end 2019 would be appropriate for the reasons noted above.

We welcome the FCA's proposed one year transition time for implementation of the Conduct Rules to other Conduct Rules Staff and for certificates to be issued under the Certification Regime as this will allow firms flexibility in introducing the new requirements and implementing changes for all staff where needed.

In relation to auto-conversion, our members have some concerns that this may result in some SMFs being missed off the Register or there being some inaccuracies with the details on the Register. This could mean affected senior managers may have to temporarily cease carrying out their role until any inaccuracies are corrected. To ensure this is not an issue we would support the FCA allowing the 12 week rule to apply to any such affected individuals in this circumstance or otherwise clarifying what the position would be in such circumstances. Ideally, we recommend the FCA permits firms to see what the auto-conversion mapping will look like after commencement at least one month in advance of transition to allow for any issues to be addressed.

Q2: Do you have any comments on our proposed mapping of functions for Core and Limited Scope firms?

We support the simple conversion process described against the controlled functions and corresponding Senior Management Function(s) at Table 3 in CP17/40 as this provides a simple and consistent approach. The requirement for a Form K (and no Statement of Responsibilities) to be submitted for those Core Firms with CF2s to identify who will map into the Chair role is understandable.

For Core and Limited Scope firms there is no requirement to lodge a Statement of Responsibilities with the FCA for senior managers in firms subject to auto-conversion. We would welcome clarity around whether the rules will note an exemption from these firms needing to file Statements of Responsibilities at a later point and also re-file these documents where there is a change, or whether there will only be a requirement to file the new document resulting from a change. We assume that if there is an issue and the FCA wishes to liaise with the accountable senior manager within a firm that has been auto-converted that the FCA will ask for the firm's Statements of Responsibilities at that time, but this clarity would also be welcomed.

Q3: Do you have any comments on our approach to conversion for Core and Limited Scope firms?

In a Core Firm, a CF1 (Director) is automatically converted to SMF3 (Executive Director) but for executive chairs they also require conversion to an SMF9 (Chair). We would appreciate some clarity from the FCA as to why a Form A is required in this instance, if individuals are already performing



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this role, rather than the simpler Form K, which can be submitted for non-executive chairs (current CF2s) converting to an SMF9.

If the FCA still requires Form A to be submitted for executive chairs it would be helpful to clarify whether a Statement of Responsibilities must also be submitted and whether the position is different depending on the timing of submission of the Form A.

Q4: Do you agree with our approach to new and in-flight applications by Core and Limited Scope firms?

We feel it would be simpler, pre-Implementation, to use the current Approved Person forms for all applications for approval for a senior manager (including where those senior managers will only commence their role on implementation) and then introduce the new SM&CR Forms from implementation. This is to avoid a confusing situation where firms are not sure which forms to use when.

An alternative approach could be taken with a 'cut off' date for applications using the current Approved Persons forms and requirements based on the standard length of the application process. Applications made after this date (e.g. 6 weeks prior to commencement) which can only expect to gain approval after the commencement date would be expected to complete forms under the requirements of the new regime. It could be a requirement for all applications for senior managers who will commence their role post-implementation to submit their application using the new forms in this window.

Under the current proposals it is not clear to us whether an in-flight application using the old Form A will be converted by (a) the FCA granting approval as if under the Approved Persons process and then converted (as if they had had their application approved pre-commencement) or (b) whether conversion of the application means it will really be treated as an SM&CR application, and, if so, whether a Statement of Responsibilities must then be submitted in order for it to be properly assessed. If the latter and a Statement of Responsibilities would be required it may be helpful to give firms the option to submit this with their Form A to avoid any delay.

Q5: Do you agree with our approach to Core and Limited Scope applicant firms?

In principle, we agree with the approach to Core and Limited Scope firms.

In order to help firms (and the FCA) deal with any potential systems issues, we would support the FCA considering opening the new electronic system for lodging Forms K and Forms A well in advance of implementation. It would also be helpful to know when the new Form A and K will be available. Early sight of the website conversion area (e.g. screen shots) would be beneficial to firms along with an understanding of whether they will be able to save and return to data or need to enter all data in one go.

Furthermore, we encourage the FCA to consider establishing a dedicated email address or help line to deal exclusively with SM&CR implementation issues. This would reduce any risk of inconsistent advice where different operators handle enquiries.



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Finally we feel it would be useful for the FCA to share their experience of implementation of the SM&CR for Deposit Takers and suggest a bank of 'frequently asked questions' or 'frequently encountered problems' is made available on the FCA's website.

Q6: Do you have any comments on our proposed mapping of functions for Enhanced firms?

While we feel the table presents a reasonable initial proposal for mapped functions, we appreciate it is not possible to foresee every scenario due to the myriad of approaches within firms. We question why it is not possible for more functions to map to SMF18 and SMF24. In particular, it is not clear why for example, the Director function can map to more SMFs than the Partner function can. For example, we question why a CF4 map across to a SMF24, Chief Operations, in the same way that a CF1 can. We generally suggest that more current CFs should be able to map to more SMFs to avoid an excessive amount of additional paperwork for the FCA and firms. In addition, we suggest inclusion in Form K of a section where a conversion could be allowed against unmapped functions provided a compelling case was presented.

We would appreciate clarity in the inconsistency of approach between the PRA and the FCA. In the Deposit Taker SM&CR, the PRA's approach was that some functions could only be held by non-executive directors where the FCA does not appear to be taking this approach with the Extension.

Q7: Do you have any comments on our approach to conversion for Enhanced firms?

As per our response to question 3, we question why a Form A is required rather than the simpler Form K for conversion of executive chairs.

The impact for Enhanced firms that do not complete the conversion process ahead of the commencement date is clearly more severe than for Core or Limited Scope firms as it would mean they were unable to continue to operate. To ensure any potential issues are avoided, we suggest all Enhanced firms are allocated a designated contact at the FCA to work with directly and to ensure they fully meet all requirements one week prior to the commencement date. As referenced above, we would also raise the possibility of the FCA opening a dedicated email address or help line to deal exclusively with SM&CR implementation and mapping issues.

We feel it would be beneficial to include provision of a testing period and allow a selection of trade bodies (such as TISA) access to the new online system to be used prior to implementation. This approach would enable a selection of firms to provide real testing as to how the system is likely to work upon implementation.

We also raise two questions for clarification: what are firms who want to opt up expected to do to avoid auto conversion applying to them by default? When will Form K go live?

Q8: Do you agree with our approach to new and in-flight applications by Enhanced firms?

Please see our response to question 4 which applies here too.



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As per our response to question 6, we support additional mapping and the inclusion in Form K of a section where a conversion could be allowed against unmapped functions provided a compelling case was presented.

We also query whether the FCA's comments regarding not having anyone performing a controlled function without authorisation even for a short period should make reference to the 12 week rule which could assist in such circumstances or clarify if the FCA does not consider that that rule can be relied on in that situation.

Q9: Do you agree with our approach to Enhanced applicant firms?

Please refer to our response to question 5. The same comments apply here.

Q10: Do you have any comments on our proposed changes to forms?

We support the majority of the proposed changes to the forms. However, we note that it is difficult to present our full view without having full exposure to the system for submitting the required forms. We refer to our answer above suggesting some industry testing of the forms to iron out any issues in advance.

Q11: Do you have any feedback on our proposed amendments to the Fitness & Propriety questions?

With regards to the new question on arbitration proceedings, we propose that the phrasing of the question should be limited to only include binding arbitration proceedings where the applicant was found to be directly at fault. We are of the view that it should not be necessary to disclose non-binding arbitration proceedings. We also feel the FCA should clarify what role the individual should have played in the proceedings; for example, we do not believe the FCA intended to capture individuals acting as lawyers or expert witnesses in such proceedings.

Whilst we do welcome some time limit on disclosure of civil proceedings we query whether a time limit should not also be applied to some of the other disclosure categories for consistency. It is not clear why these categories have been singled out. In addition, our members have highlighted that even a 10 year period may be too long and out of line with ordinary record-keeping protocol.

[NB. Under SM&CR the PRA approach is to require MRMs and SoRs to be kept for 10 years. Also please note that the long disclosure periods are intended to capture issues such as involvement with an insolvent business or a conviction which, regardless of how long ago it happened have a bearing on the individual's reputation and competence. Also, these matters would be for the individual to disclose to the firm (not for the firm to hold this information).

Q12: Do you have any comments on our proposal to extend the use of REP008 to all SM&CR firms?

We do not have any comments on this proposal to extend the use of REP008 to all SM&CR firms though do generally query the proportionality of applying this requirement to Limited Scope firms.



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Q13: Do you have any comments on our proposal to require a nil return to be submitted where no Conduct Rules breaches have occurred, and to apply the late returns fee to late or non-submitters of REP008?

We request that (if this is not intended already) firms be sent an automatic email reminder close to the deadline. Without an email reminder, we feel it would be unfair to impose a late returns fee.

Q14: Do you have any comments on our proposed consequential amendments?

As per our comment in Part 1 regarding the structure of the FCA Handbook, we would raise the possibility of a tailored FCA Handbook to each type of firm to ensure the simplicity and proportionality the FCA is aiming for with the Extension. This is particularly acute in respect of the consequential amendments which are extremely complicated to follow. We support exploring whether the online functionality of the Handbook could be tailored to each type of firm (as it is with the PRA Rulebook and as the FCA offers in some instances) to minimize the volume of rules that must be gone through. An alternative solution would be to highlight the different requirements in different colours or text types as they apply to a certain category of firm.

We also note that continuing to have APER in force for Appointed Representatives may be confusing for firms that may not necessarily understand that only COCON applies to them going forward or firms that will have individuals who will have to comply with both. For example, retaining CF30 for Appointed Representatives only may lead to confusion for other firms when using the Handbook. It may also be helpful for members for planning purposes to know whether Appointed Representatives will ultimately also need to transition over the SM&CR or not.

Q15: Do you agree with our proposal to implement the new Conduct Rules prescribed responsibility for firms subject to the Banking Regime ahead of the Commencement of the extended SM&CR?

We do not have any comments on this proposal.

Q16: Do you have any comments on our proposal to apply the late returns fee to late or non-submitters of REP008?

As per our response to question 13, we request that firms are sent an automatic email reminder close to the deadline if this is not currently in place.

PART 3 – Response to CP 17/42

We have no particular comments to make on the questions raised in CP 17/42.

Overall we agree that adopting an approach aligned with that taken for Deposit Takers makes sense in order to ensure consistency and clarity, especially for senior managers who may hold roles in different types of firms.