

UK Financial Conduct Authority Puts Heads of Legal Outside the Senior Managers Regime

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In a long-awaited but widely-expected development, the UK Financial Conduct Authority (“FCA”) has issued a new consultation paper¹ proposing that Heads of Legal do not need to be designated as Senior Managers under the Senior Managers Regime (“SMR”). Ever since the introduction of SMR in 2016, the FCA has delayed formally confirming whether heads of legal should be allocated the SMF18 role (Other Overall Responsibility Function).

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The FCA came to its position in light of the potential difficulties created by legal professional privilege. A fundamental principle of the SMR is that if a firm breaches a FCA requirement, the Senior Manager responsible for that area can be held accountable if they did not take reasonable steps to prevent the breach from occurring (the so-called ‘Duty of Responsibility’). This could lead to a conflict of interest in which a Head of Legal wishes the firm to waive privilege to help him or her avoid personal liability, while being professionally obliged to advise the firm not to waive privilege where this is not otherwise beneficial for the firm. The FCA also explained that privilege would often restrict it from exercising its usual supervisory processes regarding Senior Managers to obtain documents and information from Heads of Legal, leaving little benefit in requiring them to be Senior Managers.

Further, the FCA noted that applying the SMR to the legal function could undermine the function’s independence. Personal liability could make lawyers less likely to investigate matters or offer advice proactively, and the Senior Manager Conduct Rule requiring relevant matters to be notified to the FCA could conflict with lawyers’ duties of confidentiality and to act in the client’s best interest.

In any case, the FCA stated that Heads of Legal would be covered by the Certification Regime (which, for example, requires firms to certify annually that certain individuals are fit and proper to perform their roles). Together with all other in-house lawyers, Heads of Legal are also subject to the five Individual Conduct Rules, requiring them to act with integrity; with due skill, care and diligence; in an open and cooperative way with regulators; paying due regard to the interests of customers and treating them fairly; and observing proper standards of market conduct.

¹ ‘Optimising the Senior Managers & Certification Regime and feedback to DP16/4 – Overall responsibility and the legal function’, Consultation Paper CP19/4 (January 2019).

Finally, the FCA noted that a Head of Legal may perform another role requiring them to be a Senior Manager, such as Head of Compliance or Money Laundering Reporting Officer.



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