



The Law Society

**FCA consultation:
Individual Accountability: Extending the
Senior Managers & Certification Regime
to all FCA firms**

Law Society response



Individual Accountability: Extending the Senior Managers & Certification Regime (SM&CR) to all FCA firms

A response from the Law Society of England and Wales

1. When the Senior Managers & Certification Regime (“**SM&CR**”) was first introduced, there was uncertainty about whether the legal function was included. In January 2016, the FCA took the helpful step of acknowledging this uncertainty and providing some reassurance for organisations captured by the SM&CR. In its Discussion Paper issued on 28 September 2016, the FCA sought to clarify how and why the legal function was captured under the regime, and to consider whether the legal function should continue to be part of the regime going forwards.
2. The Law Society remains strongly of the view that the legal function should be excluded from the scope of the SM&CR. However, the long-term decision on whether the legal function will be included remains unclear.
3. The expansion of the regime, which has been proposed in this consultation, could bring even more solicitors within scope. The Law Society is therefore using this consultation response to reiterate its position on the importance of excluding the legal function from the regime.
4. Retaining the legal function within the regime raises significant risks for clients and solicitors, including:
 - a. Erosion of Legal Professional Privilege;
 - b. In-house lawyers being placed in positions of conflict with their employers; and
 - c. The prospect of dual regulation for some lawyers.
5. Legal Professional Privilege has existed for over 400 years and is a fundamental common law right of clients. It ensures that clients can freely consult with lawyers safe in the knowledge that the information they provide and the advice that they receive cannot be used against them. Furthermore, Legal Professional Privilege plays an important role in ensuring the proper administration of our justice system and is vigorously protected by our judiciary.
6. The inclusion of the legal function within the regime has the potential to put the lawyer in a conflict of interest situation with their employer and could impair that lawyer’s ability to provide full and frank legal advice to its clients. In the event of an investigation by the FCA, a lawyer within a firm may take the view that it is in their personal interest for Legal Professional Privilege to be waived by a client and certain documents disclosed where those documents may demonstrate that the lawyer acted properly. However, the client may take the opposite view and decide not to waive privilege. The lawyer is therefore placed in a position of serious conflict where the non-waiver of Legal Professional Privilege would make it more difficult for them to show that they acted appropriately.
7. Furthermore, including the legal function within the regime creates the possibility of dual regulation which can cause additional and unnecessary costs to be borne in complying with different regimes.

8. We previously stated that the proposals should be subject to a full consultation to allow both the FCA and the affected organisations and stakeholders to respond in full. The FCA has indicated that it intends to issue a full consultation, which the Society would welcome.
9. In so far as the extension of the SM&CR to all FCA firms would result in a significant increase in the numbers of solicitors being caught within the regime, the above arguments become all the more pressing. We call on the FCA to:
 - a. in the short-term, continue with its policy of taking no enforcement action against lawyers who are included within the SM&CR until the issue of the inclusion of the legal function has been resolved; and
 - b. in the medium-term, consult fully on the removal of the legal function from the SM&CR.