



SM&CR: Essential checklist for HR


The senior managers and certification regime (SM&CR) will apply on a mandatory basis to all authorised firms from 9 December 2019.

HR teams will be at the forefront of implementation of SM&CR and the checklist below offers comprehensive outline guidance for firms (other than insurers) on best practice compliance with the new regime.

There are several distinct aspects to SM&CR:

 the creation of new Senior Management Functions, replacing the approved persons regime

 the obligation to certify certain staff as fit and proper, at least annually

 the application of the conduct rules to all except “ancillary” staff

However, the level of compliance required will depend on which category a firm falls into:

- enhanced
- core
- limited scope

The majority of firms to which SM&CR will apply from December 2019 will be core firms, for whom our checklist is most relevant.

HOW WE CAN HELP

We advise authorised firms on regulatory, HR and business issues. We work with HR and compliance teams on implementing policies, processes and documents necessary to comply with SM&CR.

For further assistance please contact a member of our team. Contact details can be found on the final page.



Preparatory steps

SMFs	Allocate appropriate individuals to the mandatory SMFs.
	Allocate prescribed responsibilities, including responsibility for certification and for training, to SMFs.
	Prepare statements of responsibility for SMs. The key HR issue is to ensure that SMs agree and understand the scope of their SM&CR responsibilities. SMs and the FCA must be formally notified of their responsibilities and any changes to them.
	Consider whether “Grandfathering” applies: most approved persons at core firms will be automatically converted into the relevant SMF, but some will need to submit a conversion form (Form K).
	Ensure there is no overlap between different SM responsibilities (other than for deputy SMs to cover holidays, illness and other expected absences).
	Certify SMs as fit and proper to carry out an SMF within 12 months.
Training	Train SMs on the duty of responsibility and the “reasonable steps” they need to take to meet their responsibilities.
	Train all conduct rules staff in respect of the conduct rules, initially and on an ongoing basis.
	Train managers responsible for making fit and proper status assessments.
Breach reporting	Ensure systems are in place to notify the FCA of disciplinary action (as defined in the FCA handbook) or conduct rule breaches within relevant timescales.

Recruitment and onboarding

Process	Review recruitment processes in light of the time that will be required to obtain (and give) regulatory references.
Induction	Revise induction programmes to incorporate training on SM&CR.
Conditions in offer letters	Offers of employment to new SMs should be conditional on advance regulatory references, regulatory approval (where required) and being assessed as fit and proper.
	Offers to other certification staff should be conditional on being assessed as fit and proper.
Background checks	Criminal record checks will be mandatory for SMs and may be desirable for all certification staff, together with background checks and credit checks.
Reference requests	Regulatory references must be obtained for: <ul style="list-style-type: none"> • SMs • certification staff • NEDs who are not SMs

Policies and procedures	
Disciplinary policy	<p>Add examples of misconduct or under-performance involving a failure to comply with regulatory duties or “reasonable steps” as triggers for disciplinary action.</p> <p>Link with obligations to notify the FCA.</p>
Fit and proper certification	<p>It will be prudent to have a clear framework setting out:</p> <ul style="list-style-type: none"> • the criteria against which certification staff will be assessed • the nature of the assessment process e.g. <ul style="list-style-type: none"> • will it be part of the performance appraisal; • what information will be provided to them; • what opportunity will they have to provide information or evidence? • whether there is any right of appeal against a decision not to certify as fit and proper • the potential consequences of such a decision in terms of ongoing employment <p>Assign responsibility with the firm for determining fitness and propriety.</p> <p>In small firms this may be assumed by an SM, but in larger firms it will need to be delegated, probably to HR, but with an SM having overall supervision and responsibility.</p> <p>Consider moderation of decisions or random sampling by second decision-maker to ensure consistency.</p>
Regulatory references policy	<p>It will be advisable to have a policy setting out:</p> <ul style="list-style-type: none"> • the circumstances in which references must be obtained • the decision-maker who will decide whether references are satisfactory from a regulatory perspective • who will approve references to be given for former employees or departing employees • updating references
SM departure policy	<p>It will be useful to have a policy dealing with the departure of an SM e.g.</p> <ul style="list-style-type: none"> • to whom their responsibilities were reallocated • the completion of a handover • the communication by the SM of any concerns about individual performance or regulatory compliance • regulatory notifications in cases of misconduct
Other policies	<p>It will be sensible to review other relevant policies for compliance with SM&CR e.g.</p> <ul style="list-style-type: none"> • retention of documents • whistleblowing • D&O insurance for SMs

Employment contracts	
Job title, duties and job description	These should reflect the SM's status and duties and statement of responsibilities. The statement of responsibilities and regulatory duties should be paramount and override any contractual terms.
Conduct warranty	It is prudent to require a new joiner to warrant that they have not been investigated or disciplined (and no circumstances have occurred which would justify an investigation or discipline) in the past and/or that they are fit and proper.
SM-specific provisions	Add contractual terms governing: <ul style="list-style-type: none"> • maintenance of decision-making records • restrictions on delegation of SMF • temporary re-allocation of duties • requirement to complete handover • loss of SM status
Suspension	Add an express power to suspend employees from their SMF or certification function in appropriate circumstances.
Fit and proper standard	Consider adding a contractual obligation on employees to maintain fit and proper status, to disclose any circumstances which may lead to any breach of conduct rules and to assist with any investigations or disciplinary proceedings. This obligation should survive termination.

Key	
Certification staff	Staff who are required to be certified as fit and proper at least annually
Conduct rules	FSMA and FCA conduct rules and guidance issued from time to time
FCA	Financial Conduct Authority
FSMA	Financial Services and Markets Act 2000
NED	Non-executive director
SM	Senior Manager
SM&CR	Senior Managers and Certification Regime under FSMA
SMF	Senior Management Function

This briefing note is not intended to be an exhaustive statement of the law and should not be relied on as legal advice to be applied to any particular set of circumstances. Instead, it is intended to act as a brief introductory view of some of the legal considerations relevant to the subject in question