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Executive accountability in financial services: the Senior Managers and Certification Regime

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Summary

UK financial services firms are regulated by the Financial Conduct Authority (FCA), and sometimes the Prudential Regulation Authority (PRA) too.

Individual accountability regimes focus on the people who manage these firms, ensuring they are fit and proper to do their jobs.

The *Financial Services and Markets Act 2000* introduced the Approved Persons Regime (APR). This required the regulator to pre-vet candidates for senior management positions in financial services firms like banks.

Following the financial crisis and revelations of LIBOR-rigging, the Parliamentary Commission on Banking Standards was established in July 2012, with then-Conservative MP Andrew Tyrie as Chair, to advise on reform of the banking sector.

The Commission criticised the small number of enforcement cases brought under the APR, concluding that the APR was a “complex and confused mess”. It recommended replacing the APR with a three-pillar approach comprising pre-vetting of senior managers, internal certification of other high-risk roles, and reform of the public register of approved persons, which only contained limited information.

The Coalition Government accepted the Commission’s proposals and introduced the regime in the *Financial Services (Banking Reform) Act 2013*. In brief, this regime, known as the Senior Managers & Certification Regime (SM&CR), comprises:

- the Senior Managers Regime: people performing significant managerial functions who must be pre-approved by the regulator and then certified annually;
- the Certification Regime: a larger group of persons in high-risk roles who need not be pre-approved but must be certified annually as fit and proper for their roles; and
- the Conduct Rules: a set of minimum standards such as a duty to act with integrity, with which most staff in financial services firms need to comply.

The SM&CR was introduced to the banking industry from March 2016. It was extended to insurers in December 2018, and to the bulk of the remainder of the roughly 60,000 FCA-regulated financial services firms in December 2019.

Initial reviews of the effectiveness of the regime by the FCA and PRA concluded that the SM&CR was having a positive culture change in firms, although more time and work was needed to embed the regime. In adopting the SM&CR, the PRA described the UK as a world leader in individual accountability.

As of September 2020, however – over four years after the regime was first introduced – the regulators had only successfully enforced the regime on one occasion, by imposing a fine in May 2018 against the group Chief Executive of Barclays, James Staley. This has led to early concerns over whether the new regime is fit for purpose.

1. Background

In addition to regulating firms that perform financial services, there has for some time been specific regulation of the individuals that manage those firms.

Before the passing of the *Financial Services and Markets Act 2000* (FSMA), there was no financial services-wide regulation of firm managers. Instead, regulation was sector-specific. In banking, for example, legislation provided for the pre-vetting of certain senior management positions, but there was no specific way for regulators to take disciplinary action against such managers when misconduct took place.¹

Approved Persons Regime

FSMA introduced one regime across the financial services sector. It created a new body, the Financial Services Authority (FSA), which oversaw this new regime, known as the Approved Persons Regime (APR).

Under the APR, the FSA would specify certain functions it thought should require its pre-approval, such as chief executives, directors or those responsible for compliance oversight.² Firms could then apply for approval from the FSA for a person to be able to perform that function. The FSA would grant approval if it thought the person “fit and proper” for the role, considering factors like their qualifications, training and competence.³

Once approved, individuals needed to comply with the FSA’s statements of principle and codes of conduct. This included for example an obligation to act with integrity. Failure to comply could lead to the FSA publishing a statement against that person, issuing financial penalties, or withdrawing its approval.⁴ But enforcement of the regime at senior levels was considered rare.⁵

In 2013 there were 26,795 approved individuals from the UK’s largest 19 banking groups alone.⁶

The Parliamentary Commission on Banking Standards

Following the financial crisis and [revelations of rigging](#) of the London Interbank Offered Rate (LIBOR), a joint committee of Parliament was established in July 2012, with 10 members. Chaired by Andrew Tyrie (now Lord Tyrie, then a Conservative MP and chair of the Treasury Select Committee), its other members included the Archbishop of Canterbury, former Chancellor of the Exchequer Lord Lawson, and Labour MP Pat McFadden. Known as the Parliamentary Commission on Banking Standards (the Commission), its remit was to:

- consider the “standards and culture of the UK banking sector”;
- assess the lessons learned for corporate governance and Government policy; and
- make recommendations for legislative and other regulatory action.⁷

¹ FSMA, [Explanatory Notes](#), para 130

² Parliamentary Commission on Banking Standards - Fifth [Report](#), 12 June 2013, para 543

³ see FSMA, [section 61](#) (as originally enacted)

⁴ FSMA, [Explanatory Notes](#), paras 129 to 154

⁵ See the view of the Parliamentary Commission on Banking Standards - Fifth [Report](#), 12 June 2013, para 1136

⁶ Parliamentary Commission on Banking Standards - Fifth [Report](#), 12 June 2013, para 548

⁷ See House of Lords Library [briefing](#), Parliamentary Commission on Banking Standards QSD on 3 September 2019, 28 August 2019

In total, the Commission published five reports between December 2012 and June 2013. Its fifth and final report, titled *Changing Banking for Good*, made over 100 recommendations.

The Commission report *Changing Banking for Good* was highly critical of the Approved Persons Regime. Its main criticisms were that the APR:

- only covered those at the top of an organisation, missing out “a number of groups who might nevertheless play important roles” such as some people found to be involved in LIBOR manipulation;
- was ineffective in identifying who was responsible when things went wrong. This stemmed from the APR’s role as a verifier of whether individuals are fit and proper to take up roles, rather than as an assignor of responsibilities. As a result, the APR was not instilling a sense of personal responsibility amongst senior staff;
- was too focused on ensuring persons were fit and proper at the time of approval, rather than that they were remaining so. Withdrawing approval once given was far more difficult than refusing it in the first place; and
- had become complex and bureaucratic, especially after the division and allocation of the FSA’s responsibilities to the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) under the *Financial Services Act 2012*. For banks, both the FCA and the PRA were given responsibility for approving different functions, resulting in a “complex division of responsibilities”.

As a result the Commission concluded that the APR was a “complex and confused mess”, stating that the public “are rightly appalled by the small number of cases in which highly-paid senior bankers have been disciplined for the costly mistakes they have allowed to occur on their watch”.

It went on to say that the FSA’s approach to reform in recent years had been “timid”, and that given the flaws with the APR, “incremental change will no longer suffice”. Instead, it proposed replacing the APR with a new three-pillar system. These three pillars comprised:

- 1 A new “Senior Persons Regime” which would only cover senior decision-takers. This would be narrower in scope than the equivalent under the APR, which sought to encompass people who exercise a “significant influence” on the conduct of the firm. It would encourage greater clarity of responsibilities and establish beyond doubt who was responsible for what, to allow regulators to intervene more easily when problems occur. Beyond the most senior levels (board and executive committee members) banks themselves would identify the persons falling within the regime;
- 2 A new “Licensing Regime” which would apply a revised set of banking standards to a wider group than those covered by the APR. It would cover any bank staff whose behaviour could seriously harm the bank, its reputation, or its customers. Pre-approval would not be required for such staff (unlike the Senior Persons Regime), instead employers would be required to verify the fitness and propriety of staff. Regulators would develop a new set of clear, non-legalistic rules for them to follow, to include principles like treating customers fairly. The regulator would monitor implementation of the rules and could take enforcement action where firms fail in meeting their duties; and
- 3 Reform of the public register of approved persons which, under the APR, provided only limited information about individuals. The reformed register would cover individuals under both the Senior Persons and Licensing Regimes.

While the Commission's remit extended only to the banking sector, it concluded that there was a strong case for its proposed reforms to be extended to the financial services sector more widely:

The authorities must not be constrained, in implementing the proposed reforms relating to individuals, by the fact that the existing Approved Persons Regime and register apply to the whole financial services sector rather than just banks. Events have demonstrated why reforms are urgently needed to promote improved individual standards in banking. There may be a strong case for applying some of these reforms to other areas of the financial services sector and it is plausible to suppose that the deficiencies of the Approved Persons Regime are replicated beyond banking. However, not only does analysis of this issue lie outside the scope of the Commission's work, but there is a risk that an extension of reform would delay the timetable for reforms, both due to the wider interests involved and the operational flaws of the current Approved Persons Regime. We therefore recommend that the arrangements for a Senior Persons Regime, for a Licensing Regime and for a register, reflecting the operation of these regimes, be put in place in the first instance separately from the Approved Persons Regime, which should cease to apply to banking. It is for the regulators to advise on the merits of the new schemes' wider applicability.⁸

Government response

The Coalition Government's response to the Commission findings were published in July 2013, signed by George Osborne (as Chancellor of the Exchequer) and Vince Cable (as Business Secretary). The response noted the criticisms and agreed to implement the Commission recommendations:

The Government accepts the conclusion that the current Approved Persons Regime has failed and will work with the FCA and the Prudential Regulation Authority (PRA) to create a new framework for regulating individual standards of conduct in banking based on strengthening individual accountability. The Government will ensure that the new framework includes all the important safeguards in current legislation which ensure that the interests of consumers and the integrity of financial markets are protected. These changes will be made through amendments to the Banking Reform Bill, currently before Parliament.

While the Commission's recommendations relate to standards in the banking sector, they consider it plausible that the weaknesses of the Approved Persons Regime affect not just the banking sector but other parts of the financial services industry too. The Government agrees with this and notes that many of the failures identified by the Commission were not limited to the banking sector. The Commission propose that, to avoid delay to banking reforms, the Commission's recommendations should initially be put in place for banking only (656).

Senior Persons Regime

In fact, because the relevant FSMA provisions apply to all parts of the financial services industry, it would be simpler legislatively and operationally to apply any reforms to the framework for regulating individuals to the financial services industry as a whole. The Government will therefore consider with the regulators whether to amend the relevant FSMA provisions to allow for wider application of the proposed reforms.

As well as on the Senior Persons Regime, the Government response also agreed with the Commission recommendations on the second and third pillars: the licensing regime and reform of the individuals register:

The Government will also take forward the Commission's recommendation to replace the existing statements of principle (and codes of practice) for Approved Persons with banking standards rules (634), which will also apply to employees who are not subject

⁸ Parliamentary Commission on Banking Standards - Fifth [Report](#), 12 June 2013, Chapter 6: *A new framework for individuals*

to prior regulatory approval. This will ensure that enforceable standards of conduct will apply to all persons whose actions could seriously harm a firm, its reputation or its customers. With that in mind, the Government will also ensure that these rules can be tailored appropriately to the functions performed and the types of business carried out.

The Government will ensure that regulators have the ability to take disciplinary action against individuals who are not Senior Persons or subject to prior regulatory approval when they have breached the new banking standards rules or are knowingly concerned in a breach of regulatory requirements (632, 633). The regulators will be able to deploy the full range of civil sanctions against Senior Persons and other employees who are guilty of misconduct (1171). The extended time limit for taking disciplinary action against Senior Persons will also apply for disciplinary action against other individuals. However, the Government does not propose to reverse the burden of proof in disciplinary cases against persons who are not subject to the Senior Persons Regime as it would not be appropriate to do so in cases against persons who do not have senior management responsibilities.

The Government agrees with the Commission that there could be advantages in increasing transparency by including details of individuals' misconduct in other jurisdictions in the UK register. It will take forward with the regulators the Commission's recommendation to initiate discussions with counterparts in other jurisdictions about exchanging information about misconduct published in national registers of financial services employees (651, 654). The Government will also ask the regulators to consider whether there would be benefits in including more information in the publicly available registers.⁹

Implementation of the reforms

The Government introduced the new regime in the *Financial Services (Banking Reform) Act 2013* (the Act). The Act's Explanatory Notes state:

Part 4 of the Act (sections 18 to 38 and Schedule 3) amends Part 5 of FSMA (performance of regulated activities) to provide for the introduction of a new regime for senior managers and banking standards. The amendments implement the recommendations of the PCBS [the Commission] in this area. [...]¹⁰

A joint consultation on the new regime was then undertaken by the FCA and the PRA in July 2014. The consultation requested feedback on their proposed method of implementation. The Act's framework and the proposals were summarised as follows:

Senior Managers Regime

FSMA, as amended by the Act, enables the PRA and FCA to specify a function as a Senior Management Function (SMF). Individuals performing an SMF specified by the PRA will require pre-approval by the PRA with the FCA's consent. Individuals performing an SMF specified by the FCA will require pre-approval by the FCA only. When applying for regulatory pre-approval for these individuals (referred to as Senior Managers), relevant firms will be required to include a Statement of Responsibilities setting out the areas of the firm which the prospective Senior Manager will be responsible for managing. The Act also gives both regulators the power to approve Senior Managers subject to conditions or time-limits.

[...]

Certification Regime

The Act introduced a new Certification Regime into FSMA. This regime will apply to all employees performing a role relating to a relevant firm's regulated activities which is not an SMF but could nonetheless pose, in the PRA's and/or FCA's view, a risk of significant harm to the firm or its customers. The Act requires relevant firms to take reasonable care to ensure that no employee performing a 'significant harm function'

⁹ HM Treasury and Department for Business Innovation & Skills, [The Government's response to the Parliamentary Commission on Banking Standards](#), July 2013, paras 2.10 to 2.20

¹⁰ Financial Services (Banking Reform) Act 2013, [Explanatory Notes](#), para 15

as specified by the regulators does so unless the firm has certified them as fit and proper to do so.

[...]

Conduct Rules

The existing Statements of Principle and Code of Practice for Approved Persons, which apply only to Approved Persons, will be replaced by a set of Conduct Rules with a far wider application. The PRA and FCA both propose that the Conduct Rules should apply to all Senior Managers and to their respective populations within the Certification Regime. In addition, the FCA proposes to apply the Conduct Rules to all other employees of relevant firms except staff carrying out purely ancillary functions (i.e. catering staff, security guards and others carrying out a role which would be fundamentally the same in a non-financial services firm). This is consistent with the regulator's approaches to the scope of the Senior Managers and Certification Regime which recognise that the number of individuals capable of causing consumer or market detriment is greater than the number capable of causing prudential damage.¹¹

In October 2014 the Treasury Select Committee, with Andrew Tyrie (who also chaired the Commission) as Chair, published a report titled *Implementing the recommendations of the Parliamentary Commission on Banking Standards*. On the new regime, the report noted that:

The Financial Services (Banking Reform) Act therefore broadly implements the PCBS's recommendations for the three pillars of a new conduct regime. Mr Tyrie said:

The Banking Commission's proposals do not guarantee better standards. Much will depend on the judgment of regulators and the common sense of the banks, but identifying responsibility for key roles offers a much better prospect of higher standards than does retaining the APR. The Commissioners are delighted that our proposals on this are now going to be put on the statute book.

Mr Tyrie did note, however, that the APR would continue to apply to many in financial services outside mainstream banking, including those working in fund management and insurance:

Everyone now seems to be agreed that the APR adds little or nothing, yet over the past few weeks we have discovered that the discredited APR will survive in legislation. In doing that, the regulators are perpetuating a myth that the APR affords any real protection. It will continue to apply to several groups. First, about 20,000 people in the financial services industry outside banking will still be covered, mainly in fund management and insurance.

This is unfinished business. The Banking Commission had the remit to look only at banking. It would be absurd to retain a system for one part of financial services that has so clearly failed in another. The Government and Parliament both need to encourage the regulator to look at this and do what is necessary to extend the coverage of the new regime and to remove the APR from other parts of financial services. To rely on the APR is asking for trouble.¹²

In November 2014 the former members of the Commission (other than Liberal Democrat peer Baroness Kramer and Labour MP Pat McFadden) released a statement commenting on the FCA and PRA proposals. The statement noted the "Commission's intentions in some cases have been misunderstood or mistransposed", stating that:

¹¹ FCA and PRA, [Strengthening accountability in banking: a new regulatory framework for individuals](#), July 2014, pp8 and 9

¹² Treasury Select Committee, [Implementing the recommendations of the Parliamentary Commission on Banking Standards](#), 28 October 2014, para 87

- a new criminal offence of “reckless mismanagement of a bank” had been created¹³ and applied to all individuals within the scope of the Senior Managers Regime. This was wider than they thought desirable, and they therefore recommended limiting the Senior Managers Regime to include only board members of firms with specific responsibilities, allowing the rest to fall within the Certification Regime (which did not require the regulator’s pre-approval);
- the two regulators, the PRA and the FCA, had proposed different scopes for each of their own Senior Managers Regimes, leading to the risk that they would be viewed as rivals;
- more responsibilities should be given to banks themselves to allocate responsibilities to Senior Managers, in a way that aligns with the realities of power and influence within each organisation;
- regulators should avoid centrally setting out the roles which would be subject to the Certification Regime; banks are best to identify the high-risk roles that should require certification;
- the FCA’s proposal to set out rules governing the conduct of a very wide range of individuals within a firm was questionable, given that it included individuals not in a position to cause serious harm to a firm or its customers; and
- they agreed with the recent Treasury Committee call for the abolishment of the APR for the rest of the financial services industry, beyond the banking sector.¹⁴

On 3 March 2015, Economic Secretary to the Treasury Andrea Leadsom announced in a Written Ministerial Statement that the new regime, known as the Senior Managers and Certification Regime (SM&CR), would come into force on 7 March 2016.¹⁵

In March 2015, the FCA and PRA¹⁶ each published feedback on the 77 responses received to their [July 2014 consultation](#) paper. The FCA stated that the “majority of respondents to the consultation were supportive of the overall aims of the regime”.¹⁷ In July 2015 the FCA and PRA published the final rules for the new regime.¹⁸

Although initially developed with banks in mind, in June 2015 the Treasury, FCA and Bank of England Fair and Effective Markets Review concluded that the “Treasury should consult on legislation to extend elements of the Senior Managers and Certification Regimes to a wider range of regulated firms...”.¹⁹ In October 2015 the Treasury announced that it would extend the SM&CR to “all sectors of the financial services industry”. This was because of the recognition that many firms beyond the banking sector can pose risks to financial stability.²⁰

The extension would widen the regime to about 60,000 regulated financial services firms and the Government intended that the extension would come into effect in 2018.²¹

¹³ see [section 36](#) of the Act

¹⁴ [Statement](#) by former Members of the Parliamentary Commission on Banking Standards, 4 November 2014, pp 11 to 16

¹⁵ [Statement UIN HLWS311](#), 3 March 2015

¹⁶ See Prudential Regulation Authority, [Strengthening individual accountability in banking and insurance — responses to CP14/14 and CP26/14](#), March 2015

¹⁷ Financial Conduct Authority, [Strengthening accountability in banking: a new regulatory framework for individuals – Feedback on FCA CP14/13 / PRA CP14/14 and consultation on additional guidance](#), March 2015, p5

¹⁸ Financial Conduct Authority, [FCA publishes final rules to make those in the banking sector more accountable](#), 7 July 2015

¹⁹ Treasury, BoE and FCA, [Fair and Effective Markets Review](#), Final Report, June 2015, p62

²⁰ HM Treasury, [Senior Managers and Certification Regime: extension to all FSMA authorised persons](#), October 2015, para 1.11

²¹ *Ibid*, paras 4.1 to 4.3

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Provisions in the [Bank of England and Financial Services Act 2016](#) enabled the extension of the regime.

The regime was eventually rolled out in full to insurers on 10 December 2018, and to all financial services firms [solely](#) regulated by the FCA (such as financial advisers) in December 2019.²²

²² FCA, S19/20: [Optimising the Senior Managers & Certification Regime and feedback to CP19/4](#), 26 July 2019

2. The regime

The new SM&CR replaced the Approved Persons Regime for firms authorised to perform regulated financial services under FSMA.²³ Its main aims are to:

- encourage a culture of staff at all levels taking personal responsibility for their actions;
- improve conduct at all levels; and
- make sure firms and staff clearly understand and can demonstrate where responsibility lies.²⁴

Different requirements apply to different types of regulated firms.

The bulk of the UK's 60,000 regulated financial services firms are regulated solely by the FCA. Around 1,500 banks, building societies, credit unions, insurers and major investment firms are "dual-regulated" by both the FCA and PRA.²⁵ Dual-regulated firms face different requirements than firms which are solo-regulated by the FCA.

Even for firms which are solo-regulated by the FCA, different requirements apply depending on the type of firm. A small dental practice that offers procedures on credit (and so might need to be regulated by the FCA) faces more relaxed requirements than a medium-sized mortgage broker. Some firms are also exempt from the regime (such as overseas firms without a physical UK presence), and special rules apply to UK branches of foreign firms.²⁶ Advice should be taken when applying the regime to particular facts.

This section therefore provides a brief overview of the regime only.²⁷

The regime has three limbs: the Senior Managers Regime, the Certification Regime, and the Conduct Rules (as summarised in the diagram below).²⁸

²³ "Appointed Representatives" of regulated firms – firms which operate as agents from authorised firms – will continue to be subject to the APR. See FCA, [Guide for FCA solo-regulated firms](#), July 2019, p1

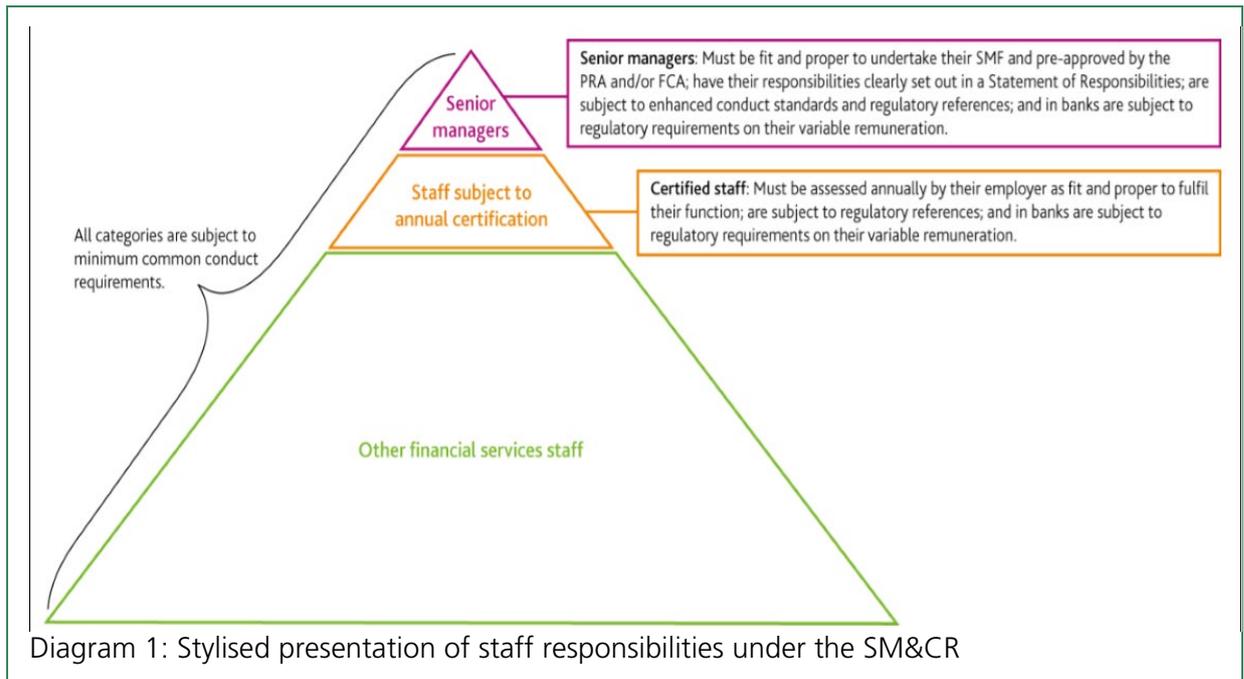
²⁴ FCA, [The Senior Managers and Certification Regime: Guide for FCA solo-regulated firms](#), July 2019, p6

²⁵ See the FCA website, "[About the FCA](#)", last updated 24 September 2020

²⁶ FCA, [Guide for FCA solo-regulated firms](#), July 2019, p28

²⁷ For some information on the categories of firms regulated, see page 8 of the [Guide for FCA solo-regulated firms](#)

²⁸ taken from the PRA's December 2020 [review](#) of the regime, p7



Senior Managers Regime

Under the Senior Managers Regime (SMR) the regulator (being the FCA and potentially also the PRA, depending on the firm’s activities) specifies the functions (roles) within the firm that it considers have the greatest potential to cause harm or impact upon market integrity.

These are called Senior Management Functions (SMF),²⁹ and the persons performing them are Senior Managers. Anyone who performs a SMF needs to obtain approval before they can start their role, and firms then need to certify once a year that the relevant manager remains fit and proper to do their job. SMFs include the Chief Executive, each Director (other than non-executive directors), and the person responsible for compliance.³⁰

Each Senior Manager must produce a document called a Statement of Responsibilities (SoRs), that clearly sets out which SMFs they are responsible for. The Senior Manager then has a “duty of responsibility” for those areas. In theory, this means that if something goes wrong within a firm, the regulator can check the SoRs for the Senior Managers within the firm to identify the person responsible. If the regulator can prove a breach by the firm of its obligations in an area which that Senior Manager was responsible for, and can show that the relevant Senior Manager did not take reasonable steps to avoid the breach occurring, it can take action against that Senior Manager for breaching his or her duty of responsibility. Examples of action the regulator can take include financial penalties, statements of censure, and suspensions from performing particular SMFs.³¹

²⁹ As defined in [section 59ZA](#) of FSMA

³⁰ FCA, [Guide for FCA solo-regulated firms](#), July 2019, p18

³¹ See [section 66](#) of FSMA

The regulator also specifies a list of “prescribed responsibilities” which must be allocated to the Senior Manager who is the most senior person responsible for the area in the firm, and must be set out on that manager’s SoR. Examples of prescribed responsibilities are the person responsible for the performance by the firm of its obligations under the Senior Managers regime itself, and the person responsible for the firm’s policies and procedures for countering the risk that the firm might be used to further financial crime.³²

The list of approved Senior Managers for each firm are then made available on the FCA’s Financial Services Register, which also shows whether any disciplinary action has ever been taken against those persons. For example, a search for HSBC Bank Plc on the Register reveals that its chief executive function is performed by Colin William Bell, who was appointed on 22 February 2021.

Certification Regime

The Certification Regime applies to employees in positions that could pose a risk of significant harm to the firm or its customers. Unlike the Senior Managers Regime, such people do not need to be pre-approved, but the firm must certify that individuals performing such roles are fit and proper to do so, both when recruited and annually afterwards.³³ The firm can only make the certification if it is satisfied that the person is fit and proper to perform the relevant function, and the certificate must set out how the person will be involved in performing that function.³⁴

Deciding whether a person is fit and proper (for the Senior Managers or the Certification Regime) includes looking at a person’s honesty, integrity and reputation, competence and capability, and financial soundness. References from employers going back six years should be obtained as well as (for Senior Managers) a criminal record check.³⁵

Roles requiring certification include people below Senior Managers who are responsible for business units, functions which are subject to qualification requirements (such as mortgage advisers), and any function which involves dealing in or arranging investments with clients (such as financial advisers).³⁶ Depending on the type of firm and the number of employees it has, there may be few or no people to certify.

Since November 2020, the FCA’s Financial Services Register also contains a [directory](#) of certified persons, as well as people assessed under the Senior Managers regime. [Dual-regulated](#) firms had until 13 November 2020 to submit their directory data, and firms regulated solely by the FCA were given until 31 March 2021.

For example, HSBC Bank Plc – a dual-regulated firm - currently lists over 2300 people as being either Senior Managers or Certified Persons.

³² FCA, [Guide for FCA solo-regulated firms](#), July 2019, p19

³³ See sections [63E](#) and [63F](#) of FSMA

³⁴ *Ibid*

³⁵ FCA, [Guide for FCA solo-regulated firms](#), July 2019, p43

³⁶ FCA, [Guide for FCA solo-regulated firms](#), July 2019, pp32-34

Conduct Rules

The Conduct Rules are a set of general standards for staff of firms within the SM&CR. A statement by most former members of the Parliamentary Commission on Banking Standards had [criticised](#) the approach of broad accountability for even junior staff. But the rules are there on the logic that improving standards of behaviour requires more accountability and awareness of conduct issues across firms, from the top down and bottom up.³⁷

The FCA and PRA each have their own slightly different Conduct Rules. Given the PRA's specific focus on preventing [prudential](#) harm, it only applies its rules to Senior Managers, Certified Persons and certain other senior officers, whereas the FCA's rules apply to all employees (not just those who are Senior Managers or Certified Persons). The FCA however excludes ancillary staff who don't perform a role specific to financial services, like cleaners and catering staff. The rules include duties to act with integrity, to act with due care, skill and diligence, to cooperate with regulators, and to treat customers fairly.

A second tier of Conduct Rules applies only to Senior Managers. It includes requirements to take reasonable steps to ensure "that the business of the firm for which you are responsible is controlled effectively" and "complies with relevant requirements and standards of the regulatory system".³⁸

Firms must ensure that all persons subject to the Conduct Rules are notified of the rules that apply to them and must take reasonable steps to ensure that those employees understand how the rules apply to them. This includes providing suitable [training](#).³⁹

Individuals will breach the Conduct Rules where they are "personally culpable", meaning where they have acted deliberately or where their conduct fell below the standard which would be reasonable in the circumstances.⁴⁰ Enforcement actions available to the regulators includes statements of public censure, withdrawals of permissions to hold a SMF (for Senior Managers), and financial penalties.⁴¹

Firms must notify the regulators if they take action against any employee for breaches of the Conduct Rules.⁴²

³⁷ FCA, [Guide for FCA solo-regulated firms](#), July 2019, p44

³⁸ FCA Handbook, [Code of Conduct rules](#) (COCON), rule 2.2

³⁹ [Section 64B\(3\)](#) of FSMA

⁴⁰ FCA Handbook, [COCON rule](#) 3.1.3

⁴¹ See the FCA [Enforcement Guide](#), para 7.2, and the FCA Handbook, [DEPP rules](#) 6.2.4 to 6.2.9

⁴² [Section 64C](#) of FSMA

3. Impact

The SM&CR was rolled out to banks in March 2016, insurers in December 2018 and to remaining financial services firms in December 2019. For most firms, therefore, the regime is new and its impact not yet fully felt. In some areas the regime is newly or not yet fully introduced – for example, the [deadline](#) for FCA solo-regulated firms to have fully implemented the Certification Regime and Conduct Rules was initially 9 December 2020, later extended to 31 March 2021.

When announcing the extension of the regime to all financial services firms in October 2015, the Treasury estimated that its scope would increase to around 70,000 firms, over 102,000 Senior Managers and over 98,000 Certified Persons.⁴³

FCA review

In August 2019 the FCA published the results of its review into the “embedding” of the SM&CR into the banking sector, which by then had been in place for over three years. The FCA review comprised interviews with 45 people at 15 firms and organisations in the banking sector, including large and small banks and building societies. Some key points from the review were that:

- firms had embarked on a process of culture change to implement the regime, but they were finding it difficult to measure this change;
- there had been a “culture of fear” during the early days of the regime, although it had dissipated with the passage of time;
- the industry had made a “concerted effort” to implement the regime, with senior managers clear on what accountability meant in the context of their jobs. However, many senior managers were inclined to always look to the regulator for guidance, rather than stating themselves what they thought “good” practice looked like;
- firms had taken steps to implement the Certification Regime, but most firms could not demonstrate that they had an effective assessment process in place; and
- staff generally understood the Conduct Rules, but firms had not always tailored their Conduct Rules training to staff’s job roles.

The review concluded that the FCA would increase its focus on the Conduct Rules and would continue to build on the links between the SM&CR and firm culture.⁴⁴

PRA review

In December 2020 the PRA published its own review of the SM&CR, drawing on data, interviews and a survey of 140 dual-regulated firms. The review stated it was unable to benchmark the UK against other

⁴³ HM Treasury, [Senior Managers and Certification Regime: extension to all FSMA authorised persons](#), October 2015, p9

⁴⁴ FCA, [Senior Managers and Certification Regime Banking Stocktake Report](#), August 2019

jurisdictions, because the UK was a leader in individual accountability and few other jurisdictions had put in place analogous regimes. The review noted that Australia, Hong Kong, Singapore and Ireland had taken steps to improve individual accountability.⁴⁵

Some key points emerging from the review were that:

- the SM&CR was having a material effect on firm behaviour, but more could be done to embed the regime further;
- there was a concern that the Senior Managers regime could have the unintended consequence of impeding diversity by encouraging firms to put forward candidates with similar characteristics to past candidates, to more easily facilitate regulatory approval. The review outlined the need to underline that the regime did not require this. The PRA should continue to promote individual accountability and board responsibility in ways that are mutually reinforcing rather than contradictory; and
- a majority of firms said that the SM&CR had been implemented in ways that were proportionate to the size of their business, although small and medium-sized firms agreed less strongly. Further views should be sought on how the regime could be applied more flexibly.⁴⁶

Enforcement

The first penalty imposed under the SM&CR came in May 2018, in a joint case by the FCA and PRA against the group Chief Executive of Barclays, James Staley.

The investigation found that Mr Staley tried to identify the author of an anonymous letter received by Barclays in June 2016 that claimed to be from a Barclays shareholder, which contained various allegations. Mr Staley should have maintained an appropriate distance rather than taking steps to identify the author. His behaviour was a breach of the Conduct Rule to act with due care, skill and diligence. He was fined £642,430 as a result.⁴⁷

A response to a freedom of information request revealed that in June 2018, the FCA had five investigations open into Senior Managers, nine into Certified Persons, and seven into individuals who are neither Senior Managers nor Certified Persons but who had breached the Conduct Rules.⁴⁸ This covers a period when the regime applied only to the banking industry.

In April 2020 the FCA's then-Chief Executive Chris Woolard described the coronavirus pandemic as the "first real test" of the Senior Managers Regime, since it allowed the regulator to monitor how banks were handling the rollout of the government's loan schemes by enabling

⁴⁵ PRA, [Evaluation of the Senior Managers and Certification Regime](#), December 2020, p18

⁴⁶ *Ibid*, p5

⁴⁷ FCA, [FCA and PRA jointly fine Mr James Staley £642,430 and announce special requirements regarding whistleblowing systems and controls at Barclays](#), 11 May 2018

⁴⁸ See FCA, [FOI5805](#), 13 July 2018

oversight into “many parts” of a bank’s business. He did however caution that “our powers are limited”.⁴⁹

A freedom of information request submitted by financial regulation consultancy Bovill in September 2020, after the extension of the regime to solo-regulated FCA firms, revealed that since March 2016 the FCA had opened 34 investigations, closed 11 without action and imposed a fine on one occasion (which is discussed above).⁵⁰ Bovill argued that the “numbers suggest that the regime might not have the right tools for the job. Questions should be asked as to why there are so few investigations and punishments, and whether SMCR is fit for purpose”.⁵¹

⁴⁹ Financial Times, [UK regulator says coronavirus is first test of post-2008 banking rules](#), 20 April 2020

⁵⁰ A second fine, and a ban, has been provisionally issued but is being appealed – see [FCA and PRA publish Decision Notices given to former CEO who paid excessive remuneration to his wife to reduce his tax liability](#), 18 November 2019

⁵¹ Bovill, [Only 34 investigations and one enforcement action after four and a half years of SMCR](#), 27 October 2020

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