

# Corporate Department

## The FSA's Extended Approved Persons Regime Guidance



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# The FSA's Extended Approved Persons Regime Guidance

## Introduction

- 1.1 In July 2009, the Financial Services Authority (the FSA), the UK's financial services regulator, published its Policy Statement 09/14 "The Approved Persons Regime - Significant Influence Function Review". The Policy Statement set out feedback that the FSA had received following its review, along with a final set of rules.
- 1.2 This introduced a number of important changes to the UK approved persons regime (the Regime), which applies to both UK and overseas firms.

## 2 Overview

- 2.1 **The Regime came into force on 6 August 2009 with a six month transitional period ending on 6 February 2010. By this time, the FSA will have expected firms who require approval to have brought themselves into compliance.**
- 2.2 The Regime applies to individuals who perform "controlled functions" such as the director function, the non-executive director function, and the significant management function within FSA-regulated firms. However, the FSA anticipates that only a few firms will need to seek approval for an individual to perform the significant management function.

2.3 The Regime has now been extended from 6 August 2009, as discussed below.

## 3 The Extended Regime

3.1 As of 6 August 2009, the FSA has:

- 3.1.1 extended the scope and application of the director function and the non-executive director function to include those persons employed by an unregulated parent undertaking or holding company whose decisions or actions are regularly taken into account by the governing body of a regulated firm
- 3.1.2 extended the definition of the significant management function to include all proprietary traders who are not senior managers but who are likely to exert significant influence on an FSA-regulated firm; and
- 3.1.3 amended the application of the Regime to UK branches of overseas firms based outside the EEA.

3.2 The extended director function is intended to catch not only the directors (both executive and non-executive) of the parent/holding company but also anyone else whose decisions or actions are regularly taken into account by the firms' governing body.

3.3 Shareholders are not included in the extended definitions but should a shareholder decide to take a more "hands on" approach and exercise significant influence in the firm, it may be appropriate for him or her to be approved for a significant influence controlled function,

## 4 Overseas Firms

- 4.1 An overseas firm which maintains an establishment in the UK from which FSA regulated activities are carried on is subject to the following controlled functions (as set out in the FSA Supervision Handbook (SUP) 10.1.7R):

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Controlled Functions	
Controlled Functions Affected by the Extended Regime	Other Controlled Functions
The Director Function (see note 4.2) The Non-Executive Director Function (see note 4.3) The Significant Management Function (see note 4.4)	The Required Functions The Systems and Controlled Functions The Customer Function The Chief Executive Function

## 4.2 The Director Function

4.2.1 This is where the person performing that function

- (a) has responsibility for the regulated activities of a UK branch which are likely to enable him to exercise significant influence over that branch; or
- (b) is someone whose decisions or actions are regularly taken into account by the governing body of that branch.

4.2.2 If a firm is a body corporate (other than a LLP), the director function is defined as acting in the capacity of either:

- (a) a director (other than non-executive director) of that firm; or
- (b) a person who is a:
  - director;
  - partner;
  - officer;
  - member (if the parent undertaking or holding company is an LLP);
  - senior manager; or
  - employee (other than a non-executive director) of a parent undertaking or holding company (except where that parent undertaking or holding company is an EEA firm);

whose decisions or actions are regularly taken into account by the governing body of the firm.

### Example

A director (other than a non-executive director) of a parent undertaking or holding company of a UK firm exercising significant influence by way of his involvement in taking decisions for the UK firm.

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## 4.2.3 Transitional provisions 6 August 2009 to 6 February 2010

- (a) This rule only applies if a director who was not approved on 6 August 2009 to perform the director function for that firm would otherwise have been performing the director function for the firm on at that date.
- (b) This transitional rule will come to an end in respect of that director and that firm if and when an application is successfully made for the director to perform the director function for that firm.

## 4.3 The Non-Executive Director Function

### 4.3.1 This is where the person performing that function

- (a) has responsibility for the regulated activities of a UK branch which are likely to enable him to exercise significant influence over that branch; or
- (b) is someone whose decisions or actions are regularly taken into account by the governing body of that branch.

### 4.3.2 If a firm is a body corporate, the non-executive director function is the function of acting in the capacity of either a:

- (a) non-executive director of that firm; or
- (b) non-executive director of a parent undertaking or holding company (except in relation to an EEA firm) whose decisions, or actions are regularly taken into account by the governing body of the firm.

### Example:

An individual who is a non-executive director of a parent undertaking or holding company having significant influence in setting and monitoring the business strategy of the UK firm.

## 4.3.3 Transitional provisions 6 August 2009 to 6 February 2010

- (a) This rule only applies if a non-executive director who was not approved on 6 August 2009 to perform the non-executive director function for that firm would otherwise have been performing the non-executive director function for the firm on at that date.
- (b) This transitional rule will come to an end in respect of that non-executive director and that firm if and when an application is successfully made for the non-executive director to perform the non-executive director function for that firm.

## 4.4 The Significant Management Function

- 4.4.1 The significant management function relates to designated investment business, effecting (for example) contracts of insurance, making material decisions on the commitment of a firm's financial resources and commitments, asset acquisitions, liability management, payments, settlements, insurance claims, client money and similar matters in so far as this relates to designated investment business;

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- 4.4.2 The significant management function also includes the function of acting as a proprietary trader.
- 4.4.3 This controlled function does not include any of the activities described in any other controlled function.
- 4.4.4 Transitional provisions 6 August 2009 to 6 February 2010
  - (a) This rule only applies if a person who was not approved on 6 August 2009 to perform the significant management function for that firm would otherwise have been performing the significant management function for the firm on at that date.
  - (b) This transitional rule will come to an end in respect of that person and that firm if and when an application is successfully made for the person to perform the significant management function for that firm.

## Example

A manager based overseas and not approved by the FSA will be performing the significant management function. Such a person will need the FSA's approval if he is responsible for implementing strategy in the United Kingdom, and has not delegated that responsibility to a senior manager in the United Kingdom.

## 5 The Application Process

- 5.1 Application forms must be submitted by, or on behalf of, the firm or the parent or holding company, not by the candidate.
- 5.2 In addition to filling out the application form, applicants may be interviewed by the FSA in order to assess fitness, propriety, competence and capability, including:
  - 5.2.1 why the candidate is competent and capable to perform the role applied for;
  - 5.2.2 why the appointment complements the firm's business strategy, activity and the markets in which it operates;
  - 5.2.3 how the appointment was agreed, including details of any discussions at governing body level.
  - 5.2.4 that the regulatory responsibilities of the proposed role have been explained to and understood by the candidate.
- 5.3 Those given approved person status will be bound by the FSA's Statements of Principle and the Code of Conduct for approved persons, and are solely responsible for complying with the requirement imposed on them and are subject to the FSA's disciplinary powers.

## 6 Enforcement

- 6.1 The FSA will take enforcement action against approved persons, including fines and criminal prosecutions.
- 6.2 The Financial Services Bill, which is due for its second reading (the general debate on all aspects of the Bill) in the House of Lords on 8 February 2010, will among other things, add "financial stability" to the FSA's regulatory objectives and extend the FSA's disciplinary powers.

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## 7 Conclusion

- 7.1 The Regime captures circumstances where the de facto management influence and control in respect of an FSA-regulated firm are exercised by the management of a non-UK parent company.
- 7.2 Overseas owners and managers of FSA-regulated firms are now faced with the prospect of either:
- 7.2.1 becoming approved by the FSA where they fall into one or more of the “controlled functions” categories described above; or
  - 7.2.2 accepting that decision-making and the exercise of significant influence relating to an FSA-regulated firm will have to be vested in persons other than themselves who are approved by the FSA.
- 7.3 The Regime has far-reaching consequences not only for persons within the UK/EEA but also for individuals outside the UK who fall into one or more of the above categories. Therefore, firms need to give careful consideration to who may be caught by the Regime and should also contact the FSA about the possible need to apply for approved person status before 6 February 2010.
- 7.4 It is important for firms to note that during the transitional period from 6 August 2009 to 6 February 2010 it is preferred, although not necessary for firms to have individuals who perform these function approved by the FSA. However, firms must have sought the necessary approval by 6 February 2010, when the transitional period comes to an end.
- 7.5 Therefore, firms are expected to have made such an application to the FSA should they need approval. Firms should note that under the legislation the FSA can take up to 3 months to approve an application, and so any firms who have not yet addressed this, should do so as a matter of urgency.

Devonshires has taken reasonable precautions to ensure that the information contained in this note is materially accurate. However this note is not intended to be a comprehensive summary of the FSA's Approved Persons Regime or of the matters referred to in it. No action should be taken on matters covered in this note without taking full legal advice.