

Consultation Paper

CP16/27***

Applying our conduct rules to all non-executive directors in the banking and insurance sectors



September 2016

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We are asking for comments on this Consultation Paper by 9 January 2017

You can send them to us using the form on our website at:
www.fca.org.uk/cp16-27-response-form.

Or in writing to:

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We have developed the policy in this consultation paper in the context of the existing UK and EU regulatory framework. We will keep the proposals under review to assess whether any amendments will be required due to changes in the UK regulatory framework, including as a result of any negotiations following the UK's vote to leave the EU.

We make all responses to formal consultation available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure.

Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

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Abbreviations used in this paper

The Bank of England Act	Bank of England and Financial Services Act 2016
COCON	Code of Conduct sourcebook
CP	Consultation Paper
CR	Certification Regime
CRD IV	Capital Requirements Directive IV
FCA	Financial Conduct Authority
FSMA	Financial Services and Markets Act 2000
MiFID II	Markets in Financial Instruments Directive II
NED	Non-Executive Director
PCBS	Parliamentary Commission on Banking Standards
PRA	Prudential Regulation Authority
The Regulators	The FCA and the PRA
RAPs	Banks, building societies, credit unions and dual-regulated investment firms ('Relevant Authorised Persons')
SC rules	Senior Conduct rules
SIMR	Senior Insurance Managers Regime
SM&CR	Senior Managers & Certification Regime
SMF	Senior Management Function
SMR	Senior Managers Regime

1. Overview

Introduction

- 1.1** In this consultation paper (CP), we are proposing to extend the application of our Code of Conduct sourcebook (COCON) to standard non-executive directors (NEDs) in banks, building societies, credit unions and dual-regulated investment firms (relevant authorised persons or RAPs) and insurance firms¹. This is so that all Board members are required to adhere to basic good standards of individual conduct.
- 1.2** For the purposes of this CP, 'standard NEDs' means those NEDs who are not subject to regulatory pre-approval under the Senior Managers Regime (SMR) for RAPs or the Prudential Regulation Authority's (PRA) Senior Insurance Managers Regime (SIMR) and the FCA-revised Approved Persons Regime for insurance firms.
- 1.3** These rules form part of the new accountability regimes introduced in March this year for RAPs and insurers.

Who does this consultation affect?

- 1.4** This paper affects RAPs subject to the Senior Managers & Certification Regime (SM&CR), insurance firms subject to the PRA SIMR and the FCA-revised Approved Persons Regime, as well as standard NEDs within those firms.

Is this of interest to consumers?

- 1.5** The application of COCON to standard NEDs will help raise standards of conduct for these individuals and, by placing additional duties on them, aims to reduce the risk of future misconduct and mis-selling.

Context

- 1.6** The SM&CR for RAPs, the PRA's SIMR and the FCA-revised Approved Persons Regime for insurance firms came into force on 7 March 2016.

¹ Insurance firms mean Solvency II firms as defined in the FCA Glossary (including large non-Directive firms) and small non-Directive firms.

- 1.7** Two of the main elements of the new accountability regimes are the power for the FCA and the PRA to:
- **Specify senior roles that are subject to regulatory pre-approval.** These roles are known as Senior Management Functions (SMFs) or Senior Insurance Manager Function (SIMFs); collectively 'Senior Managers'; in addition, the FCA specifies Controlled Functions under the FCA revised Approved Persons Regime for insurers.
 - **Introduce rules about the conduct of individuals within these firms.** We used this power to introduce COCON, a set of new, enforceable conduct rules that set basic standards of good individual conduct, against which we can hold individuals to account where they fall short of our expectations.
- 1.8** At Board level, the Regulators only designated certain NED roles as Senior Managers. Only NEDs with specific responsibilities, for example chairmen of Boards and senior independent directors, qualify as Senior Managers. We refer to these NEDs in this CP as 'approved NEDs' because they are subject to regulatory pre-approval.
- 1.9** We applied COCON to all Senior Managers, including approved NEDs, and we set expectations for how these important roles should be carried out. We also provided guidance on our differing expectations for executive Senior Managers and non-executive Senior Managers.
- 1.10** However, under the Financial Services and Markets Act 2000 (FSMA) at the time, the Regulators only had the power to apply rules of conduct to individuals who meet the definition of 'employee' in FSMA, unless we designated them as a Senior Manager. Standard NEDs do not meet this definition, and we did not specify their roles as Senior Manager roles, so we were unable to apply COCON to these individuals.
- 1.11** With the Bank of England and Financial Services Act 2016 (the 'Bank of England Act'), the Government made changes to SM&CR for RAPs and extended it to all FSMA authorised firms, including insurance firms. One of the key amendments is the new power for the Regulators to apply individual rules of conduct to all directors, irrespective of whether they perform a Senior Manager role or other Controlled Function. Not all of the Bank of England Act is currently in force, but the power to apply rules of conduct to directors came into force on 6 July 2016.
- 1.12** We intend to use this new power and propose to extend the application of COCON to standard NEDs in RAPs and insurance firms.
- 1.13** Please refer to PRA's CP34/16 on amendments and optimisations to the SM&CR and SIMR, which includes PRA's proposals about the application of conduct rules to NEDs.

Summary of our proposals

- 1.14** We are proposing:
- that standard NEDs be subject to the five FCA individual conduct rules set out in COCON 2.1 and to the senior conduct (SC) rule 4 requiring persons to "disclose appropriately any information of which the FCA or PRA would reasonably expect notice"

- that Senior Conduct rules 1², 2³ and 3⁴ will not apply to a standard NED unless, as well as being a standard NED, he/she also fall into one of the other categories of 'senior conduct rules staff' as defined in the Glossary
- to introduce additional guidance to individual conduct rule 2 (i.e., the requirement to act with due skill, care, and diligence) to clarify that this rule applies to a director (whether executive or non-executive) when acting as a member of the Board or other governing body or of its committees
- to extend the application of the guidance COCON 1 Annex 1 on the role and responsibilities of NEDs to insurance firms (as, currently, the guidance only applies to RAPs)
- to amend column J of the conduct breach report (Form H) to allow us to recognise which conduct breaches have been made by standard NEDs in RAPs

Equality and diversity considerations

- 1.15** We have considered the equality and diversity implications of this paper.
- 1.16** Standard NEDs will be subject to the additional duties under COCON. However, how firms apply these requirements will depend on individuals' roles and responsibilities rather than their age, disability status, gender (including transgender), maternity, pregnancy, race, religion and belief or sexual orientation.
- 1.17** So we do not expect the proposals to result in direct discrimination against any protected groups. We welcome feedback on these issues as part of the consultation.

Next steps

- 1.18** We are seeking feedback on the proposals set out in the paper. Please send us your comments by 9 January 2017, when the consultation ends.
- 1.19** We will consider your feedback and publish our final rules later in 2017.

What do you need to do next?

- 1.20** Please send your response to cp16-27@fca.org.uk by 9 January 2017.
- 1.21** We will share responses publicly, unless you specifically ask for your response to remain confidential.

2 Requiring Senior Managers to take reasonable steps to ensure that the business of the firm for which they are responsible is controlled effectively

3 Requiring Senior Managers to take reasonable steps to ensure that the business of the firm for which they are responsible complies with regulatory requirements.

4 Requiring Senior Managers to take reasonable steps to ensure that any delegation is i) to an appropriate person and, ii) overseen effectively.

2. Extending COCON to standard NEDs in RAPs and insurers

The new power to apply COCON to standard NEDs

- 2.1** Our Code of Conduct Sourcebook (COCON) does not currently apply to standard NEDs in Relevant Authorised Persons (RAPs) and insurers. In RAPs, COCON applies to:
- Senior Managers (or SMFs) under the SMR
 - certification employees under the Certification Regime and
 - other 'employees' listed in section 1.1.2.R of COCON 1
- 2.2** NEDs do not meet the definition of 'employee' in FSMA. As a result, unless NEDs hold a SMF they are outside of the scope of COCON.
- 2.3** The scope of COCON is narrower for insurance firms than it is for RAPs as it only applies to approved persons within those firms; currently, there is no CR in place for insurers.
- 2.4** In RAPs, the Regulators currently apply conduct rules to the following NED positions which they have designated as SMFs:
- Chairmen
 - Senior Independent Directors
 - Chairs of the Risk, Audit, Remuneration and Nominations Committees.
- 2.5** In insurance firms, in addition to the above list of individuals, Chairs of With-Profits Committees are FCA Controlled Functions and, as such, are subject to regulatory pre-approval under the revised FCA Approved Persons Regime for insurers.
- 2.6** Following revisions of the Act we have considered applying COCON to standard NEDs. In particular, FSMA was changed to allow us to apply conduct rules to any of the directors of a firm. So this includes standard NEDs, regardless of whether the directors are approved persons.
- 2.7** **Not** applying COCON to standard NEDs has raised the following issues:
- Although we can take enforcement action against standard NEDs (e.g. outright prohibition under section 56 FSMA) we cannot fine them. This has meant we cannot comply fully with European obligations under article 70 of MiFID II which will require us to be able to impose financial penalties against members of an institution's management body (including

all NEDs). CRD IV⁵ and Solvency II⁶ have similar (although less prescriptive) provisions which afford Member States a degree of discretion.

- Junior staff in RAPs, such as bank clerks, are subject to COCON but standard NEDs are not and stakeholders have challenged the perceived fairness of this.

2.8 Parliament revised FSMA to address the issues above.

2.9 We believe that applying COCON appropriately to standard NEDs will address these concerns and help raise standards of conduct for these individuals.

Applying conduct rules to standard NEDs

2.10 COCON is formed of two sets of conduct rules: five individual conduct rules and four senior managers conduct rules. A list of conduct rules is shown in Table 1 below.

2.11 **Individual conduct rules** set out high-level standards of conduct, including the duty to act with integrity (Rule 1), to act with due skill, care and diligence (Rule 2), and to be open and cooperative with regulators (Rule 3).

2.12 We propose to apply the full set of individual conduct rules to standard NEDs. We also propose to amend the Handbook guidance to Rule 2 to clarify that this rule includes a director's conduct (whether executive or non-executive) when acting as a member of the Board or other governing body or of its committees.

2.13 At present the **SC rules** only apply to Senior Managers in RAPs and insurers. However, we believe the requirement in SC4 to 'disclose appropriately any information of which the FCA or PRA would reasonably expect notice' is particularly important for NEDs and we therefore propose to apply this rule to standard NEDs. We expect any director to challenge the firm or its management if concerns arise and alert the FCA and the PRA if needed⁷.

2.14 We are proposing that the individuals conduct rules and SC4 will only apply to standard NEDs in a UK domestic RAP or insurance firm.

2.15 In addition to applying the above conduct rules to standard NEDs in RAPs and insurers, we are proposing to apply the 'Guidance on the role and responsibilities of NEDs' in COCON 1 Annex 1 to insurance firms. Currently, the above guidance only applies to RAPs.

2.16 Applying COCON to standard NEDs in RAPs will mean firms have to notify us annually of any disciplinary action taken as a result of COCON breaches by these individuals (this is under s64C

⁵ Article 65(2) of CRD IV: '...Member States shall ensure that where [Directive] obligations... apply to institutions, financial holding companies and mixed financial holding companies in the event of a breach of national provisions transposing this Directive or of Regulation (EU) No 575/2013, penalties may be applied, subject to the conditions laid down in national law, to the members of the management body and to other natural persons who under national law are responsible for the breach.'

⁶ Article 34(2) of Solvency II: 'The supervisory authorities shall have the power to take any necessary measures, including where appropriate, those of an administrative or financial nature, with regard to insurance or reinsurance undertakings, and the members of their administrative, management or supervisory body.'

⁷ This is also stated in 'The Prudential Regulation Authority's approach to banking supervision': www.bankofengland.co.uk/publications/Documents/praapproach/bankingappr1304.pdf, 'The Prudential Regulation Authority's approach to insurance supervision': www.bankofengland.co.uk/publications/Documents/praapproach/insuranceappr1406.pdf and PRA SS 28/15 'Strengthening individual accountability in banking', of July 2015: www.bankofengland.co.uk/pradocuments/publications/ss/2015/ss2815.pdf

FSMA). Firms will continue to use FCA Form H for these notifications. We are proposing to amend column J to ask firms whether the person specified in the breach is a standard NED. Reporting obligations under s64C of FSMA do not currently apply to insurers, but these firms are currently subject to reporting requirements in SUP 15.3.11R(1) and notify us in line with SUP 15.7. (i.e. they are not currently required to use Form H above). We are proposing to amend SUP 15.11 to reflect these changes and to clarify that the reporting obligations under section 64C currently only apply to RAPs.

- 2.17** For breaches of COCON by standard NEDs in RAPs, the PRA will require firms to notify it when they occur (i.e. real-time notifications via PRA Form L) and will share information with us, where needed. For standard NEDs in insurance firms, PRA expects free format notification of relevant information as soon as practicable, under PRA Rulebook – Insurance – Fitness & Propriety s4.3. (i.e. they are not currently required to use Form L above).
- 2.18** The proposals in this paper will come into force two months after the final rules are confirmed in Q2/Q3 2017. This allows firms to fulfil the obligations in COCON, including training requirements.

- Q1: Do you agree with our proposal to apply the 5 FCA individual conduct rules and the senior conduct rule 4 to standard NEDs?**
- Q2: Do you agree that Senior Conduct rule 1, 2 and 3 should not apply to a standard NED unless, as well as being a standard NED, they also fall into one of the other categories of 'senior conduct rules staff' as defined in the Glossary?**
- Q3: Do you agree with our proposal to amend Handbook guidance to Rule 2 to clarify that this rule includes a director's conduct (whether executive or non-executive) when acting as a member of the Board or other governing body or of its committees?**
- Q4: Do you agree that the guidance COCON 1 Annex 1 on the role and responsibilities of NEDs should also apply to insurance firms?**
- Q5: Do you have any comments on our proposals to amend column J of the conduct breach report (Form H) to allow us to recognise which conduct breaches have been made by standard NEDs in RAPs?**

Table 1: List of the Regulators' conduct rules

Rule		Applied by
First tier – Individual Conduct Rules (applies to Senior Managers, Certified Persons and other financial services staff)		
CR1	You must act with integrity	FCA and PRA
CR2	You must act with due skill, care and diligence	FCA and PRA
CR3	You must be open and cooperative with the FCA, the PRA and other regulators .	FCA and PRA
CR4	You must pay due regard to the interests of customers and treat them fairly.	FCA only
CR5	You must observe proper standards of market conduct .	FCA only
Second tier – Senior Management Conduct Rules (applies to Senior Managers only)		
SM1	You must take reasonable steps to ensure that the business of the firm for which you are responsible is controlled effectively	FCA and PRA
SM2	You must take reasonable steps to ensure that the business of the firm for which you are responsible complies with the relevant requirements and standards of the regulatory system	FCA and PRA
SM3	You must take reasonable steps to ensure that any delegation of your responsibilities is to an appropriate person and that you oversee this effectively	FCA and PRA
SM4	You must disclose appropriately any information of which the FCA or PRA would reasonably expect notice	FCA and PRA

Annex 1

List of questions

- Q1:** Do you agree with our proposal to apply the 5 FCA individual conduct rules and the senior conduct rule 4 to standard NEDs?
- Q2:** Do you agree that Senior Conduct rule 1,2 and 3 should not apply to a standard NED unless, as well as being a standard NED, they also fall into one of the other categories of 'senior conduct rules staff' as defined in the Glossary?
- Q3:** Do you agree with our proposal to amend Handbook guidance to Rule 2 to clarify that this rule includes a director's conduct (whether executive or non-executive) when acting as a member of the Board or other governing body or of its committees?
- Q4:** Do you agree that the guidance COCON 1 Annex 1 on the role and responsibilities of NEDs should also apply to insurance firms?
- Q5:** Do you have any comments on our proposals to amend column J of the conduct breach report (Form H) to allow us to recognise which conduct breaches have been made by standard NEDs in RAPs?

Annex 2

Cost benefit analysis

Benefits

1. Applying COCON to standard NEDs will help raise standards of conduct for these individuals. Placing additional duties on them, aims to reduce the risk of future misconduct and mis-selling. We aim to improve personal responsibility for each individual director and to incentivise NEDs to challenge executives.
2. As a result of applying these rules, standard NEDs may take a closer interest in avoiding misconduct and mis-selling in discussions over the firm's strategy and governance arrangements, which may prevent such episodes.
3. In addition, standard NEDs may be able to identify potential misconduct or mis-selling from papers reported to the Board. Those NEDs may be more motivated to challenge the executive if they have additional individual responsibilities than if they do not, with some effect in mitigating the risk after it has crystallised.

Costs

4. RAPs are required to take all reasonable steps to ensure that individuals subject to COCON understand how the rules apply to them, including the provision of suitable training. This requirement to train conduct rules staff is one of the main costs firms subject to the SMR must bear as a result of the new accountability regimes.
5. In addition, as clarified in CP14/25¹, we expect insurers to ensure that individuals subject to COCON understand the regime that applies to them. Insurers would need to do this to comply with the threshold condition in paragraph 3D to Schedule 6 of FSMA (and see current guidance on this in COND 2.5.6G(7)). In particular, we consider that standard NEDs would also be caught by the threshold conditions requirements: the list in CON 2.5.6G(7) is non exhaustive and covers any other person to whom requirements and standards under the regulatory system applies.
6. In light of the above, RAPs and insurers already have training programs in place for COCON staff, including NEDs already covered by the SM&CR. As such, we believe that compliance costs for those firms will only be minimally increased.
7. RAPs are already required to notify us with COCON breaches by certification employee and other conduct rules staff annually via Form H. Applying COCON to standard NEDs will trigger annual notification requirements via Form H. Although firms will be asked to identify whether

¹ FCA CP14/25, 'Changes to the Approved Persons Regime for Solvency II firms': www.fca.org.uk/news/cp1425-changes-to-the-approved-persons-regime-for-solvency-ii-firms

the person specified in the breach is a standard NED, we do not believe this new requirement will place a significant burden on them.

- 8.** No costs result from our proposals to extend the application of the guidance in COCON 1 Annex 1 to insurance firms and to provide guidance on individual conduct rule 2. This guidance makes the proposed regime clearer and does not reflect any additional requirements on firms, so will not involve any additional cost to firms or the FCA.
- 9.** Given that additional costs are of minimal significance in our view, a CBA is not required as envisaged under s138L(3)(b) of FSMA.

Annex 3

Compatibility statement

Compatibility with the FCA's general duties

1. We are required, by section 138I of FSMA, to explain why making the proposed rules is compatible with our strategic objective, advances our operational objectives, and has regard to the regulatory principles in section 3B of FSMA.

Our strategic objective and regulatory principles

2. The proposals set out in this CP are compatible with our strategic objective of ensuring that the relevant markets function well. Making standard NEDs subject to COCON should raise standards of conduct for these individuals and discourage reckless decision-making and mismanagement.
3. Our proposals have regard of the regulatory principles as set out in section 3B of FSMA. In particular:
 - We are proposing to adopt a proportionate approach by making standard NEDs subject to those COCON rules relevant to their responsibilities while seeking to preserve their important oversight and challenge role.
 - Our proposals should have a positive impact on governance, behaviour and culture, which will contribute to the advancement of sustainable growth.
 - The proposals in this paper concern the internal organisation of firms and requirements applying to their staff. These are not matters over which consumers can have any influence.
 - We will not normally make public the fact that we are (or are not) investigating a particular matter or any of our findings or conclusions of an investigation except as set out in Chapter 6 of the Enforcement Guide. The proposals contained in this CP do not change that position.
 - We are an open and transparent regulator. We will engage with relevant external stakeholders as part of this consultation process.

Our operational objectives

4. The objective of the proposals in this paper to extend COCON to standard NEDs will bring about benefits through reductions and mitigation of the harm from future misconduct and mis-selling.

5. In preparing this paper we have had regard to our duty to promote effective competition in the interests of consumers under section 1B(4) of FSMA. We consider that the proposals in this paper should help enhance the effectiveness of the accountability regime for in-scope firms. The proposed measures do not have any readily apparent adverse competition implications.
6. We also have a statutory requirement under section 138K(2) of FSMA to state whether the impact on mutual societies will be significantly different from the impact on other firms. We consider that mutuals are not expected to be affected differently, or in a disproportionate way, from other firms.

Appendix 1

Draft Handbook text

INDIVIDUAL CONDUCT RULES (NON-EXECUTIVE DIRECTORS) INSTRUMENT 2017**Powers exercised**

- A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 64A (Rules of conduct);
 - (2) section 64C (Requirements for relevant authorised persons to notify regulator of disciplinary action);
 - (3) section 137A (The FCA’s general rules);
 - (4) section 137T (General supplementary powers); and
 - (5) section 139A (Power of the FCA to give guidance).
- B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on [date] 2017

Amendments to the FCA Handbook

- D. The modules of the FCA’s Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2) below:

(1)	(2)
Glossary of definitions	Annex A
Code of Conduct sourcebook (COCON)	Annex B
Supervision manual (SUP)	Annex C

Citation

- E. This instrument may be cited as the Individual Conduct Rules (Non-Executive Directors) Instrument 2017.

By order of the Board
[date]

[Editor’s Note: *This draft instrument is based on the version of the Handbook that is due to be in force on 8th March 2017*]

Annex B

Amendments to the Glossary of definitions

Insert the following new definitions in the appropriate alphabetical position. The text is not underlined.

- board director* (in relation to a *firm*) has the same meaning as “director” in section 64A(7) of the *Act* (Rules of conduct), which in summary means a member of the board of *directors*, or if there is no such board, the equivalent body responsible for the management of the *firm*.
- standard non-executive director* (in relation to a *firm*) any of the following:
- (1) a *board director* of that *firm* who:
 - (a) has no responsibility for implementing the decisions or the policies of the board of *directors*, or if there is no such board, of the equivalent body responsible for the management of the *firm*; and
 - (b) is not:
 - (i) an *SMF manager*; or
 - (ii) an *approved person* whose approval is to perform an *FCA significant-influence function*; or
 - (iii) an *approved person* whose approval is to perform a senior insurance management function as defined in the *PRA Rulebook*;
 - of that *firm*; or
 - (2) a *non-executive director* of that *firm* who is an *employee* (as defined in paragraph (4) of the *Glossary* definition of *employee*) of that *firm*.

Amend the following definition as shown. Underlining indicates new text and striking through indicates deleted text.

- senior conduct rules staff member* (in *COCON*) a *person* who ~~is~~:
- (a) comes within row (1) of the table in *COCON* 1.1.2R (an *SMF manager*);

- (b) comes within row (2) of the table in COCON 1.1.2R (an employee of a relevant authorised person who performs the function of an SMF manager as specified in COCON 1.1.2R(1)(b)); or
- (c) meets the following conditions:
 - (i) they come within row (7) of the table in COCON 1.1.2R (an approved person performing a controlled significant-influence function (including a PRA controlled function) in a Solvency II firm (including a large non-directive insurer) or a small non-directive insurer); and
 - (ii) that controlled function is a significant-influence function;
or
- (d) comes within row (8) of the table in COCON 1.1.2R (a standard non-executive director of a relevant authorised person, a Solvency II firm (including a large non-directive insurer) or a small non-directive insurer).

Delete the following definition.

*other conduct rules
staff*

a person who:

- (a) ~~meets the requirement in COCON 1.1.2R(1)(b) (employee of a relevant authorised person who performs the function of an SMF manager);~~
- (b) ~~meets the requirement in COCON 1.1.2R(1)(c) (employee of a relevant authorised person who would be an SMF manager but for SUP 10C.3.13R (The 12 week rule));~~
- (c) ~~meets the requirement in COCON 1.1.2R(1)(e) (employee of a relevant authorised person who would be a certification employee but for SYSC 5.2.27R(1) (Scope: emergency appointments)); or~~
- (d) ~~comes within COCON 1.1.2R(1)(f).~~

Annex A

Amendments to the Code of Conduct sourcebook (COCON)

In this Annex, underlining indicates new text and striking through indicates deleted text.

1 Application and purpose

1.1 Application

- 1.1.1 G Under section 64A of the *Act*, the *FCA* may make *rules* about the conduct of ~~*approved certain persons*~~ and persons who are employees of relevant authorised persons working in firms.

To whom does it apply?

- 1.1.1A R COCON applies to the persons set out in the table in COCON 1.1.2R.

- 1.1.2 R ~~(1) COCON applies to:~~ Table: To whom does COCON apply?

<u>Persons to whom COCON applies</u>	<u>Comments</u>
(a) <u>an <u>An</u> SMF manager;</u> <u>(1)</u>	
(b) <u>an <u>An</u> employee (“P”) of a relevant authorised person who:</u> <u>(2)</u> <u>(i)</u> performs the function of an <u>SMF manager</u> ; <u>(a)</u> <u>(ii)</u> is not an <u>approved person</u> to perform the function in question; and <u>(b)</u> <u>(iii)</u> is required to be an <u>approved person</u> at the time P performs that function; and <u>.</u> <u>(c)</u>	
(c) <u>an <u>An</u> employee of a relevant authorised person who would be an SMF manager but for SUP 10C.3.13R (The 12-week rule);</u> <u>.</u> <u>(3)</u>	
(d) <u>a <u>A</u> certification employee employed by a relevant authorised person;</u> <u>.</u> <u>(4)</u>	<u>This applies</u> even if the <u>certification employee</u> has not been notified that <u>COCON</u> applies to them or notified

	of the <i>rules</i> that apply to them.;
<p>(e) an <u>An</u> <i>employee</i> of a <i>relevant authorised person</i> who would be a <i>certification employee</i> but for SYSC 5.2.27R(1) (Scope: emergency appointments) or SYSC 5.2.28AR (Scope: temporary UK role); .</p>	
<p>(f) any other <u>Any</u> <i>employee</i> of a <i>relevant authorised person</i> <u>not coming within another row of this table, except: one listed in column (2).</u></p> <p>(i) a non-executive director other than a senior conduct rules staff member; and</p> <p>(ii) an employee whose role is listed under COCON 1.1.2R(2); and</p>	<p>(2) For Swiss general insurers, references in this sourcebook to parts of the PRA Rulebook for ‘Solvency II firms’ are to be read as references to the corresponding parts of the PRA Rulebook applying to large non directive insurers. COCON This row does not apply to an <i>employee</i> of a <i>relevant authorised person</i> who only performs functions falling within the scope of the following roles:</p> <p>(a) receptionists;</p> <p>(b) switchboard operators;</p> <p>(c) post room staff;</p> <p>(d) reprographics/print room staff;</p> <p>(e) property/facilities management;</p> <p>(f) events management;</p> <p>(g) security guards;</p> <p>(h) invoice processing;</p> <p>(i) audio visual technicians;</p> <p>(j) vending machine staff;</p> <p>(k) medical staff;</p>

	<ul style="list-style-type: none"> (l) archive records management; (m) drivers; (n) corporate social responsibility staff; (o) data controllers or processors under the Data Protection Act 1998; (p) cleaners; (q) catering staff; (r) personal assistant or secretary; (s) information technology support (ie, helpdesk); and (t) human resources administrators /processors.
<p>(g) an <u>An FCA-approved person or PRA-approved person</u> approved to perform a <i>controlled function</i> in a <i>Solvency II firm</i> (including a large non-directive insurer) or a <i>small non-directive insurer</i>.</p> <p>(7)</p>	<p>(3) COCON <u>This row</u> does not include <i>approved persons</i> approved to perform a <i>controlled function</i> in <i>SUP 10A.1.15R</i> to <i>SUP 10A.1.16BR</i> (appointed representatives).</p>
<p><u>(8)</u> <u>A standard non-executive director of:</u></p> <ul style="list-style-type: none"> <u>(a)</u> <u>a relevant authorised person;</u> <u>(b)</u> <u>a Solvency II firm; or</u> <u>(c)</u> <u>a small non-directive insurer.</u> 	<p><u>This row only applies to a UK domestic firm.</u></p>
<p>Note: In accordance with the <i>Glossary</i>, <i>Solvency II firm</i> includes a <i>large non-directive insurer</i>.</p>	

1.1.2A R For Swiss general insurers, references in this sourcebook to parts of the PRA Rulebook for ‘Solvency II firms’ are to be read as references to the corresponding parts of the PRA Rulebook applying to large non-directive insurers.

1.1.3 R ...

- 1.1.4 R (1) *Rules SC1 to SC4 in COCON 2.2 apply to all senior conduct rules staff members (subject to (2)).*
- (2) *SC1 to SC3 in COCON 2.2 do not apply to a standard non-executive director unless, as well as being a standard non-executive director, they also fall into one of the other categories of senior conduct rules staff member.*
- 1.1.5 G (1) ...
- (2) *The persons in COCON 1.1.2R(1)(a) and (b) are referred to as senior conduct rules staff members. An approved person performing a significant influence function (including a PRA controlled function) in a Solvency II firm or in a small non-directive insurer is also a senior conduct rules staff member. [deleted]*
- (3) ...

To what conduct does it apply?

...

- 1.1.7 R For a person (P) subject to COCON who is not an approved person, COCON applies to the conduct of P in relation to the performance by P of functions relating to the carrying on of activities (whether or not regulated activities) by:
- (1) *(in the case of a board director of a firm) that firm; or*
- (2) *(in any other case) P's employer.*

[Note: sections 64A(4), (5)(ab) and (5)(b) of the Act (Rules of conduct)]

...

- 1.1.14 G COCON 1 Annex 1 has guidance on the role and responsibilities of non-executive directors ~~of relevant authorised persons~~ to whom COCON applies.

...

**1 Annex Guidance on the role and responsibilities of NEDs for relevant authorised persons
1G subject to COCON**

1	Introduction
1.1	This annex applies to <i>non-executive directors (NEDs) of: who are performing a designated senior management function.</i> It only applies where the individual performing that function is also a NED.
	(1) <u>a relevant authorised person;</u>

	(2)	<u>a Solvency II firm (including a large non-directive insurer); or</u>
	(3)	<u>a small non-directive insurer.</u>
...		
3.3		<u>SYSC 4.3A.8R and SYSC 4.3A.9R deal with the nomination committee for relevant authorised persons. There is no equivalent material for Solvency II firms. Although being the chair of the nomination committee is not a controlled function for a small non-directive insurer, paragraph 3.2 of this annex is still relevant to a small non-directive insurer if it has such a committee.</u>
...		
4.3		Although NEDs who are subject to the senior management regime for <i>SMF managers</i> or the <i>approved persons</i> regime for insurers have individual duties under that regime, the FCA views the regime and its application as consistent with the principle of collective decision-making.

...

4.1 Specific guidance on individual conduct rules

...

Rule 2: You must act with due skill, care and diligence

...

4.1.3 G ...

Acting with due skill, etc as a manager (Rule 2)

...

4.1.8 G ...

Acting with due skill, etc as a member of the Board (Rule 2)

4.1.8A G Rule 2 in COCON 2.1.3R applies to a director (whether executive or non-executive) when taking part in the activities of the Board, other governing body or of its committees. This includes, for example, participating in meetings, preparing papers or other submissions for meetings and reporting to the body or committee.

...

Annex E

Amendments to the Supervision manual (SUP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

15.11 Notification of COCON breaches and disciplinary action

Reasons for making a notification to the FCA

- 15.11.1 G Under section 64A of the *Act*, the *FCA* may make *rules* about the conduct of *approved persons* and certain other persons who ~~are employees of relevant authorised persons~~ work for a firm.
- 15.11.2 G *COCON* sets out *rules* under section 64A of the *Act* and guidance ~~about the conduct of conduct rules staff~~ on those rules for relevant authorised persons and insurers.
- 15.11.4 G Under section 64C of the *Act*, a *firm* must notify the *FCA* if it takes disciplinary action against ~~any conduct rules staff~~ certain people working for a relevant authorised person and the reason for this action is a reason specified in *rules* made by the *FCA* (those rules are set out in SUP 15.11.6R).
- 15.11.5 G Disciplinary action against a person is defined in section 64C of the *Act* as the issuing of a formal written warning, the suspension or dismissal of a that person ~~who is a member of a relevant authorised person's conduct rules staff~~ or the reduction or recovery of any of such *person's* remuneration.
- 15.11.6 R If a reason for taking the disciplinary action is any action, failure to act or circumstance that amounts to a breach of *COCON*, then the ~~firm~~ relevant authorised person is required to notify the *FCA* of the disciplinary action.
- 15.11.6A G The effect of section 64C of the *Act* and SUP 15.11.6R is that the reporting obligation in section 64C of the *Act* and in this section:
- (a) only applies to relevant authorised persons; and
- (b) only covers persons who are subject to COCON (who are called conduct rules staff in the Handbook) rather than to the whole workforce of a relevant authorised person.

...

Timing and form of notifications: ~~certification employees and other~~ conduct rules staff other than SMF managers

- 15.11.13 R (1) A *firm* must make any notifications required pursuant to section 64C of the *Act* relating to ~~a certification employee or other~~ conduct rules staff other than SMF managers in accordance with SUP 15.11.13R to SUP 15.11.15R.

...

...

- 15.11.14 R (1) A *firm* other than a *credit union* must make each notification pursuant to SUP 15.11.13R (notifications about section 64C of the *Act* relating to a ~~*certification employee or other conduct rules staff*~~ other than SMF managers) by submitting it online through the *FCA*'s website using the electronic system made available by the *FCA* for this purpose.

...

...

- 15.11.15 R A *credit union* must make each notification pursuant to SUP 15.11.13R (notifications about section 64C of the *Act* relating to ~~a *certification employee* or other conduct rules staff~~ conduct rules staff other than SMF managers) in accordance with the *rules* and *guidance* in SUP 15.7, using Form H as set out in SUP 15 Annex 7R.

General guidance on notifications of rule breaches and disciplinary action

- 15.11.16 G ~~A *firm* is required to submit nil return notifications about section 64C of the *Act* in the case of *certification employees* and *other conduct rules staff* (see SUP 15.11.13R(5)). However, a *credit union* is not required to make a nil return.~~
[deleted]

...

- 15 Annex 7R **Form H: The Notification of Conduct rules Breaches and Disciplinary Action Form for the notification of disciplinary action relating to conduct rules staff (other than SMF managers) in relevant authorised persons**



Application number
(for FCA/PRA use only)

Form H

**Notification of ~~Conduct Rules Breaches and Disciplinary~~
Action relating to ~~certification~~
~~employees and other~~ conduct
rules staff (other than SMF
managers) in relevant
authorised persons**

FCA Handbook Reference: SUP 15 Annex 7R
~~30 September 2016~~ [date]

...

Disciplinary Action Details

Section 4

For each individual that is the subject of a notification under this Form, please provide the details requested below, in so far as applicable.

A	B	C	D	E	F	G	H	I	J	K	L	M
Title	Surname	Forenames	IRN <i>(See note 1)</i>	Date of Birth <i>(See note 1)</i>	National Insurance Number <i>(See note 1)</i>	Passport Number <i>(See note 1)</i>	Nationality <i>(See note 1)</i>	Job Title / Position And Department / Division	Has the person, at any time during the reporting period, been <u>(a) certified for FCA-specified significant-harm function (7) (material risk takers) or (b) a standard non-executive director?</u> <i>(See note 2)</i>	Please identify the relevant conduct rule(s) that have been breached which form the basis of the disciplinary action taken <i>Refer to Conduct Rules</i>	Please provide more information in relation to the conduct rule breached. Please also state here whether the firm is updating a previous notification or is making a new notification. <i>Free text description (2000 characters only. Anything greater than this please provide an attachment.) (See note 2 3)</i>	Please provide information as to the disciplinary action taken: <ul style="list-style-type: none"> • issuing of a formal written warning • suspension or dismissal of the person • reduction or recovery of any of the person's remuneration <i>Free text description (2000 characters only. Anything greater than this please provide an attachment.) (See note 3 4)</i>
<p>Note 1: ...</p>												

Note 2: If the answer is Yes, please state which of the listed functions the person performed. The term “standard non-executive director” is defined in the Glossary.

Note 2 3: If the firm is updating a previous notification, please confirm this in this column but include the details in column M (see note 3 4).

Note 3 4:

- (a) If the person about whom the notification is being made is appealing against the firm’s decision, please include details here.
- (b) If the firm is updating a previous notification, please include the details in this column. This includes (1) any appeal made by the subject of the notification subsequent to a previous notification or (2) the outcome of any appeal previously notified.
- (c) The firm should specify which of the listed types of disciplinary action it has taken.

Financial Conduct Authority



PUB REF: 005254

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