

April 6, 2020

COVID-19: THE UK FINANCIAL CONDUCT AUTHORITY'S EXPECTATIONS UNDER THE SENIOR MANAGERS AND CERTIFICATION REGIME

To Our Clients and Friends:

On 3 April 2020, the UK Financial Conduct Authority (“FCA”) published a statement setting out its expectations of FCA solo-regulated firms under the Senior Managers and Certification Regime (“SMCR”) during the COVID-19 outbreak. This client alert provides FCA solo-regulated firms with an overview of the FCA’s SMCR-related expectations.

What are the responsibilities of senior management during the current outbreak?

The FCA has previously stated that it does not require firms to have a single senior manager responsible for their coronavirus response. Rather, firms should allocate these responsibilities in the way which best enables them to manage the risks they face. The FCA’s latest statement notes that senior managers are responsible for risks in their areas of responsibility and should be considering:

- where the current situation might lead to emerging risks, and
- how it affects existing risks, along with the controls used to manage them.

Does my firm need to make changes to statements of responsibilities?

The FCA recognises that some firms may need to make temporary arrangements to cover absences or change senior manager responsibilities in light of the COVID-19 outbreak. However, the FCA has stated that it wants to minimise the burden to firms at this time and **does not** intend to enforce the requirement on firms to submit updated statements of responsibilities provided that the change is:

- is made to cover multiple sicknesses, or other temporary changes in responsibilities in direct response to the pandemic, and
- is temporary and expected to revert to the firm’s previous arrangements.

However, the FCA does expect allocations (even if temporary) to be clearly documented internally to ensure that those within the firm understand who is responsible for what. This must be made available to the FCA on request. Furthermore, firms’ internal records should aim to keep a “running commentary” of their senior manager population and their responsibilities during this period. The FCA has stated that

this includes keeping statements of responsibilities, role profiles and, if applicable, responsibilities maps up-to-date. The FCA does not expect firms to notify it of such temporary arrangements using Form D.

Firms that are classified as “fixed portfolio” firms should supply the FCA with timely detail of the changes they would normally include in updated statements of responsibilities. Firms should also update their FCA supervisors of any furloughing of one or more senior managers.

What if my firm needs to make temporary arrangements for senior management functions?

The FCA intends to issue a Modification by Consent to the “12 week rule” to support firms using temporary arrangements during the crisis. The 12 week rule permits an individual to cover for a senior manager without FCA approval where the absence is temporary or reasonably unforeseen and the appointment is for less than 12 consecutive weeks. If temporary arrangements last longer than 12 weeks as a result of the COVID-19 outbreak, firms can notify the FCA that they consent to a modification of the 12 week rule. In these cases, temporary arrangements can be extended up to 36 weeks.

Under the modification, firms will also be able to allocate the prescribed responsibilities of the absent senior manager to the individual who is standing in for the absent Senior Manager. Usually, prescribed responsibilities can only be allocated to another FCA approved senior manager under this rule. However, if possible, the FCA still expects firms to do this. Firms should still allocate to the most senior person responsible for that activity or area, who has sufficient authority and an appropriate level of knowledge and competence to carry out the responsibility properly. The “temporary” manager will require access to the governance forums they need to exercise their responsibilities.

The FCA expects firms to clearly document these responsibilities, however temporary, including on relevant statements of responsibilities and, if applicable, responsibilities maps.

What notifications does my firm need to make?

The FCA does not expect firms to submit the updated statement of responsibilities of the absent senior manager or of senior managers who take on the responsibilities of the absent manager. However, the FCA does expect allocations to be clearly documented internally. Although, the FCA has stated that, if applicable, the firm’s responsibilities map should reflect the responsibilities of those non-senior managers with temporary responsibilities taken on under the 12 week rule.

What is the position regarding furloughed senior managers?

The FCA has previously noted that senior managers may be considered key workers. However, there may be circumstances where a senior manager has been furloughed. Unless such a senior manager is permanently leaving their position, the senior manager will retain their FCA approval and will not be required to re-apply for approval on their return to work.

To the extent that a firm is subject to the “Overall Responsibility” rule, the responsibilities of the furloughed senior manager must be allocated to another senior manager. If the firm is relying on the 12 week rule, the replacement does not need to be a senior manager.

Does my firm need to re-allocate prescribed responsibilities?

If a firm has furloughed a senior manager, that senior manager's prescribed responsibilities should be re-allocated to another senior manager. However, if a temporary replacement has been appointed under the 12 week rule, the proposed modification by consent allows the firm to re-allocate prescribed responsibilities to the temporary replacement, even if the replacement is not a senior manager.

The FCA has stated that individual performing "required function" (for example, Compliance Oversight and MLRO) should only be furloughed as a last resort. Where an individual holding a required function is furloughed, the firm should replace that individual until their return. If the replacement is temporary, firms can use the 12 week rule to arrange cover. The FCA's rules regarding who can hold certain functions still apply. For example, executives should not be allocated an oversight role.



Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 pandemic. For additional information, please contact any member of the firm's Coronavirus (COVID-19) Response Team, the Gibson Dunn lawyer with whom you usually work, or the authors:

Authors: *Michelle Kirschner and Martin Coombes*

© 2020 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.