

SMCR SERIES

IMPACT OF SMCR ON ASSET MANAGERS CERTIFICATION REGIME | THE CLIENT DEALING FUNCTION AND TREATMENT OF PARTNERS

JUNE 2019

Prepared in association with Simmons & Simmons (<http://www.simmons-simmons.com/>)

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1. **Purpose**

1.1 The new Senior Managers and Certification Regime (**SMCR**) will be extended to asset managers from 9 December 2019. Firms will need to examine the roles and activities of individuals within their organisation in order to comply with the regime.

1.2 The purpose of this position paper is to present the Investment Association with views on the following issues raised by a significant number of asset managers, with the intention of obtaining consensus where possible in the absence of clear regulatory guidance. In particular, the paper:

- sets out the scope of the *client-dealing function*, including how it expands on the CF30 role, and applies it to various activities in which asset managers engage (see in particular the Annex which provides an overview of key activities performed by asset managers and analyses whether individuals performing those activities should be within scope of the Certification regime); and
- considers whether and how *partners* (in the sense of LLP members) fall within the scope of the SMCR.

2. **Summary of views**

Client dealing function

2.1 The definition of the client-dealing function under the FCA Certification Regime is wider than the CF30/customer-dealing function under the current regime. This requires firms to examine their current CF30 population, as well as individuals performing certain other roles and activities, in order to examine which individuals within their organisation will map into the new FCA Certification Regime and be caught by the client-dealing function.

2.2 In our view, although it will depend on the particular circumstances of each case, it is likely that the client-dealing function will apply generally as follows:

- **Must be certified:** individuals engaging in activities such as portfolio management, trading or advising on investments.
- **May require certification:** individuals promoting products to institutional clients or to retail clients via intermediaries, partners who fall within the FSMA definition of 'employee', analysts who are an integral part of the investment management activity.
- **No certification required:**
 - Individuals whose roles would otherwise fall within the scope of the client-dealing function but who interact with clients in purely administrative capacities and whose roles do not require them to exercise a significant amount of discretion, judgement or technical skill.
 - Partners who do not fall within the FSMA definition of 'employee'.

Partner function

2.3 Given the narrowing of the definition of partner under the SMCR, firms will need to assess each member of their partnership and decide whether that individual is performing a Senior Management Function. This requires the following:

- the person performing it to be responsible for managing one or more aspects of the firm's affairs which relate to the carrying on of a regulated activity; and
- those aspects involve, or may involve, a risk of serious consequences for the firm or for business or other interests in the UK.

- 2.4 For firms with a large number of LLP members today, it appears likely that at least some of those LLP members will not be properly categorised as SMF27 partners under SMCR. While there is no express maximum number of SMF27s which a firm is permitted to have, it is expected that (very broadly speaking) a firm seeking to identify double-digit numbers of LLP members as SMF27s may be stretching credibility and may face supervisory challenge by the FCA.
- 2.5 Firms will need to consider in particular the status of corporate members in the LLP, and “junior” partners who may in practice have little or no senior management responsibility.
- 2.6 Corporate members of an LLP which perform senior management functions can (and must) be approved to perform the SMF27 partner function. There is nothing in the SMCR which prevents corporate members from being SMF27s. Conversely, if a particular corporate member does not have management responsibility (for example, if it is a passive vehicle for holding economic interests) then it would not need to be approved as SMF27.
- 2.7 Members of the LLP who do not have influence will not be performing the partner function under SMF27. Unless they can be determined to be employees under the FSMA definition, then technically they will fall outside of the Certification Regime and the Conduct Rules (which only apply to employees). The FSMA definition of employee for the purposes of the Certification Regime refers to being subject to the supervision, direction and control of the firm, rather than any status under employment law. It may be the case that if an LLP member does not have sufficient management responsibility to meet the definition of a senior manager, then such a person should likely be properly understood as being subject to the supervision, direction and control of the firm. The member should therefore be treated as an “employee” (although clearly that needs to be tested on a case-by-case basis).
- 2.8 However, it remains theoretically possible that there will be a group of LLP members in a firm who are not senior enough to be SMF27 senior managers, but who are too senior to be treated as “employees”. In light of this lacuna, we suggest that firms consider voluntarily assessing the fitness and propriety of ‘partners without influence’ as if they were performing the Significant Management Function and train them to comply with the Conduct Rules.
- 2.9 From a tax perspective, firms will also need to consider whether these ‘partners without influence’ still qualify to be taxed as a partner on the basis of either the percentage of the individual’s remuneration referable to the profits of the firm or the amount of their capital contribution to the firm.

PART 1: CLIENT-DEALING FUNCTION: CERTIFICATION REGIME

Annex 1 sets out the analysis of various key roles performed by individuals within an asset manager and provides some criteria for firms to take in identifying whether they are performing the client-dealing function.

1. **What is the issue?**

- 1.1 The SMCR extension sees the replacement of the CF30/customer-dealing function (under the current Approved Persons regime) with an expanded client-dealing FCA certification function.
- 1.2 The definition of the client-dealing function under the Certification Regime is wider than the CF30/customer-dealing function under the current regime. This requires firms to examine their current CF30 population, as well as individuals performing certain other roles and activities, in order to examine which individuals within their organisation will map into the Certification Regime and be caught by the client-dealing function.
- 1.3 Firms will have to certify those individuals within scope as fit and proper under the SMCR both at the outset of performing any new role and annually.
- 1.4 The Certification Regime covers a number of other functions beyond the client-dealing function, which are beyond the scope of this note.

2. **What are the overarching considerations?**

- 2.1 In considering the interpretation of the client-dealing function, it is important to consider:
 - the overarching intention of the SMCR, which includes for the Certification Regime capturing individuals who are not Senior Managers but whose jobs mean that they can have a significant impact on customers, the firm or market integrity; and
 - the importance of clarifying the interpretation and application of this function to ensure that firms apply it consistently and so that individuals do not find that in moving firms, their classification when performing the same function also varies.

3. **What is the definition of client-dealing FCA certification function?**

- 3.1 [SYSC 27.8.18R](#) provides that a person (“P”) performs the client-dealing FCA certification function for a firm if they are:
 - carrying out any of the activities in [SYSC 27.8.19R](#); and
 - those activities will involve P dealing with:
 - a person with or for whom those activities are carried out; or
 - the property of any such person,
 in a manner substantially connected with the carrying on of regulated activities by the firm.
- 3.2 In January 2019, the FCA released [CP19/4](#), which proposes additional regulations to exclude from the scope of the client-dealing function staff performing solely administrative functions in relation to the activities **highlighted** below. We expand on this further in paragraph 4.3.
- 3.3 The table in [SYSC 27.8.19R](#) sets out the following activities that are covered by the client-dealing FCA certification function:

Activity	Comments
<p>1. The following activities:</p> <ul style="list-style-type: none"> a. advising on investments other than a non-investment insurance contract; or b. performing other functions related to this, such as dealing and arranging. 	<p>(a) does not include advising on investments in the course of carrying on the activity of giving basic advice on a stakeholder product.</p>
<p>2. The following activities:</p> <ul style="list-style-type: none"> a. giving advice¹ in connection with corporate finance business; or b. performing other functions related to this. 	
<p>3. If the firm does any of the following activities:</p> <ul style="list-style-type: none"> a. dealing, as principal or agent; or b. arranging (bringing about) deals in investments²; taking part in those activities is included. 	<p>(a) and (b) do not include dealing or arranging (bringing about) deals in investments in a non-investment insurance contract.</p> <p>For the activity in this row (3), SYSC 27.8.18R(2)(a) and (b) are expanded to cover also:</p> <ul style="list-style-type: none"> a. a person in connection with whom the activities in the first column of this row are carried out; and b. the property of any such person.
<p>4. If the firm is acting in the capacity of an investment manager the following are included:</p> <ul style="list-style-type: none"> a. taking part in that activity; and b. carrying on functions connected to this. 	
<p>5. Acting as a 'bidder's representative' in relation to bidding in emissions auctions.</p>	<p>Acting as a 'bidder's representative' has the meaning in sub-paragraph 3 of article 6(3) of the auction regulation.</p>

4. How will the CF30 position be amended?

4.1 Under [SYSC 27.8.21G](#), the client-dealing function generally involves dealing with any person with or for whom the activities in [SYSC 27.8.19R](#) are carried out (or their property). New guidance clarifies in [SYSC 27.8.21G](#) that that person need not be a client of the firm.

¹ Note that the definition of CF30 used to specify "advice to clients", whereas SYSC 27.8.19 R (2) does not refer to clients, broadening the scope of this category.

² Similarly, the definition of CF30 referred to "dealing [...] and arranging (bringing about) deals in investments [...] with, for, or in connection with customers where the dealing or arranging deals is governed by COBS 11 (Dealing and managing)". Again, this limitation has been omitted from SYSC 27.8.19 R (4), broadening the scope of this category.

- 4.2 The final sentence indicates that the act of staff in engaging in client-dealing as defined in [SYSC 27.8.19R](#) with intermediaries would be sufficient to fall within the scope of the Certification Regime (even though those intermediaries are not clients of the relevant firm). These staff would appear to be 'having contact with' intermediaries in a manner substantially connected with the carrying on of regulated activities by the firm.
- 4.3 [CP19/4](#) proposes to exclude from the scope of the client-dealing function those individuals who interact with clients only in purely administrative capacities. The FCA's rationale is that these individuals will be following a procedure with appropriate systems and controls in place to prevent them from causing significant harm.
- 4.4 The proposed new SYSC 27.8.23AR³ provides that:
- (1) This rule qualifies rows (3) and (4) of the table in [SYSC 27.8.19R](#) (Table: Activities covered by the client-dealing FCA certification function).
 - (2) A person does not perform a function in (1) if their only activities that would otherwise come within the client-dealing FCA certification function do not require them to exercise a significant amount of discretion, judgement or technical skill.
- 4.5 SYSC 27.8.23BG⁴ goes on to state that:
- (1) The client-dealing FCA certification function does not apply to purely administrative roles even though they involve customer contact.
 - (2) SYSC 27.8.23AR excludes someone who has no scope to choose, decide or reach a judgement on what should be done in a given situation, and whose tasks do not require them to exercise significant technical skill.
 - (3) SYSC 27.8.23AR is likely to exclude a role that is simple or largely automated.
 - (4) There is no need to apply SYSC 27.8.23AR to row (1)(b) or (2)(b) of the table in [SYSC 27.8.19R](#), because a person must also be carrying out the functions in row (1)(a) or (2)(a) for the client-dealing FCA certification function to apply and the functions in row (1)(a) or (2)(a) require judgement and skill.
- 4.6 This will allow firms to exercise judgement on whether a role requires certification. The relevant factors that firms would be required to consider in assessing individuals would include whether the role:
- is simple or largely automated
 - involves exercising discretion or judgment.
- 4.7 The deadline for responding to [cp19/4](#) is 23 april 2019, with the fca to release a policy statement in q3 ahead of the commencement of the smcr extension on 9 december 2019.

5. **What is the impact on delegation models?**

- 5.1 Firms will need to consider in which legal entity the relevant client-dealing function sits.
- 5.2 Larger investment firms with complex group structures may face challenges in identifying which hat individuals wear when carrying out some, or all, of the client-dealing functions. To date, the lines have been somewhat blurred. The SMCR will require these lines to be clearly defined and documented.
- 5.3 A typical structure may be where a firm has a separate MiFID firm, UCITS Management Company and/or AIFM within its group which, together, carry out (i) portfolio management; (ii) marketing, prospecting and distribution; and (iii) client servicing for clients. Where there is clear delegation of services within group companies, the lines are easier to identify. If some or all of these services are being carried out without clear delegation agreements in place, challenges will arise.
- 5.4 Firms will need to consider the oversight of these relevant individuals.

³ See page 55 of [CP19/4](#).

⁴ See page 56 of [CP19/4](#).

PART 2: PARTNER FUNCTION

1. **How are partners treated under the SMCR?**

1.1 We have considered the extent to which members of LLPs will fall within both:

- the Senior Managers regime; and
- the Certification Regime,

and then the possible tax consequences of not identifying a partner as a SMF27.

2. **Smf27 partner function**

2.1 For the purposes of the SMCR, there is effectively a two-step process to identify whether a person is performing the SMF27 partner function. The first step is to identify all those persons who occupy the position of a "partner" which, as noted below, has an extended definition. The second step is to assess whether the persons identified have senior management responsibilities. The outcome of the second step may likely result in some persons who occupy the position of LLP member not being identified as performing the SMF27 function.

2.2 ***First step – identifying persons who are "partners":*** Under [SUP 10C.5.16 R \(2\)](#), the partner function (SMF27) in an LLP that is a UK SMCR firm is the function of being or acting in the capacity of:

- (a) a member in that LLP or a person occupying the position of a member (by whatever name called);
- (b) a person appointed to direct the LLP's affairs;
- (c) a member of the LLP's governing body; or
- (d) a person in accordance with whose directions or instructions (not being advice given in a professional capacity) the members or directors are accustomed to act.

2.3 We note that the above definition captures LLP members, and also captures certain persons who are not members of the LLP as a matter of corporate law, including members of the governing body (under limb (c)) and "shadow" or de facto partners (under limb (d)).

2.4 ***Second step – assessing whether "partners" have senior management responsibility:*** Unlike the current CF4 function, SMF27 does not automatically apply to all persons who are members of the LLP. Instead, it is necessary to analyse whether each LLP member (or other "partner") is actually performing a Senior Management Function.

2.5 Under [section 59ZA\(2\)](#) of the Financial Services and Markets Act 2000 (FSMA) and [SUP 10C.3.11G](#), a function is a Senior Management Function in relation to the carrying on of a regulated activity by a firm if:

- the function will require the person performing it to be responsible for managing one or more aspects of the firm's affairs, so far as relating to the activity; and
- those aspects involve, or may involve, a risk of serious consequences:
 - for the firm; or
 - for business or other interests in the UK.

2.6 'Managing' includes taking decisions, or participating in the taking of decisions, about how one or more aspects of the firm's affairs should be carried on (under [section 59ZA\(3\)](#) FSMA).

2.7 It is therefore necessary for firms with an LLP structure to review each member of the LLP (and anyone else who may meet the definition of "partner") and assess whether each member personally has responsibility for managing one or more aspects of the firm's affairs. For example, this analysis is likely to capture partners who are members of an executive committee, management committee or similar

– i.e. those with specific personal responsibility for running the firm. In carrying out this assessment, firms may need to pay particular attention to the correct treatment of (i) corporate members and (ii) junior partners.

- 2.8 **Corporate members:** Corporate members can meet the definition of SMF27, if they have the relevant management responsibilities and, consequently, corporate members can (and must) be approved to perform the SMF27 partner function. There is nothing in the SMCR which prevents or excludes corporate members from being SMF27s (and indeed this is a carryover from the Approved Persons regime, where corporate members can be approved as CF4). Conversely, if a particular corporate member does not have management responsibility (for example, if it is a passive vehicle for holding economic interests) then it would not need to be approved as SMF27.
- 2.9 There is nothing in the FCA Rules which expressly requires “looking through” the corporate member to its directors or officers and requiring those directors to be personally approved as senior managers. However, we understand that the FCA has indicated (although made clear that this is not a policy view) that if a firm has *only* corporate members, and no individual members, then it may be appropriate to look through the corporate member(s) to the directors of those corporate entities and assess if those individuals should be properly understood as performing a senior management function. In this scenario, firms should consider whether any of the directors of the corporate member (in their individual capacity) meet the definition of partner in [SUP 10C.5.16 R \(2\)](#) (which includes any person in accordance with whose directions or instructions (not being advice given in a professional capacity) the members or directors are accustomed to act) and appoint them as SMF27 if appropriate.
- 2.10 In any event, it would be necessary to assess if any director or officer of a corporate member satisfies the extended definition of “partner”, and to thereby include persons appointed to direct the LLP’s affairs or members of its governing body.
- 2.11 We understand that the FCA has expressed the view that it may not be generally appropriate to assign prescribed responsibilities to a corporate member. There is no express prohibition on this approach but the FCA has indicated that firms should consider whether this would make sense in practice.
- 2.12 **Junior partners:** Junior partners who have little or no day-to-day management responsibility will be unlikely to meet the second test (even if they are a senior investment professional). For example, it seems likely that merely having a vote at members’ meetings on reserved matters is unlikely to meet this test. This approach to the treatment of certain partners is reflected in the new [SUP 10C.5.18G](#), which provides:
- (1) [SUP 10C.5.14R](#) to [SUP 10C.5.17R](#) (Partner function (SMF27)) cover all partners and members.
 - (2) However, the partner function (as are all FCA-designated senior management functions) is subject to [SUP 10C.3.10R](#) (Definition of FCA-designated senior management function).
 - (3) The effect is that unless the function performed by the partner or member in question comes within the definition of a Senior Management Function, the function does not come within the partner function. Therefore partners or members who play no part in the management of the firm are unlikely to be performing the partner function (SMF27).

- 2.13 Accordingly, at some firms, applying this analysis may exclude a significant number of (junior) partners from being a SMF27. Of course, it will be necessary to perform a case-by-case analysis for each firm, based on the role, powers and responsibilities of each partner within the organisation.
- 2.14 For firms with a large number of LLP members, it appears likely some of those members will not be properly categorised as SMF27 partners under SMCR. While there is no express maximum number of SMF27s which a firm is permitted to have, it is expected that (very broadly speaking) a firm seeking to identify double-digit numbers of LLP members as SMF27s may be stretching credibility and may face supervisory challenge by the FCA.
- 2.15 **Are partners subject to the Certification Regime and Conduct Rules?**
- 2.16 Both the Certification Regime and the Conduct Rules apply only to employees as defined in FSMA. The FCA considers partners are unlikely to meet the definition of 'employee' in [section 63E\(9\)](#) of FSMA, being a person who:
- (a) personally provides, or is under an obligation personally to provide, services to [a firm] under an arrangement made between [the firm] and the person providing the services or another person, and
 - (b) is subject to (or to the right of) supervision, direction or control by [the firm] as to the manner in which those services are provided.
- 2.17 The FCA's published view is that partners or LLP members cannot be 'employees' because they are not subject to the supervision, direction or control of the firm. The FCA has subsequently clarified in industry meetings that this view was intended to refer to partners in a partnership, rather than members of an LLP. This draws an express distinction between general law partnerships (which would be a very uncommon structure for an asset management firm) and LLPs (a much more common structure). It is also understood that the FCA is, to an extent, attempting to "row back" on an industry misconception that the published view leads to a widespread exclusion of LLP members from the Certification Regime.
- 2.18 In our view, the conclusion that partners / LLP members are not "employees" (as defined) is generally correct for "genuine" partners (i.e. the owner or managers of the business) but may not be the case for "junior" partners. There is some nuance around "junior" partners who may have little or no management power and may in practice be properly seen as working for a firm – i.e. subject to the supervision, direction and control of the firm, particularly in light of [SUP 10C.5.18G](#) (set out in paragraph 2.12). This is supported by a body of case law dealing with the status of LLP members, which recognises that in some cases the reality is that they are providing their services to the LLP, which may arguably presuppose an element of control. The FCA has confirmed in industry meetings that it would expect firms to assess carefully whether LLP members who are not senior managers should properly be treated as "employees", and so fall within scope of the Certification Regime (rather than making the default assumption that they are not).
- 2.19 Notwithstanding this, in our view, there may in some circumstances be a group of partners within a firm who are both not senior enough to be SMF27, and too senior or autonomous to be employees. On a technical reading of the current definition, they would completely fall outside SMCR. However, we expect that the FCA may take a dim view of firms making a technical argument about why they did not assess the fitness and propriety of one of these partners, if that individual is found to have caused or failed to prevent an issue.
- 2.20 Accordingly, pending any further clarification on this from the FCA, firms may wish to consider voluntarily applying fitness and propriety tests to these out-of-scope partners and requiring them to comply with the Conduct Rules. These out-of-scope partners would not however be caught by the Directory rules or the regulatory reference rules.

3. **What are the potential tax consequences of not identifying partners as SMF27s?**
- 3.1 In order not to be taxed as an employee, an LLP member must fall outside (or “fail”) at least one of three HMRC tests relating to employment status. In summary, these relate to:
- A. the percentage of the individual’s remuneration referable to the profits of the firm;
 - B. the level of the individual’s influence over the management of the firm; and
 - C. the amount of the individual’s capital contribution to the firm.
- 3.2 Some firms may have structured partner status for staff in reliance on “failing” limb B – i.e. a structure where LLP members have significant influence over the management of the firm. This raises the question whether not identifying some partners as SMF27s, because they are not responsible for managing one or more aspects of the firm’s business, undermines their tax status.
- 3.3 In our view, it is not automatically fatal, and depends on which of the three-limb tests the individual does not meet, in order not to be taxed as an employee.
- 3.4 If a firm concludes that a partner is not performing the function of SMF27 (because the partner is not responsible for managing the firm’s affairs) then this may remove or undermine the argument that they “fail” the significant influence limb of the HMRC test, or at least invite discussion with HMRC.
- 3.5 Our preference would therefore be for SMF27 to be drawn broadly, but understand this may not be possible where a firm allocates SMF27 to dozens of individuals (given that the general market approach is that even the biggest Enhanced firms may only have a dozen or so Senior Managers), again, particularly in light of [SUP 10C.5.18G](#) (set out in paragraph 2.11).
- 3.6 The analysis also depends on which HMRC test the individual currently does not meet. It is not necessarily the significant influence test which individuals do not currently meet. Some firms rely on multiple limbs (e.g. significant influence plus capital contribution tests) and others rely on only other tests (e.g. capital contribution alone). Where a firm has 20 or 30 partners, then it may not be credible to argue that they all exercise a significant influence and so satisfy that test. In these circumstances, the firm may have already concluded that it relies on one or both of the other tests.

Annex | examples of the application of client-dealing FCA certification function

	Must certify
	Potentially required to certify, depending on the facts
	No need to certify
	Not applicable

Example activity	Team conducting activity	Corresponding client-dealing FCA certification function under Certification regime	Application of client-dealing FCA certification function
Providing information	Information givers/marketing	<i>Advising on investments¹ other than a non-investment insurance contract or performing other functions related to this, such as dealing² and arranging³</i>	<p>Individuals whose only activity in the sense of 'advising' is providing information about investment products, investment services or ancillary services (for the purposes of the MiFID II knowledge and competence requirements) will not necessarily fall within the scope of any FCA certification functions and accordingly will not need to be certified.</p> <p>This is because they may not be carrying out any of the functions set out in SYSC 27.8.19R and may be excluded from the scope of the client-dealing function by the FCA's proposed clarification, which excludes an individual who has no scope to choose, decide or reach a judgement on what should be done in a given situation, and whose tasks do not require them to exercise significant skill.</p>
Partners	Potentially, various	Potentially, various	The FCA noted on page 30 of PS18/14 that the Certification Regime can only apply to employees. Firms will need to consider if partners meet the definition of employee in section 63E(9) of FSMA. Partners in an LLP may well be an employee (see paragraph Error! Reference source not found. above).

¹ 'Advising on investments' is a reference to the regulated activities specified in article 53(1) to (1D) and article 53(2) (advising on investments) of the Regulated Activities Order ("RAO") and includes any activities that would be included but for the exclusion in article 72AA (Managers of UCITS and AIFs) of the RAO. This includes advice (a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or potential investor; and (b) on the merits of his buying, selling, subscribing for or underwriting an particular investment which is a security or contractually based investment or exercising any right conferred by such an investment (per Article 53 RAO).

² 'Dealing' means buying, selling, subscribing for or underwriting investments or offering or agreeing to do so, either as a principal or as an agent, including, in the case of an investment which is a contract of insurance, carrying out the contract. Per the new SYSC 27.8.20G, the FCA interprets the phrase 'dealing with' as including having contact with and extending beyond 'dealing' as used in 'dealing in investments'.

³ 'Arranging' is defined to include:

- arranging (bringing about) deals in investments (which includes making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite one or more of a specified set of investments;
- making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting any of a specific set of investments; and
- agreeing to carry on either of those regulated activities.

Example activity	Team conducting activity	Corresponding client-dealing FCA certification function under Certification regime	Application of client-dealing FCA certification function
Portfolio management	Portfolio managers	<i>Acting in the capacity of an investment manager⁴ and carrying on functions connected to this.</i>	Yes – required to certify portfolio managers.
Analysts	Analysts	<i>Acting in the capacity of an investment manager⁵ and carrying on functions connected to this.</i>	Certain analysts may be caught by the client-dealing function if they are seen to be: <ul style="list-style-type: none"> • an integral part of the investment management activity; or • arranging by virtue of dealing with investors/potential investors and attending meetings.
Sale of portfolio management services to investors	Institutional sales team	<i>Advising on investments⁶ other than a non-investment insurance contract or performing other functions related to this, such as dealing⁷ and arranging⁸</i>	Those advising on investments ⁹ will need to be certified. Most asset managers will not intend to provide investment advice to their clients but there may be individuals who may be 'tripped' into the regime and, as such, may certify a limited number of individuals for these purposes. In addition, those 'dealing with' a person who the firm is advising on investments (or engaging in dealing and arranging with) will also need to be certified, regardless of whether the person they are dealing with is a client of the firm as 'dealing with' is defined to include 'having contact with', anyone who engages in any form of contact with a client or intermediary (or engages in dealing in connection with their property) in a manner substantially connected with the carrying on of regulated activities will need to be certified.

⁴ A person who, acting on behalf of a client:

- manages designated investments in an account or portfolio on a discretionary basis under the terms of a discretionary management agreement; or
- manages designated investments in an account or portfolio on a non-discretionary basis under the terms of a non-discretionary management agreement.

⁵ A person who, acting on behalf of a client:

- manages designated investments in an account or portfolio on a discretionary basis under the terms of a discretionary management agreement; or
- manages designated investments in an account or portfolio on a non-discretionary basis under the terms of a non-discretionary management agreement.

⁶ See footnote 5 above regarding the interpretation of 'advising on investments'.

⁷ See footnote 6 above regarding the interpretation of 'dealing'.

⁸ See footnote 7 above regarding the interpretation of 'arranging'.

⁹ We are conscious that often asset managers will not provide investment advice. However, if they are 'dealing with' a person for whom the investment advice is being provided, they will fall within the scope of the Certification regime and need to be certified. This is because per the new SYSC 27.8.20G, the FCA interprets the phrase 'dealing with' in SYSC 27.8.18R as including having contact with and extending beyond 'dealing' as used in 'dealing in investments'.

Example activity	Team conducting activity	Corresponding client-dealing FCA certification function under Certification regime	Application of client-dealing FCA certification function
<p>Promotion of product (i.e. the funds)</p>	<p>Institutional sales team</p>	<p><i>Advising on investments or performing other functions related to this, such as dealing and arranging</i></p>	<p>The institutional investors who invest in the funds will not necessarily be clients of the firm for these purposes (although they may be the same investors for whom other services above may be performed, albeit by other individuals within a firm).</p> <p>However, there is still a risk that the individuals at the firm should be certified on one or more of the following bases:</p> <ul style="list-style-type: none"> • the concept of 'dealing with', including 'having contact with', anyone who engages in any form of contact with a person (or engages in dealing in connection with their property) in a manner substantially connected with the carrying on of regulated activities (regardless of whether that person is a client or not); • there is a risk that the institutional sales team are seen to be giving investment advice to the end investor in connection with the promotion of the funds; and/or • there is a direct relationship with the ultimate investor in the fund. <p>This needs to be balanced with the proposed clarification by the FCA which excludes from the scope of the client-dealing function an individual who has no scope to choose, decide or reach a judgement on what should be done in a given situation, and whose tasks do not require them to exercise significant skill.</p> <p>The overriding principle is that a person must be certified if they have the potential to cause a significant impact to customers, the firm or market integrity and this should guide the relevant decisions.</p>

Example activity	Team conducting activity	Corresponding client-dealing FCA certification function under Certification regime	Application of client-dealing FCA certification function
	Retail sales team	<i>Dealing, as principal or as agent, and arranging (bringing about) deals in investments (in relation to a person in connection with whom the activities are carried out and their property)¹⁰</i>	<p>The retail investors who invest in the funds will not typically be clients of the firm for these purposes. In any event, the retail sales team of the firm will usually deal with intermediaries who on-sell to retail investors and not the retail investors themselves. These retail intermediaries will also typically not be clients of the firm.</p> <p>In some firms, the retail sales team would be currently out of scope of the existing CF30 function. However, this does not mean an automatic determination that they should be out of scope of the client-dealing FCA certification function.</p> <p>There is a risk that the individuals at the firm should be certified on one or more of the following bases:</p> <ul style="list-style-type: none"> • the concept of 'dealing with', including 'having contact with', anyone who engages in any form of contact with a person (or engages in dealing in connection with their property) in a manner substantially connected with the carrying on of regulated activities (regardless of whether that person is a client or not); • there is a risk that the retail sales team are seen to be giving investment advice to the retail intermediary in connection with the promotion of the funds. • there may be a wider firm relationship with the intermediary, such that it is challenging to isolate this particular business line; and/or • that if the intermediary offers nominee or custody services such they may, themselves, hold legal title to financial instruments, albeit for and on behalf of their clients and in doing so, does this bring them closer to being considered a client. <p>This needs to be balanced with the proposed clarification by the FCA which excludes from the scope of the client-dealing function an individual who has no scope to choose, decide or reach a judgement on what should be done in a given situation, and whose tasks do not require them to exercise significant skill.</p> <p>The overriding principle is that a person must be certified if they have the potential to cause a significant impact to customers, the firm or market integrity and this should guide the relevant decisions.</p>

¹⁰ 'Arranging (bringing about) deals in investments' includes making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite one or more of a specified set of investments.