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## UK Financial Conduct Authority Proposes to Exclude the Head of the Legal Function From the Senior Managers Regime

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On 23 January 2019 the UK Financial Conduct Authority (FCA) [published](#) Consultation Paper CP19/4 which, amongst other things, proposes to exclude the Head of the Legal function from the Senior Managers Regime (SMR). The proposal will be of interest to banks, insurers and enhanced solo-regulated firms in the UK and represents a significant climb-down for the regulator following almost three years of calls from the UK's financial and legal industries to ringfence the Head of Legal from the SMR.

Following the 2008 financial crisis and the [recommendations](#) of the Parliamentary Commission on Banking Standards, the Senior Managers and Certification Regime (SM&CR) represented a radical overhaul of the former Approved Persons Regime, in a bid to strengthen accountability in the UK's financial services industry. The SM&CR is comprised of three parts:

1. The SMR, which requires that a Senior Manager has overall responsibility for each of a firm's activities, business areas and management functions. Every Senior Manager must have a 'statement of responsibilities' that clearly says what they are responsible and accountable for. Senior Managers require FCA approval before starting their roles;
2. The Certification Regime, which applies to employees who are not Senior Managers but whose role, called a 'certification function' can cause significant harm to the firm or its customers. Such people don't need to be FCA approved, but firms must annually certify that they are fit and proper to perform their role; and
3. The Conduct Rules, which are high-level standards of behavior such as the obligation to act with integrity, due skill, care and diligence and be open and cooperative with the FCA and other regulators. Firms must ensure staff are trained in and know that the Conduct Rules apply to them and notify the FCA of any Conduct Rule breaches.

The last three years has seen a public back and forth between the FCA, regulated firms and various industry bodies, by way of published [statement](#) and discussion [paper](#), as to how and why the legal function was captured by the SMR and whether the Head of Legal should continue to be part of the SMR. In proposing to exclude the Head of Legal from the SMR, the FCA has acknowledged the two principal policy arguments for doing so that have been advanced in recent years.

First, the Head of Legal performs a crucial independent advisory function: counselling a firm and its senior management on legal risk. Were the FCA to bring a personal enforcement action, the Head of Legal would be compelled to protect their personal position whilst also being obliged to act in the best interests of the firm thus potentially compromising their ability and willingness to provide independent advice.

Second, legal professional privilege (LPP) may be prejudiced. If the Head of Legal needed to demonstrate that reasonable steps had been taken in their performance as a Senior Manager, the only practical and meaningful way to demonstrate this would be to rely on material benefitting from LPP. In addition to undermining a fundamental protection, this would place the lawyer in an awkward position as any LPP belongs to the company and is for it alone to choose to waive.

In its Consultation Paper, the FCA relies on the fact that irrespective of the applicability of the SMR, the Head of Legal falls under the Certification Regime and that in-house lawyers are already subject to the Conduct Rules. It is suggested that including the Head of Legal in the Certification Regime and applying the Conduct Rules to in-house lawyers will deliver the benefits of including these individuals in the SMR, without compromising the laws of LPP. The Consultation Paper stresses that the FCA is not proposing to exclude anyone who is a lawyer from performing a Senior Management Function.

The FCA's proposal is likely to be well-received by regulated firms and their senior lawyers. Commenting on the Consultation Paper, the Law Society vice president Simon Davis was unequivocal, *"We're delighted that the FCA agrees with the Law Society that general counsels should not be included in the SMR. This will ensure lawyers remain free to provide full and frank advice to their employer without the risk of a conflict of interest emerging."*

The deadline for responses to the Consultation is 23 April 2019, after which the FCA will consider the feedback received and publish a Policy Statement, setting out its rules and guidance, in the third quarter of 2019.

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