



C L I F F O R D
C H A N C E

A practical guide to the Senior
Managers and Certification
Regimes – October 2014



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Glossary of key terms

Certified Person	An individual covered by either the FCA's or PRA's Certification Regime. Covers a wider group of individuals in institutions regulated by the FCA than in those regulated by the PRA. Institutions will have to certify individuals falling within this definition as "fit and proper" annually.
Group Entity Senior Manager	Employees or officers of a parent or group entity exercising considerable influence over decision-making on matters capable of affecting an institution's safety or soundness. Individuals falling within this definition, which may include group finance directors and chairs of committees, will require approval by the PRA as Senior Managers.
Head of key business area	An individual "managing a business area or division so large in relative terms to the size of the firm that it could jeopardise its safety and soundness and so substantial in absolute terms that it warrants an SMF even though the Senior Manager performing it may report to the Chief Executive or another SMF". Defined by the PRA as an individual managing an area with gross total assets of £10bn or more which accounts for either 20 per cent or more of the firm's or, where the firm is part of a group, 20 per cent of the group's gross revenue. Individuals falling within this definition will require approval by the PRA as Senior Managers.
Prescribed responsibilities	The term used by the PRA to describe a responsibilities additional to that inherent in a particular Senior Manager Function, which will be required to be allocated amongst Senior Manager.
Relevant Authorised Person	The term used to refer to institutions covered by the new regimes (i.e. banks, building societies, credit unions and PRA regulated investment firms).
Responsibilities Map	The single up-to-date document required to be maintained by institutions covered by the SMR detailing their management and governance arrangements.
Senior Manager	An individual performing one or more Senior Manager Functions (see below). Individuals falling within this definition will be required to be approved as "fit and proper" by the FCA or PRA as appropriate.
Senior Manager Functions	The term used by the FCA and PRA to describe roles within institutions covered by the SMR which require occupants to be approved as Senior Managers.
Significant Responsibility Senior Manager	The term used by the FCA to describe individuals with overall responsibility for a key function or identified risk who are performing a function not otherwise specified as an SMF. Individuals in institutions regulated by the FCA falling within this definition will be required to be approved as "fit and proper" by the FCA.
Statement of Responsibilities	The single up-to-date document required to be maintained by institutions detailing the responsibilities of each individual Senior Manager.

Introduction

At 395 pages, the joint consultation paper on individual accountability in the banking sector, published by the Financial Conduct Authority (“FCA”) and the Prudential Regulation Authority (“PRA”), is weightier than the average guide to the galaxy.

Although some elements of the proposals may yet change in the light of responses to the consultation exercise, and as the regulators continue to refine their policy positions, the paper gives the clearest indications yet of the FCA’s and PRA’s (sometimes divergent) interpretations of how the new regimes set out in the

Financial Services (Banking Reform) Act 2013 should work in practice, and to which firms and individuals it is proposed they will apply.

This briefing unpacks the main implications of the proposed new regimes and looks at the steps banks, building

societies, credit unions and PRA regulated investment firms can take at this stage to map out their response to the proposals and begin to adjust their governance arrangements.

The key features of the new regimes

The proposals have been published alongside another joint consultation paper on aligning risk and reward in banks’ remuneration structures. Together, their purpose is threefold: to increase and better delineate the responsibilities of those at the highest levels of management within banks; to extend the class of individuals subject to sanctions for misconduct to all staff within institutions who pose a risk of significant harm to the institution or its customers; and to make it easier for the regulators to hold individuals accountable for breaches.

The new regulatory arrangements comprise four main elements:

Senior Managers Regime (“SMR”)

- More detailed and clearer allocation of responsibilities between a smaller cohort of individuals than currently covered by the current Approved Persons Regime (“APR”)
- Particular emphasis placed on key documents – Statements of Responsibilities and Responsibilities Maps – to record the allocation of responsibility to individual Senior Managers and to demonstrate to the regulators that there are no gaps or excessive overlaps
- “Reverse burden of proof” presumption of responsibility will place burden on individual Senior Managers to demonstrate that they took reasonable steps to avoid contraventions in their areas of responsibility

Certification Regime

- Firms to certify staff performing roles relating to the firm’s regulated activities as fit and proper on an annual basis based on qualifications, competence and personal characteristics
- Populations covered by FCA and PRA regimes will differ, but in either case will extend further downwards into institutions than the current APR

Conduct Rules

- Will cover all individuals subject to senior managers and certification regimes, although some differentiation between rules applicable to each
- Wider in scope than current Statements of Principle and Code of Practice for Approved Persons (“APER”)
- FCA and PRA will be able to enforce rules against Senior Managers and Certified Persons
- Obligations on banks to provide tailored training to Senior Managers and Certified Persons and to notify breaches to regulators

Criminal offence of recklessly taking a decision causing an institution to fail

The journey so far

The rapid development of the new regimes began in June 2013 with the recommendations made by the Parliamentary Commission on Banking Standards (“PCBS”) that new “Senior Persons” and “Licensing” regimes should be introduced.

For fuller commentary on the changes made to the proposals as they have progressed through Parliament, see our briefings published in June 2013, October 2013 and January 2014.

Most of the relevant provisions of the Act, which amend and supplement Part 5 of the Financial Services and Markets Act 2000, entered into force in July 2014 but are being held in abeyance until the finer

detail of how the regimes will operate in practice has been decided.

The FCA and PRA have emphasised that they have designed their proposed rules to operate “jointly as a single cohesive regime in practice”. However, when applying the proposed new arrangements to their organisational and governance arrangements and preparing responses to the consultation paper (which are

required to be submitted by 31 October), many institutions will identify practical challenges arising from the different approaches taken by the FCA and the PRA in a number of areas.

The key questions facing banks and individuals covered by the new regimes (and who may come within their ambit in future) are addressed below.

Who is covered by the new regimes?

Which firms are affected?

At present, only UK institutions with permission to accept deposits (not including insurers), and investment firms with permission from the PRA to deal in investments as principal are covered.

UK branches of foreign banks are not currently covered, but bringing them within the new regimes is high on HM Treasury’s political agenda, and steps to pass the necessary secondary legislation have been announced. The PRA has set out brief details of how it envisages the new regimes applying to individuals in UK branches of overseas institutions. The FCA will wait until HM Treasury has legislated before

consulting on how it would approach the issue.

Any time lag between the anticipated implementation date for the new regimes (currently estimated to be mid 2015) and the extension of their scope to UK branches of foreign institutions is expected to be short.

Who will be a “Senior Manager”?

The SMR is intended to cover the top levels of decision makers within institutions. Although exactly how far down an institution’s governance structure it reaches will vary, all members of banks’ boards, together with some individuals in the echelons immediately

below board level (such as the Executive Committee in many institutions) will need to be approved as Senior Managers. In some instances, individuals in separate groups or parent companies who exercise significant influence over decision making may also be required to be approved as Senior Managers.

Between them, the regulators have identified a total of 17 “Senior Management Functions” (“SMFs”) in banks which will require approval. The addition of the “head of key business area”, “group entity senior manager” and “significant responsibility senior manager” SMFs represent significant extensions to the existing approved persons regime.

	Executive	Non-executive
FCA	Executive Director Significant Responsibility Senior Manager Money Laundering Reporting Compliance Oversight	Non-Executive Director Chair of Nominations Committee
PRA	Chief Executive function Chief Finance function Chief Risk function Head of Internal Audit Head of key business area Group Entity Senior Manager	Chairman Chair of the Risk Committee Chair of the Audit Committee Chair of the Remuneration Committee Senior Independent Director

The regulators have stated that they will allow each SMF to be shared and have acknowledged that relevant individuals may not necessarily be based in the UK. However, they have made clear that the individuals put forward for particular SMFs must be the most senior individual responsible for overseeing or managing that particular aspect of the institution's affairs. The FCA, in particular, has described the test for identifying the right individual as the person from whom the board would expect to receive a report in respect of a particular issue, which may not necessarily correspond with the individual's job title.

Who will be a "Certified Person"?

The onus will be on banks, both when recruiting and on an ongoing basis, to ensure that no employee performs a "significant harm function" unless they have been certified as fit and proper to do so.

The FCA and PRA have taken different views as to who may cause "significant harm" within banks. The PRA, concerned with safety and soundness, has used the definition of "material risk taker" in the Capital Requirements Regulation (whose proposed meaning is discussed in the parallel joint consultation paper on remuneration rules issued simultaneously by the regulators) as the basis for identifying Certified Persons within banks covered by its remit. It proposes that any individuals performing a SMF or a controlled function under the approved persons regime should be treated as falling outside the Certification Regime for its purposes, as should "individuals whose functions are not related to the regulated activities of the firm" (although it does not provide details of how this is to be determined). The net result of this process is expected to be that the PRA's Certification Regime will cover a relatively select grouping of the employees of the

banks it regulates, some of which may be located outside the UK.

By contrast, the FCA, reflecting its focus on the risk of harm arising from breaches of conduct standards, has drawn the boundaries much more widely. This disparity stems from its decision to bring individuals who, under the current approved persons regime, would occupy "significant influence functions" but will not be Senior Managers under the SMR (for example, benchmark rate submitters), individuals in customer facing roles with qualification requirements, and any person (other than a Senior Manager) who supervises or manages a "Certified Person" within their scope.

To whom will the new Conduct Rules apply?

Conduct Rules, which are divided into core "first tier" and additional "second tier" rules, will apply to all individuals

falling within the combined scope of the SMR and the Certification regime.

For institutions regulated by the FCA, the new rules will extend even further downwards to cover the majority of staff. The only individuals who will not be subject to the rules will be ancillary staff performing a role not specific to the financial services business of the institution, i.e. those whose role would be fundamentally the same if they worked in a non-financial services organisation. This is proposed to be defined by reference to an exhaustive list of 20 categories of support staff, with examples including reception, security, catering and cleaning staff.

The table below outlines which rules will apply to which employees under the regulators' distinct proposed approaches. The content of the rules applied by both

regulators will be the same (although the FCA will require compliance with two additional rules).

	Senior managers	Certified persons	Other employees other than ancillary staff	Ancillary staff
First tier conduct rules	✓ ✓	✓ ✓	✓ x	x x
Second tier conduct rules	✓ ✓	x x	x x	x x
Institutions regulated by FCA			✓//x	
Institutions regulated by PRA			✓//x	

What will the new regimes mean for institutions?

How many Senior Managers will institutions be required to appoint?

The PRA proposes to mandate that all institutions falling within its SMR must have one or more individuals occupying each of the Chief Executive, Chief Finance and Chairman functions and to prescribe that certain types of institutions must appoint one or more individuals to other particular SMFs.

It is expected that, in practice, most significant institutions will appoint at least one individual in respect of each SMF. There are some restrictions on the combinations of SMFs individuals will be able to perform. This is aimed at ensuring

that the SMFs are independent where necessary and that they have the required skills and experience.

What will Senior Managers' responsibilities be?

The SMR has been designed to enable banks to allocate responsibilities among Senior Managers flexibly. It has been left to institutions to decide how to do so in the way best suited to their activities and structure. Individual Senior Managers' particular responsibilities will be a function of factors such as the size and activities of the institution, and how many individuals are approved as Senior Managers.

Separately, the FCA and PRA have each set out lists of responsibilities, which may not fall squarely within the remit of particular Senior Managers, which they will require to be divided between Senior Managers. The PRA's proposed rules require all of these "prescribed responsibilities" to be allocated to a specific Senior Manager and dictate that some can only be allocated to non-executive Senior Managers.

However, the FCA has identified certain core responsibilities (some of which correspond to those prescribed by the PRA) which it will require to be allocated among Senior Managers. In addition, it

has listed others that will not necessarily apply to all firms. Where these do apply, the individual with “overall responsibility” for them will be required to be approved by the FCA as a Senior Manager. Where individuals with “overall responsibility” are not already approved by the FCA or the PRA as a SMF, they will be required to be approved as the occupant of a “significant responsibility” SMF.

The PRA has also made clear that institutions can choose to allocate additional responsibilities to individual Senior Managers and that, in some instances, it may require them to do so. The FCA has clarified that, where firms allocate additional responsibilities to individuals occupying SMFs over and above those prescribed under the SMR, it will regard all those individuals as jointly responsible for them.

What should Statements of Responsibilities and Responsibilities Maps look like?

The requirement for institutions to put together and submit Statements of Responsibilities in respect of each proposed Senior Manager (both when applying and where there are any significant changes to the individual's responsibilities) is one of the most important differences from the approved persons regime. These statements will be used not only at the approval stage but also by Supervision and, if necessary, by Enforcement to identify and evidence who is responsible for oversight of a particular aspect of an institution's activities under the “reverse burden of proof”.

The PRA, whose expectations with regard to these statements are likely to mirror those of the FCA, has indicated that the content of both documents should remain dynamic. They intend to require Statements of Responsibilities to be supported by information which may include, but is not limited to, CVs, job

descriptions, organisational charts, learning and development plans, and institutions' Responsibilities Maps. Similarly, both regulators have left it to institutions to decide on the format and content of Responsibilities Maps, simply stating that they must be contained in a single document and giving only high level indications of the information that should be included to summarise and illustrate lines of responsibility.

What will banks' training, monitoring and notification obligations entail?

The obligations of institutions and individuals will not end with the identification of who will be covered by the SMR, Certification Regime and Conduct Rules. They will have ongoing obligations to provide appropriate training, assess whether individuals remain fit and proper for the roles they occupy, and make the regulators aware of issues affecting an individual's fitness and propriety. Responsibility for compliance with the training, monitoring and notification obligations will rest with one or more designated Senior Managers.

Institutions will be required to make reports where they are aware or suspect that an individual has breached Conduct Rules, where they have taken formal disciplinary action in response to conduct amounting to a breach of a conduct rule or, in the case of Senior Managers, where they become aware of any grounds on which that individual's approval may be withdrawn. It is proposed that all notifications are made to the FCA, which will then share information with the PRA as appropriate.

Where the known or suspected breach has been committed by a Senior Manager, institutions will be obliged to notify the FCA within seven days of becoming aware of the matter. The regulators have proposed that breaches

by other individuals should be notified in aggregated lists submitted on a quarterly basis.

The regulators have proposed that the Conduct Rules are adopted six months before the commencement of the SMR and the Certification Regime to enable institutions to provide individuals covered by these regimes with training on the rules. They have proposed that institutions will be allowed a period of 12 months after the commencement of the SMR and Certification Regime to train other employees subject to the rules.

How will the FCA and PRA assess applications for approval?

The FCA will make some amendments to the Fit and Proper Test set out in the Handbook. These are largely cosmetic and aimed at integrating the tests which institutions will have to apply under the Certification Regime, rather than substantively altering the nature of the tests to be applied.

The PRA has stated that, as part of the ongoing exercise of excising and updating the parts of the legacy FSA Handbook relevant to its remit, it will publish new rules (in the form of a supervisory statement to sit within the PRA Rulebook). This will set out the personal characteristics, competence, knowledge, experience, qualifications and training it considers necessary to enable “sound and prudent management”.

In the consultation paper, the PRA has indicated that its process will involve a three pronged assessment of “probity, reputation and financial soundness”, “competence and capability”, and “understanding of the regulatory landscape and the nature of the relationship they will have with the regulators”. The word “probity” (whose dictionary definition is “the quality of having strong moral principles, honesty

and decency”) does not appear in the PRA’s draft supervisory statement setting out its proposed approach in this area. It prefers the more familiar term “propriety” (defined as “conformity to conventionally accepted standards of behaviour or morals”). However, its use to describe the PRA’s proposed stance is amongst the most concrete illustrations to date of the more subjective “judgement based” approach to which it has previously committed itself, and may be an indication of its intention to subject applications to higher levels of scrutiny.

Both regulators propose requiring institutions to undertake criminal records checks on individuals put forward for SMFs and to obtain references covering their previous five years’ employment, which will have to disclose details of any breaches of Conduct Rules and associated disciplinary action.

A key difference between the current regime and the SMR will be that individuals may be approved subject to conditions or time limits. The FCA, in particular, has indicated that it is prepared to use these powers in cases where it identifies that individuals applying to occupy SMFs have the required skills and aptitude but may require coaching or training in particular areas, or where approval is sought for the purposes of providing cover for a defined period of time, or as part of a transitional management plan.

When and how will banks have to certify their employees?

The proposals give primary responsibility to institutions for assessing the fitness and propriety of the vast majority of individuals working for them. For institutions falling within the purview of the FCA, the criteria to be applied will be set out in the Fit and Proper Test (as amended). Those regulated by the PRA will look to new supervisory statements. Both contain requirements to obtain references covering an employee’s previous five years’ employment, which must disclose any breaches of Conduct Rules and associated disciplinary action.

Banks will have to reassess the fitness and propriety of all employees covered by the Certification Regime on an annual and ongoing basis (the latter meaning that they will not be permitted to wait until the annual renewal date to certify those coming within the scope of the regime during the course of a year). The regulators have stated that they expect that banks will be able to put in place a single process for certifying each employee who falls within either regulator’s Certification Regime, and propose allowing institutions 12 months from implementation of the Certification Regime to issue employees with their first certificates. In practice, the most effective and efficient way for banks to meet these expectations and comply with the separate obligation, to ensure that individuals cease to perform certification

functions where they refuse to renew individuals’ certification, is likely to be to integrate the certification process with their existing appraisal and performance management processes.

The regulators have indicated that they are unlikely to intervene in assessments of individuals. However, they will be looking closely at the systems and controls adopted by institutions to give effect to the Certification Regime, and will be swift to take supervisory (and, if necessary, enforcement) action to address perceived shortcomings.

What will compliance with the Conduct Rules entail?

Whilst the Conduct Rules the FCA and PRA propose to implement are the same, they have taken different approaches to the publication of guidance. The PRA will disapply the provisions of APER and replace them with more general policy material, which will not include detailed examples of non-compliant behaviour.

The FCA will support the Conduct Rules with detailed guidance, drawing upon, simplifying and supplementing APER and providing non-exhaustive lists of behaviour which, in its view, will amount to breaches. These lists are likely to be relatively lengthy and detailed, and will be of assistance not only to institutions and individuals seeking to avoid breaches but also to the FCA as the building blocks of enforcement cases in due course.

The approvals, supervision and enforcement environments

How will the approval process work?

The detail of the proposed approval processes will be released in separate consultation documents later this year. However, the consultation paper acknowledges that the regulators’ approaches will evolve once the regimes

have been implemented, and will be coloured by their current policies on authorisations and approvals (which will continue to apply).

For now, the regulators have indicated that applications for approval must be

accompanied by Statements of Responsibilities, and have only provided outline details of how they will approach the granting of approvals to Senior Managers. Nonetheless, as mentioned above, the PRA in particular has signalled that it intends to examine applications

more intensively. It has indicated that it will test the due diligence conducted by institutions more thoroughly than is currently the case with, for example, closer scrutiny of criminal records checks undertaken and references obtained, and “a more tailored” assessment of a candidate’s knowledge and competency by reference to the particular SMF they are seeking to occupy.

The PRA has indicated that its supervision teams will be more involved than those of the FCA, and will take the lead on deciding “complex” applications (although it has not stipulated when it will consider applications to be “complex”).

The FCA and PRA have indicated that individuals wishing to fulfil more than one SMF will need to obtain separate approval for each (except where they are applying to the FCA to occupy the “significant responsibility senior manager function”) albeit in a single application. They have also confirmed that they propose to integrate their approval processes in order that individuals requiring approval from both the FCA and the PRA (e.g. Chief Financial Officers) will not be required to submit multiple applications.

Individuals performing a Senior Management function specified by the PRA require pre-approval by the PRA with the FCA’s consent. Individuals performing a SMF specified by the FCA require pre-approval by the FCA only.

The FCA has indicated that the same processes as currently apply in respect of decisions on applications under the approved persons regime will apply to those taken under the SMR. Those whom it proposes to refuse will first receive a “minded to refuse” letter, followed by consideration by the Regulatory Transactions Committee, and

then a right for the applicant to refer the matter to the Regulatory Decisions Committee and, ultimately, the Upper Tribunal.

Will banks and senior individuals notice any differences in the approaches taken by the regulators in dealing with them on a day-to-day basis?

The PRA has indicated that it sees the Certification Regime, in conjunction with the proposed new arrangements in relation to remuneration, as a helpful development in clarifying its “evolving requirements on the use of malus and clawback of variable remuneration and its powers to take enforcement action against individuals”. It has identified accountability, effective delegation, and the adequacy of checks and balances to prevent dominance by any one individual as areas of particular priority.

The FCA has indicated that it intends to maintain its focus on individuals’ continuing fitness and propriety once they have passed through the approval gateway, with remuneration and performance management singled out as areas of particular interest. It has made clear that it intends to continue to require firms to provide attestations in relation to compliance in particular areas, it is prepared to use its powers to vary individuals’ approvals if it has concerns about how effectively firms are applying the SMR. Future thematic reviews will focus on the role of senior management.

What will Senior Managers have to do to avoid falling foul of the presumption of responsibility?

Both regulators are clear that the “reverse burden of proof” presumption of responsibility does not create a strict liability environment for Senior Managers, with the FCA adding that it will “protect those who have properly discharged their

duties”. Both have stated that this will be an assessment to be made on a case by case basis by reference to existing criteria.

In the FCA’s case, these are set out in DEPP. The PRA has indicated that, when assessing whether to take any action, it will consider the specific responsibilities of any other SMFs in the area in which the contravention occurred. The PRA’s guidance on the circumstances in which it will take action against individuals is less detailed. In a statement that could be seen as placing a gloss on the relevant provisions of the Act, it has stated that it will require individuals to satisfy it that they took “reasonable steps to prevent, stop or remedy” breaches in order to discharge the reversed burden of proof. The PRA has also recognised that “reasonable steps” may include delegation where appropriate and undertaken effectively.

Should individuals be concerned about the new criminal offence?

Other than simply stating that the evidential and public interest tests under the Code for Crown Prosecutors will be applied, neither regulator specifies in the consultation paper when the new criminal offence of recklessly taking a decision causing an institution to fail is likely to be used. In practice, the additional measures put in place to avoid the failure of institutions and the substantial evidential difficulties which would be faced by prosecutors seeking to link decisions by an individual to the failure of an institution, are likely to mean that there will be very few prosecutions.

What happens next?

What will individuals currently occupying Significant Influence Functions have to do in order to become Senior Managers?

Under the “grandfathering” arrangements proposed by the regulators, individuals’ whose current approvals correspond with a SMF will not be required to re-apply. However, institutions will need to notify the relevant regulator of individuals existing SIF approvals and the equivalent SMFs they are proposed to occupy. They propose to require this notification to take the form of an attestation from the individual concerned.

This notification exercise is not intended to involve an assessment by the regulators of the competence of the individuals to occupy particular SMFs. Both regulators are clear that they regard this as the responsibility of institutions making applications.

Will the regulators release further details of their proposed approaches? When will the new regimes be implemented?

Further technical consultation papers, which will contain additional detail in areas such as notification of breaches to the regulators and proposed forms, are

expected later in 2014. A policy statement setting out finalised details of the new regimes is expected around the end of 2014. Current expectations are that the new regimes will be implemented in mid 2015.

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