

# The Senior Managers and Certification Regime

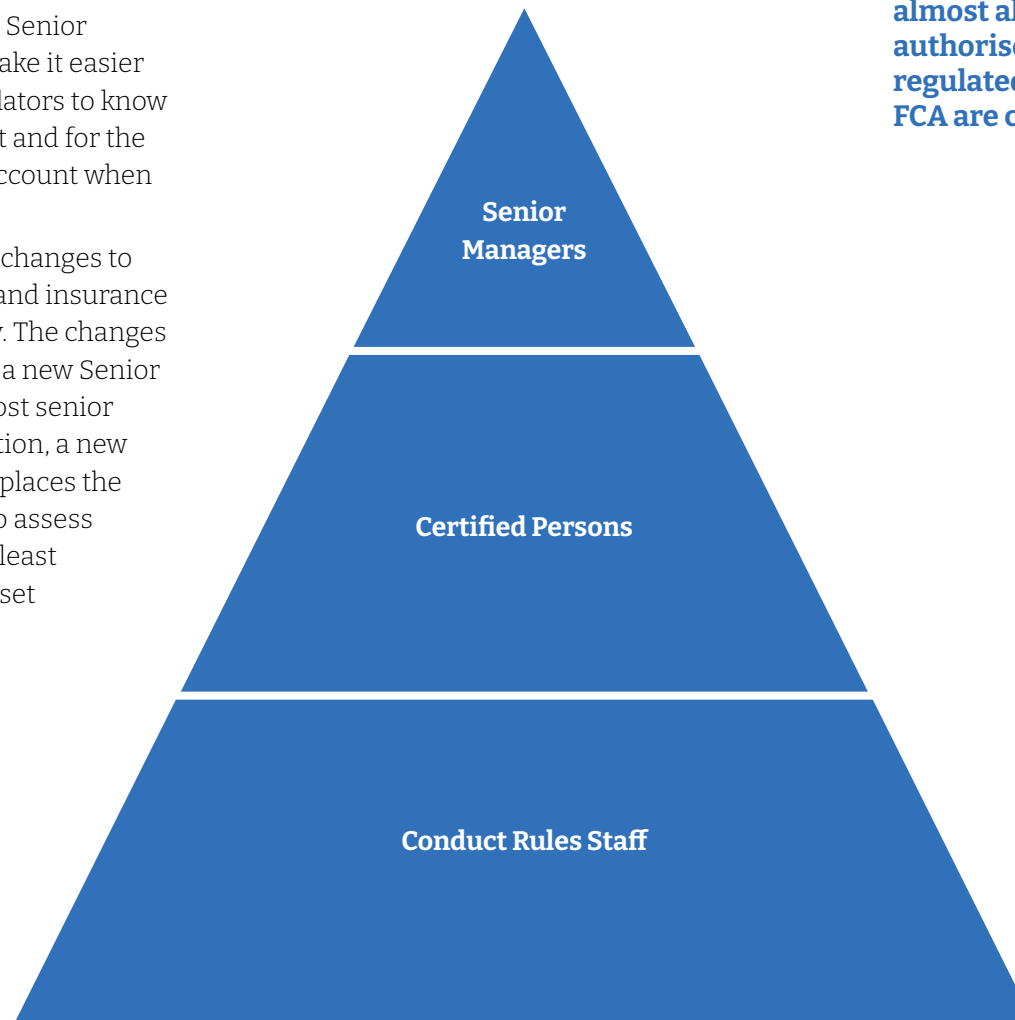


# What is SMCR?

**The Senior Managers Certification Regime (SMCR) was introduced in the wake of the 2008 financial crisis in order to bring individual responsibility and improved culture to the financial services and insurance industry.**

The SMCR regime applies to most organisations that are authorised and regulated by the Prudential Regulation Authority (PRA) or the Financial Conduct Authority (FCA). It is intended to drive up professional standards and introduce personal accountability for Senior Managers. The rules will make it easier for organisations and regulators to know who is responsible for what and for the right people to be held to account when things go wrong.

SMCR is one of the biggest changes to face the financial services and insurance industries in recent history. The changes are significant and include a new Senior Manager regime for the most senior individuals in the organisation, a new certification regime which places the onus on the organisation to assess fitness and propriety on at least an annual basis and a new set of Conduct Rules which apply to all staff across the organisation, except for the most ancillary.



# The Senior Managers Regime

**SMCR came in to force for major banks and other large financial institutions in March 2016 and since December 2019, almost all organisations authorised and regulated by the FCA are covered.**

Organisations must take reasonable care to ensure that no one undertakes certain functions without regulatory approval. The FCA will need to approve individuals before they can undertake any Senior Management Functions (SMFs).

## Organisations need to:

- Seek approval from the regulator before appointing a new Senior Manager.
- Allocate 'prescribed responsibilities' to Senior Managers as appropriate
- Ensure that each Senior Manager has a Statement of Responsibility setting out what they have personal accountability for.
- Before making an application for approval, satisfy itself that the candidate is 'fit and proper' to perform the SMF.
- Obtain a regulatory reference for the individual from all previous employers going back six years
- If required, produce a firm 'responsibilities' map that shows the regulator who is responsible for what, and that all areas are covered
- Put in place a rigorous training programme to ensure Senior Managers are fully aware of their obligations and responsibilities.



They were very clear and able to put things in a simple enough way so the board could fully understand the implications. ”

*Chambers UK [2021]*

# The Certification Regime



Birketts has a great pool of talented individuals offering a ‘magic circle’ service outside of the ‘magic circle’.

*Legal 500 UK [2021]*

**The Certification Regime applies to individuals who are considered to pose a risk of significant harm to the organisation or its customers, for example, staff who give investment advice or advice on insurance products.**

**Organisations need to:**

- Satisfy themselves that the candidate is ‘fit and proper’ to perform the role.
- Obtain a regulatory reference for the individual from all previous employers going back six years.
- Assess fitness and propriety on at least an annual basis.
- Keep records of assessments.

# The Conduct Rules

**There are two sets of Conduct Rules**

There are the Senior Manager Conduct Rules (that apply only to Senior Managers) and the Individual Conduct Rules that apply to all other staff members in the organisation (except for those in ancillary posts such as cleaners, post room and catering staff).

**Organisations need to:**

- Familiarise themselves with regulatory guidance on financial and nonfinancial misconduct and examples in the FCA handbook.
- Ensure all staff receive training on Conduct Rules.

**There are four Senior Manager Conduct Rules that only apply to Senior Managers.**

Rule	Description
SCR1	You must take reasonable steps to ensure that the business of the firm for which you are responsible is controlled effectively.
SCR2	You must take reasonable steps to ensure that the business of the firm for which you are responsible complies with relevant requirements and standards of the regulatory system.
SCR3	You must take reasonable steps to ensure that any delegation of your responsibilities is to an appropriate person and that you oversee the discharge of the delegated responsibility effectively.
SCR4	You must disclose appropriately any information of which the FCA or PRA would reasonably expect notice.

**There are five standard Conduct Rules that apply to all staff (including Senior Managers, temps, Contractors and Consultants)**

Rule	Description
CR1	You must act with integrity.
CR2	You must act with due skill, care and diligence.
CR3	You must be open and co-operative with the FCA, the PRA and other regulators.
CR4	You must pay due regard to the interests of customers and treat them fairly.
CR5	You must observe proper standards of market conduct.



## The Birketts' Employment Team



Since instructing Birketts on employment matters, our legal costs have gone down and the quality of advice has improved. The team is highly recommended if you would like a local adviser outside of London.”

*Legal 500 UK [2021]*

**Birketts is a full service, top 100 UK law firm. With a rich heritage spanning over 150 years, we've built an enviable track record advising businesses, institutions and individuals in the UK and internationally.**

Operating from offices across East Anglia and London, the firm shares a common culture and approach to service delivery. Our unrivalled reputation for providing high quality legal advice and client service has resulted in the firm regularly achieving high-level legal awards.

Ranked in the first tier by Legal 500 and Chambers UK, our Employment Team has extensive experience in the financial services and insurances sectors and have spent many years supporting clients in overcoming the regulatory challenges that they face. We have provided support to banks, building societies, investment companies and those in the insurance sector to help them navigate and ready themselves for SMCR employment compliance.

# Birketts' SMCR services

## **Fixed fee Health Check for all your employment documentation**

For a fixed fee, our teams can help you by carrying out a 'Health Check' of all your HR procedures and documents to ensure they are compliant with SMCR requirements and industry best practice and provide advice on what needs to be updated and if any extra policies and procedures are needed.

Once the Health Check has been completed and we have identified what needs to be updated, you will be provided with a report identifying which if any of your policies, procedures and document would benefit from being updated and suggestions for what changes we think should be made. Should you wish us to carry out those amendments, we will provide you with a fee estimate for doing so.

## **Training for staff or key stakeholders**

The FCA requires that organisations train relevant staff on how the Conduct Rules apply to their roles. It has made it clear that good training should:

- Be interactive and based on realistic and challenging scenarios.
- Bring to life real questions that relate to peoples' jobs.
- Put the Conduct Rules into the context of SMCR overall.

After training, staff should know what a Conduct Rule breach is and what it looks like in relation to their work. They should feel able to speak up and report behaviour that does not align to the Conduct Rules. The FCA prefers training to be delivered locally and for line managers to be involved.

The training must represent the step change in regulatory expectations and be rigorous and interactive.

Designing the right course will require planning and take time.

Birketts can help you to design and run training sessions to assist your workforce in embedding SMCR within the organisational culture and values. We can design and deliver bespoke training on a range of SMCR matters including:

- SMCR Conduct Rules for new starters and as regular refreshers tailored to your organisation and job role profiles.
- Senior Manager training on personal accountability and responsibility.



# Our experience

- Advising banks, building societies and insurers on amendments to their onboarding processes for new hires including updating offer letters, contracts of employment and hiring processes.
- Advising on SMCR training requirements and approaches in respect of Senior Managers, Certified Persons and Conduct Rules.
- Amending HR policies and procedures across the employment life cycle to take account of SMCR requirements and best practice.
- Advising on poor performance and negotiating senior exits.
- Advising on disciplinary processes included amendments to letters and creating guidance for line managers.
- Defending Employment Tribunal Proceedings brought by individuals dismissed for breach of the Conduct Rules.



# SMCR Health Checklist

**The FCA has made it clear that it expects organisations to 'embed' SMCR into its policies and procedures to demonstrate commitment to upholding market standards and good conduct.**

We have prepared a checklist below of processes, procedures and documents that can be reviewed or incorporated as part of a 'health check'.

- Offer letters (Senior Managers, Certified Person, Conduct Rules staff).
- Contract of Employment (Senior Managers, Certified Persons, Conduct Rules staff).
- Template regulatory reference request letter.
- On-boarding procedures.
- Criminal records checks processes.
- Disciplinary policies and procedures.
- Management guidance on conducting and disciplinary/Conduct Rule investigations.
- Performance management policies and procedures.
- Template suspension and disciplinary/performance procedure letters.
- Handover policy and template.
- Whistleblowing and 'Speak Up' policies.
- Template Settlement Agreements.

# Frequently asked questions

## What are Senior Management Functions?

Senior Management Functions (SMFs) are functions performed by the most senior people in the organisation.

They are considered to have the biggest potential impact on consumers and markets. The FCA has proposed a list of SMFs (reduced for smaller organisations) covering roles such as the Chair (SMF9), the Chief Executive (SMF1), Partner (SMF27), Executive Director (SMF3), Compliance Oversight (SMF16) and Money Laundering Reporting Officer (SMF17).

There are other functions that are sector specific or apply to larger organisations that fall under the enhanced regime, but these are the main ones. A person carrying out a SMF must have prior approval from the regulator. A person can hold more than one SMF but will need separate approval for each one.

## What is a Statement of Responsibilities?

An application for approval to the regulator for a Senior Manager must be accompanied by a Statement of Responsibilities. This document must set out all of the areas of responsibility that the person will have.

A person holding more than one SMF need only submit one statement, but it must cover all of their responsibilities.

## What are the rules on whistle blowing?

Relevant organisations are required to appoint a Senior Manager as a 'Whistleblowing Champion', establish internal whistleblowing procedures, inform staff about the procedures for raising a complaint, inform staff about the whistleblowing services of the FCA and PRA, present a report to the board

annually on whistleblowing and report any findings made by an employment tribunal that an individual has suffered a detriment as a result of blowing the whistle. Where this is not required, it is considered best practice to establish.

## What is the Certified Person Regime?

A person cannot carry out a Certified Function unless they have a valid certificate issued by the organisation confirming they are fit and proper.

These are functions that could cause significant harm to the organisation or its customers and include for example client-dealing functions, material risk takers and algorithmic trading functions.

## What are regulatory references?

New referencing rules are now in force that apply to candidates that are applying for Senior Manager or Certified Person positions. Organisations must request a regulatory reference covering the candidates past employment history over the previous six years to allow them to assess fitness and propriety.

Specific information must be provided on the relevant FCA/PRA reference template format and suppliers of references are under an on-going duty to update the reference if new information comes to light that, had they known at the time, would have caused them to write it differently.

## What are the handover obligations?

An application for approval to the regulator for a Senior Manager must be accompanied by a Statement of Responsibilities. This document must set out all of the areas of responsibility that the person will have.

A person holding more than one SMF need only submit one statement, but it must cover all of their responsibilities.

Organisations must ensure when they hire Senior Managers that they take all reasonable steps to ensure that they have

all the information the Senior Manager reasonably need to perform their role including providing them with a handover document. The document should be a 'living' document kept up to date by the former Senior Manager, containing information on the importance of issues, any possible breaches of regulatory requirements and any regulatory involvement in the function.

Whilst the regulators have limited this requirement to Senior Managers, it may be good practice to consider whether it should apply to other key persons or certified individuals with functional responsibilities.



### **Do contract of employment need to be updated?**

Senior Manager employment contracts must refer to their status and ensure that the role and responsibilities outlined in it, is consistent with the Statement of Responsibilities. Contracts should contain express warranties, issues relating to delegation or reallocation of responsibilities, reference to the Senior Manager rules and standard Conduct Rules, termination and suspension rights, compliance with regulatory rules and investigations and issues surrounding fitness and propriety.

Similarly, contracts for Certified Persons should also be updated to include warranties around conduct issues, fitness and propriety, termination and suspension rights. For staff simply covered by the Conduct Rules, it is advisable to amend such contracts to include an express obligation to comply and that non-compliance may lead to termination.

### **What if a Senior Manager or Certified Person is suddenly absent, for example due to sickness or holidays?**

The FCA allows someone to cover for a Senior Manager (or take responsibility for some or all of their SMF) without prior approval, if the absence is temporary or reasonably unforeseen and the cover is for less than 12 consecutive weeks. If however it becomes apparent that the person will need to provide cover for more than 12 weeks, approval must be sought. During the COVID-19 pandemic, the FCA made an amendment to its rules to permit these temporary arrangements to be extended up to 36 weeks.

Prescribed Responsibilities should usually be allocated to another Senior Manager and the FCA expects organisations to do this where possible. Changes to responsibilities must be clearly documented on Statements of Responsibility and internally.

In relation to Certified Staff, it is not necessary for a colleague covering for a Certified Person for less than four weeks to have certification status from their organisation.



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