Compliance | POLICY

SM&CR

SIGNATURE

SENIOR MANAGERS & CERTIFICATION REGIME

FREQUENTLY ASKED QUESTIONS

The purpose of this document is to provide answers to any outstanding questions firms may have in implementing the Senior Managers & Certification Regime.

SimplyBiz Group

Introduction

This guide follows on from, and clarifies, the information that has already been provided in Issues 1 to 4. Instead, it aims to answer some common questions that have arisen from Firms as they implement SM&CR, and also includes feedback we have received following publication of our previous guidance.

We advise firms to revisit the information and guidance already available within the SM&CR section of the website, where the following resources may be accessed:

Timeline

Conduct Rules Training
A series of videos and cases studies that help to explain the requirements and support your learning.

SM&CR: A practical guide to prepare firms for the new regime - Issue 1
A practical guide to prepare **firms** for the new regime

SM&CR: A practical guide to prepare firms for the new regime - Issue 2
A practical guide to prepare **individuals** for the new regime

SM&CR: A practical guide to prepare firms for the new regime - Issue 3
A practical guide for firms **after commencement – Existing individuals within the firm**

SM&CR: A practical guide to prepare firms for the new regime - Issue 4
A practical guide for firms **after commencement – New staff and role changes**

SM&CR: The Directory – to follow

Additional Support
Additional support and help is available from the Compliance Helpdesk.

The questions and responses are organised in line with the content of the SM&CR practical guides.

SM&CR: A practical guide to prepare firms for the new regime - Issue 1

This section of the Guide sets out to assist with:

- Determining the firm type (limited or core)
- Establishing the different 'Senior Management Functions' and mapping from the old to the new regime

Firm type

Will our firm be Core or Limited Scope?

All firms will be **Core** unless they are:

- A Sole Trader
- A limited permission consumer credit firm
- An Authorised Professional Firm (APF) whose only regulated activities are non-mainstream regulated activities
- Insurance intermediaries whose principal business is not insurance intermediation and who only have permission to carry on insurance distribution activity for non-investment insurance contracts

Added: Last updated:

Are we a limited permission consumer credit firm?

A limited permission consumer credit firm is a firm where the main business of the firm is the sale of goods and services and not financial services.

The FCA has published a broad list of Limited and Full Permission Activities in the Guide for Consumer Credit Firms available for download here:
https://www.fca.org.uk/publication/finalised-guidance/consumer-credit-being-regulated-guide.pdf

Firms would have applied at the time of authorisation as either a Full or Limited permissions firm, however, if you are at all in doubt, please check the Financial Services Register as this will indicate whether you are a Limited or Full Permission firm.

Added: Last updated:

As an Authorised Professional Firm (APF) how do we know if we only carry out regulated activities that are non-mainstream regulated activities?

For an APF to carry out non-mainstream regulated activities you must satisfy the conditions set out in the FCA Handbook under PROF 5.2 **www.handbook.fca.org.uk/handbook/PROF/5/2.html**

Added: Last updated:

What do we need to do for our Appointed Representatives (ARs) in the new regime?

SM&CR does not affect ARs. There are no plans at present, or for the foreseeable future, for ARs to be required to follow the new requirements. This change would require primary legislation.

Added: Last updated:

Types of Senior Manager Functions and mapping across

The FCA guidance states that 'partners' will map across from CF4 to SMF27. Does this apply to partners of a LLP as well as standard partnerships?

Yes, the mapping across process is the same for partnerships and LLPs.

Where reference is made to 'a limited partner in a partnership registered under the Limited Partnership Act 1907', this is a specialist type of partnership structure that rarely applies to financial service firms and therefore we have not considered this type of firm within our guides, as we do not believe it is relevant to do so.

Added: Last updated:

I am currently an approved person designated a CF29 Significant Management Function. Will I be mapped over to the new regime, and if so how?

The CF29 - Significant Management Function will not be mapped over to the new SMF regime.

Added: Last updated:

If CF29 is not represented in the new regime, will I need 'certification' if I am not a 'Senior Manager'?

Dependent on the role the individual plays within the firm and their responsibilities, it is likely that they will become a Certified Person under the Certification Regime but only where that person also holds a position of responsibility for a business unit of significant size.

Added: Last updated:

My spouse and I are the only directors/partners of the firm, but my spouse has no day-to-day involvement in the running of the business. What do they need to do for SM&CR?

In this instance they will need to be registered as a director or partner of the firm and should have been mapped across into the new regime as a SMF3 or SMF27 respectively.

All Senior Managers will require a Statement of Responsibilities, although no responsibilities may need to be allocated to your spouse.

Added: Last updated:

We operate as a Partnership/LLP where some partners have no involvement in the financial services activity of the business. How will they be affected by SM&CR?

Partners who were CF4 will have been mapped across to SMF27. As a Senior Manager, they require a Statement of Responsibilities, although this may not allocate any responsibilities to that person or persons. However, the FCA has introduced the concept of 'partners without influence'. This primarily applies to an Authorised Professional Firm but may not be limited to such type. It is relevant where a partner is not involved in financial services and their only role in the firm is other non-financial (professional) services/activities.

Added: Last updated:

SM&CR: A practical guide to prepare firms for the new regime - Issue 2

- Statements of Responsibilities
- Prescribed Responsibilities
- Duty of Responsibility
- Certified Persons
- Conduct Rules for Senior Managers
- Conduct Rules for Certified Persons and other staff

Statements of Responsibilities (SoRs)

When I look at the Financial Services Register it states that I am 'Responsible for Insurance Distribution' and/or have 'Responsibility for MCD Intermediation'. How does this link to SM&CR?

These responsibilities are required as part of the relevant European Directives (Insurance Distribution Directive and Mortgage Credit Directive) and are outside of SM&CR. The register will continue to show these responsibilities and this will not change. For larger firms, these responsibilities are wide in scope and are likely to be broken down into more specific areas when firms consider individual responsibilities under each SoR.

For smaller firms, the person showing on the Financial Services register may be allocated these responsibilities in full and this will show on their SoR as, for example; Responsible for Insurance Distribution and Mortgage Sales.

For Sole Traders and Sole Directors, it would not be a requirement to list all the responsibilities where you are responsible for all activity with the firm, and a statement along the lines of: 'I am solely responsible for all regulated activities within the firm' would be sufficient.

Added: Last updated:

Our firm's Senior Managers have been will be converted automatically to SMFs. Do we need to submit their Statements of Responsibilities (SoR) to the FCA?

No. Only new applicants or applications to change an SMF role requires an SoR to be submitted to the FCA.

Added: Last updated:

Where a Senior Manager has been mapped over to the regime and a change is then made to their role, does the firm need to notify the FCA?

If there is a significant change to a person's roles and responsibilities an updated SoR should be drafted and may need to be submitted to the FCA. Please refer to Issue 4 for more details of what constitute a 'significant' change.

Firms should also retain a copy of all past versions of SoRs, regardless of whether the changes are significant, as these form an important part of the firm's records, should the information be required by the FCA.

Added: Last updated:

Is an SoR required for individuals who are currently and will remain as a CF1 in an Appointed Representative (AR) firm?

SM&CR does not apply to AR firms and therefore no SoR is required for any individual in an AR.

Added: Last updated:

Can a Senior Manager have a SoR with no Prescribed Responsibilities (PRs)?

Core firms must allocate each one of the PRs to a Senior Manager(s). This can be allocated to just one individual and it is therefore possible for some Senior Managers not to be allocated any PRs. Those Senior Managers not allocated any PRs may be allocated other responsibilities, and in some instances, may have no responsibilities recorded i.e. a spouse that as a director has a general responsibilitiy but no day-to-day involvement in the business.

Added: Last updated:

Is it possible for one of the PRs to be allocated to different Senior Managers?

Each PR should only be allocated to one person and preferably not 'shared' or 'divided' unless there is appropriate and justifiable reason i.e. part time workers or job sharing.

Added: Last updated:

Certified Persons

My firm has self-employed advisers, how does the SM&CR apply to them?

The FSMA definition of an 'employee' has a wider scope than that traditionally used in employment terms and the FSMA define this as a person who:

(a) personally provides, or is under an obligation personally to provide, services to [a firm] under an arrangement made between [a firm] and the person providing the services or another person, and

(b) is subject to (or to the right of) supervision, direction or control by [a firm] as to the manner in which those services are provided.'

The crux of this is that a self-employed adviser, who provides services for an authorised firm, or who conducts a certification role on behalf of the firm, or, fulfils the role of a pension transfer specialist, is defined as an 'employee' in the context of FSMA, and the firm will be required to treat them as such.

They will be subject to the Conduct Rules and will need to be certified annually where they fall within the Certification Regime.

Added: Last updated:

If a paraplanner reports to an adviser, does the paraplanner also need to be certified?

Where a paraplanner has a role which is purely administrative, our view is that they will not need to be certified, even where their role involves customer contact.

However, where a paraplanner's role involves exercising a significant amount of discretion, judgment or technical skill, they will need to be certified i.e. where they decide on the outcome or construct the firm's centralised investment proposition.

Added: Last updated:

Where an adviser only advises on protection and general insurance products, will they be brought under the Certification Regime, or will they be subject to different processes to assess their competence?

As the distribution of non-investment insurance products (advised or non-advised) does not require any qualifications to be held by the individual, it does not fall under a Certified Function and therefore the Certified Regime does not apply to that person.

It should be noted that the existing Training & Competence rules will continue to apply.

Added: Last updated:

Conduct Rules

Our firm outsources telephone answering when we are not available. What is the impact under SM&CR?

Firms that appoint an external firm to answer calls and take messages would not normally need to consider the outsourced provider of these services when applying the regime within the firm. This is because the outsourced provider does not engage in any financial services activity, with or on behalf of, clients of the firm. Under SM&CR, this is known as an 'ancillary' function.

Added: Last updated:

We outsource paraplanning services. What do we need to do?

This depends on the nature of the service and which outsourcing partner is the provider. Where you appoint a company to carry out this activity, that company is unlikely to fall within the definition of an 'employee' and therefore SM&CR is not likely to apply. This would not preclude you from carrying out your own due diligence on that business to ensure they are competent to perform their duties, but no formal SM&CR checks are required.

Where you appoint an individual to perform the role and that person personally provides the services under the direction, supervision or control of your firm, that person would be considered an employee and within the scope of SM&CR. As detailed earlier in our guide, our view is that most paraplanners would not fall within the Certification Regime and therefore these persons would only be required to carry out Conduct Rules training.

Added: Last updated:

Do my employees need to undertake Conduct Rule training annually?

The Rules do not specifically state that training must be done annually. The SimplyBiz Group's view would be that this would be good practice and would also assist in supporting an individual's assessment of fitness and propriety.

Added: Last updated:

My firm is Limited Scope. We have Directors that are not Senior Managers (both executive and non-executive directors). Do the Conduct Rules apply to them?

Whilst the full Conduct Rules do not apply, Senior Conduct Rule 4 (SC4) will. This is shown in Appendix 6 of Issue 2.

This scenario is most likely to apply to consumer credit firms that are subject to the limited permission regime, i.e. where consumer credit is not their principal business activity or an Authorised Professional firm.

Added: Last updated:

I am a Sole Trader (Proprietorship), so I understand that I am not regarded as an employee under SM&CR. Do I still need to train myself on the Conduct Rules?

Some but not all Sole Traders will be a Senior Manager and those that are will be required to complete training on the Senior Manager's Conduct Rules. No Sole Trader however will fall within the Certification Regime and this means that training on the Individual Conduct Rules will not be required, although there are obvious benefits in undertaking both of these.

It is important to note that if you are a sole trader, you are the firm and all 11 FCA Principles will apply to you. Therefore, you should be fully aware of your personal responsibility to these.

Added: Last updated:

SM&CR: A practical guide to prepare firms for the new regime - Issue 3

A practical guide for firms after commencement – Existing individuals within the firm

- A general overview of the Fit and Proper requirements ('FIT')
- FIT Assessments
  - Senior Managers
  - Certified Persons
  - Non-Executive Directors (NEDs)
  - Other Staff
- Non-Approval of FIT – Disciplinary Action – Conduct Rule Breaches
- Other Areas
- Supporting Documentation

FIT Assessments

When do we need to issue a certificate to existing staff who are identified as Certified Persons?

Firms will need to ensure that a certificate is issued to all existing staff that fall within the Certification Regime by 9 December 2020 at the latest and only after they have been assessed as fit and proper.

It is important to note that this requirement does not apply to a Sole Trader or Partners in a partnership that is not an LLP, as the Certification Regime does not apply to those individuals. This is different to a Sole Director of a company, where that person must produce a certificate in their own name.

It is important to note that whilst the Sole Trader or Partner above does not fall under the Certification Regime, an employee in the firm could do so and the fit and proper assessment will apply to that person, for example, an investment or mortgage adviser.

Added: Last updated:

Conduct Rule Breaches

What constitutes a breach of the Conduct Rules and how do I determine whether I am required to make a notification to the regulator?

Breaches in this context relate to whether the individual has breached any of the Individual Conduct Rules or, where they are a Senior Manager, the Senior Manager Conduct Rules (please refer to appendix 5 & 6 in SM&CR Issue 2 respectively). If the breach results in disciplinary action, this must be notified to the regulator. Disciplinary action is
defined as

- the issuing of a formal written warning;
- the suspension or dismissal of that person;
- a reduction or recovery of that person's remuneration.

This is covered in more detail in SM&CR Issue 3

Added: Last updated:

If a customer cancels their life assurance policy and there is a 'clawback of commission', does this need to be reported?

No. Clawback of commission is different to 'clawback of remuneration' which refers to income that is due or has been paid to the individual being withheld or reclaimed due to failings in that person's competence requirements. A series of commission clawbacks could however lead to such a scenario on further investigation.

Added: Last updated:

Disciplinary Action

Does concluded disciplinary action need to be reported if it is subject to an appeal?

Yes. The FCA has confirmed this as follows in their guidance papers:

"Firms should only report Conduct Rule breaches once disciplinary action has concluded. If a firm takes disciplinary action for a Conduct Rule breach but the employee appeals, or plans to, this should still be reported to us. Where an appeal is successful, firms should update us in the following REP008 submission. We believe that these instances will be rare given the annual submission cycle. This should only usually occur where a disciplinary process is concluded shortly before the due date for REP008 and there is not time to assess the appeal before submission."

Reporting disciplinary action and the timeframe for doing so is confirmed in SM&CR Issue 3.

Added: Last updated:

What happens if a firm discovers a breach of the new Conduct Rules that occurred prior to commencement of SM&CR?

The FCA has clarified that it does not expect a firm to notify under the new Conduct Rule breach reporting requirements if the breach occurred before the application of the Conduct Rules to the individual, or in other words, you cannot breach a rule if it was not in existence.

However, depending on the circumstances of the case, it may be that it requires notification under Principle 11. The breach may also affect that individual's ongoing FIT assessment depending on the role they perform.

Added: Last updated:

Other areas

I am a sole trader (proprietorship), so I understand that I am not regarded as an employee under SM&CR. Will I need to notify the FCA of Conduct Rule breaches?

Notification of a Conduct Rules breach only applies where it results in disciplinary action. So whilst a Sole Trader may be subject to this reporting requirement as a Senior Manager, it is unlikely a Sole Trader would ever formally self-discipline.

This, however, does not prevent the Sole Trader from notifying the FCA under Principles 11 - Relations with Regulators. A firm must deal with its regulators in an open and co-operative way, and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice.

The above principle is intentionally open as this typically relates to a significant breach of the Rules or any breach of the Conduct Rules. If a firm is ever in doubt as to where information should be reported, it is always favourable to err on the side of caution and make a notification.

Added: Last updated:

I am a sole Director. How do I notify FCA of any Conduct Rule breaches?

As a Director of a firm, you are deemed by the FCA to be an employee. Any employee who receives disciplinary action as a result of a Conduct Rule breach must notify FCA. As above, it is unlikely as a sole Director you would ever formally discipline yourself, however, any breach of a Conduct Rule should be notified to the FCA under Principles for Businesses 11 (see above).

SM&CR: A practical guide to prepare firms for the new regime - Issue 4

A practical guide for firms **after commencement – New staff and role changes**

- The procedure for changing roles within a firm
- Criminal record check requirements
- New Hires
- Leavers
- The new regulatory reference

How will advisers who may not be able to demonstrate that they have met the requirements of the Certification Regime as they remain in training, or under direct supervision, or who have not yet achieved full Diploma or CeMAP, be treated under the SM&CR?

A new entrant can commence an advising role without holding the required qualifications to be assessed as competent under T&C rules. You should note the T&C rules are not changing as a result of SM&CR.

SM&CR requires the individual to be fit and proper for the role they carry out within that firm. Therefore, in relation to a new adviser to the firm, or a 'trainee' adviser, the firm can assess that person as fit and proper for the role they are, or will be, carrying out as an adviser under direct supervision, but who has not yet been deemed competent under the firm's T&C programme. The firm can then issue a FIT certificate to that person, but within the certificate the limitation to the individual's role could be confirmed.

Added: Last updated:

New Hires

I am recruiting a candidate for a Certification Function role who previously worked in an Appointed Representative firm? Do I still need to obtain a reference?

Yes. The requirement to obtain a reference applies to all individuals being appointed under a Certification Function regardless of their past employment. Where the individual was with an AR and therefore not subject to SM&CR, the firm still requests the regulatory reference, however, the previous employer will not be reporting any activity under SM&CR, as they do not fall under that regime e.g. a Conduct Rules Breach. Instead the AR will apply the Statements of Principle for Approved Persons.

Added: Last updated:

A firm recruits a new investment adviser on 1 February 2020. Would the firm need to complete the SM&CR fit and proper assessment and certify them to perform the role before they start giving advice or by 9 December 2020?

Any appointment made post-implementation of SM&CR for a Certified Person and/or a Senior Manager will require the firm to carry out a FIT assessment before the individual carries out the role. It may be practical at that point in time to issue a certificate of FIT, although officially the deadline for issuing a certificate would not be until the end of the transition period – 9th December 2020.

Added: Last updated:

Regulatory References

What are the legal obligations when providing a reference?

All details in a reference **must be fair and accurate**. An employer must be capable of supporting any opinion given in a reference with evidence.

A reference must **not be misleading, inaccurate or discriminatory**. A reference should not include irrelevant personal information or use 'protected characteristics' (unless in exceptional circumstances where a protected characteristic is an occupational requirement and is crucial to do a job). Protected characteristics include age, disability, race, gender reassignment, marriage and civil partnership, pregnancy and maternity, religion or belief, sex and sexual orientation.

Added: Last updated:

What are the regulatory obligations when providing a reference?

A firm must disclose to the reference requestor (the new employer) all the information of which they are aware that they reasonably consider to be relevant to the requestor's assessment of whether the employee is fit and proper.

Firms are expected to share information using the standard regulatory reference template set out in the FCA Handbook. The information contained within the reference will include:

- details of any disciplinary action taken due to breaches of the Conduct Rules (where it relates to a breach that occurred on or after 9 December 2019);
- any findings that the person is not fit and proper; and
- any other information relevant to assessing whether a candidate is fit and proper (for example, the number of any upheld complaints) covering the previous six years.

Added: Last updated:

Can a Non-Disclosure Agreement limit the amount of information that can be provided in a regulatory reference?

As of the 7th March 2017, the rules in the FCA handbook state that no firm can enter into any arrangements or agreements with any person that may limit its ability to disclose information in a regulatory reference. This includes a "COT 3", which is a recording of a legally-binding contract between parties to settle actual or protentional complaints to the Employment Tribunal. **If you receive a request for a reference for an employee or ex-employee with whom such an agreement is in place, it will be necessary to obtain legal opinion from an employment lawyer before providing the reference.**

Added: Last updated:

I have received a request for a reference for an individual who was only with the firm on a secondment. Do I still need to provide a full regulatory reference?

Yes. A regulatory reference must be provided regardless of how the employment ended, whether this be via secondment, fixed term work, temporary work, redundancy or resignation.

Added: Last updated:

I have incomplete records and cannot provide all the information requested for a regulatory reference. What should I do?

The fact that you are not able to provide complete information must be made clear in the reference.

Added: Last updated:

I have received a request for a reference for an employee who has been subject to disciplinary action and/or has breached Conduct Rules. What should be included?

As complete a picture as possible of the employee's conduct record should be included in the regulatory reference. As such, any disciplinary action against an employee which occurred within the past six years or any breach of Conduct Rules which occurred on or after the 9th December 2019 should be included in the reference.

Remember, the reference must be fair, accurate and not misleading and the firm should ensure that they can verify any information provided (i.e. with complete records of the disciplinary procedure).

Added: Last updated:

I have received a request for a reference for an employee about whom I have concerns, but an investigation into these concerns has not yet been undertaken and/or concluded. What should be included?

The rules do not require a firm to disclose information that has not been properly verified. However, a firm can include such information in a reference if it wishes and believes the inclusion would benefit the firm making the appointment. When deciding what to disclose, a firm must use their judgement to balance the potential harm of disclosure to the individual with the potential harm of non-disclosure to the industry.

If an allegation has been raised about an employee that would not have been investigated further or prompted disciplinary proceedings, good practice would be to omit this from the reference. A firm should use their judgement on a case-by-case basis, disclosing the information that they would consider relevant if they were looking to appoint the individual within their own firm.

Remember, the reference must be fair, accurate and not misleading. Unsupported opinions or concerns may lead to legal action and so if in doubt, legal counsel should be sought.

Added: Last updated:

Do I have to show the employee the information included in the reference, before I provide it to the requestor?

An employee does not usually have the right to request sight of their reference before leaving employment, however they can ask their new employer to see a copy once they have started their new job.

The firm is however **required to provide the employee with the opportunity to comment on any allegations/concerns** which the firm believes should be included in the reference. If the employee was not given this opportunity at the time the concerns arose (i.e. as part of a disciplinary procedure), then they must be allowed to comment **prior to the reference being finalised.** This requirement does not mean that the employee should be given sight of the reference itself, merely that they are asked for to comment on the allegations on which it is based, if not previously provided. The employee's comments should not be noted in the reference, but the firm should take them into consideration when deciding whether to disclose the allegations/concerns and/or when drafting the disclosure.

Added: Last updated:

I am providing a regulatory reference for an employee and believe that there is a serious matter to disclose, but this falls beyond the previous six years. Am I able to include this information?

The rules in the FCA Handbook allow the removal of the six year time limit for 'serious matters/misconduct'. In considering whether a matter is 'serious', a firm should consider how important the information still is to the firm requesting the reference, how long ago the matter occurred, fairness, whether the conduct was deliberate, reckless or dishonest (e.g. a small one-off case of dishonesty many years ago may not be sufficiently serious to require disclosure).

If the employee did not comment on the allegations of misconduct at time it occurred, they should be provided with this opportunity before the reference is finalised.

The requirement to update a regulatory reference does not extend to references completed pre the new regime.

Added: Last updated:

When should I provide a revised reference?

If a firm subsequently becomes aware of **new, significant information** that relates to the fitness and propriety of the individual that, with hindsight, would have changed the way they drafted their reference, the firm is expected to take reasonable steps to update the reference requestor. The firm need only update the reference requestor if they are still the current employer of the individual.

This requirement to update a reference will apply for six years from the date the individual leaves the firm. Matters of serious misconduct that occurred more than six years ago, but which come to light within six years from the date the individual leaves the firm, may also require disclosure as discussed above.

Prior to making the revised disclosure, the firm should make reasonable effort to provide the ex-employee with the opportunity to comment on the new information. If the ex-employee cannot be contacted, this should be noted within the reference.

The requirement to update only applies to regulatory reference, i.e. those given after commencement of the regime. It does not apply to the references given prior to 9th December 2019

Added: Last updated:

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