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Preparing for the individual responsibility regime

A guide for FSMA authorised firms due to be covered by the regime from 2018, including its employment law and HR aspects



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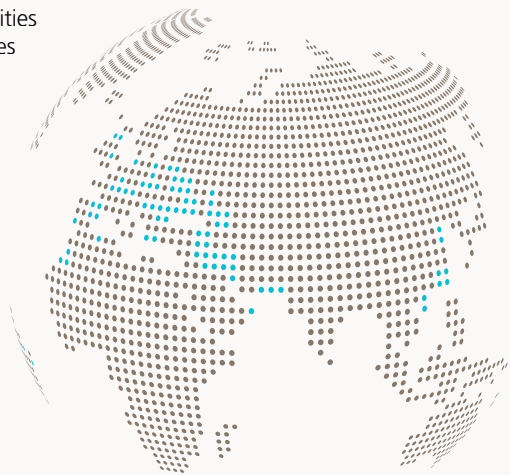
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(Bloomberg,
Thomson Reuters)

#2 in Europe
(Mergermarket)

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The individual responsibility regime

The individual responsibility regime – also known as the ‘senior managers regime’ or the ‘senior managers and certification regime’, and referred to in this guide simply as the regime – came into force for the banking and (in part) insurance sectors on 7 March 2016. The rationale behind the regime is that:

- senior individuals working in certain parts of the regulated sector should be personally responsible for any misconduct, and especially for their participation in any collective decisions; and
- nearly all staff in the sector should be subject to enforceable conduct rules.

From 2018, the regime is due to be extended to all FSMA authorised firms, including investment firms, asset managers, mortgage brokers and consumer credit firms. This will widen the scope of the regime to an additional 60,000 firms.

The regime will replace the current Approved Persons Regime (APR) for those firms which are FSMA authorised but outside of the banking and insurance sectors.

This guide describes the regime as it stands – it is expected that the regime will apply in a similar way to the rest of the financial services sector outside of its current remit. If you would like further information on the regime please see our more detailed brochure, which is available by contacting any member of the CMS team.

The regime for the banking sector carves a firm’s workforce into three categories:

1. senior managers;
2. certified staff; and
3. conduct staff.

Note: There is a similar regime for insurers, the Senior Insurance Managers Regime that also came into force on 7 March 2016, which is not covered by this guide.



Senior managers – key elements

Individuals holding one of a prescribed list of ‘senior management functions’ – also known as Senior Management Function holders and described in this guide simply as **senior managers** – must be **pre-approved** by the regulators. When the regime initially came into force in March 2016, a ‘grandfathering’ policy was in place for existing senior employees under the APR who were moving to similar roles, and it is likely there will be a similar grandfathering policy when the regime is extended in 2018.

Statement of responsibilities and management responsibilities map

A **statement of responsibilities** must be prepared setting out senior managers’ duties and the firm must prepare a **management responsibilities map** linking together the various statements of responsibilities, clearly identifying which individual is responsible for which senior management function and describing the firm’s governance arrangements. Applications for approval must be accompanied by a statement of responsibilities.

Firms must certify senior managers as **fit and proper** on an annual basis.

Senior managers are subject to both first tier and second tier **conduct rules**. These replace the existing Statements of Principle and Code of Practice for Approved Persons (APER).

Senior managers of banks are liable for a new criminal offence of causing a financial institution to fail, but it is widely considered that this is unlikely ever to be prosecuted.

Certification regime

Individuals below the level of senior managers who can **cause significant harm** to the firm or its customers (e.g. dealers, customer advisors) are covered by the certification regime and are known as **certified staff**.

Firms must certify staff under the certification regime as **fit and proper** on an annual basis. The firm will issue a certificate to the individual stating that it is satisfied they are fit and proper to perform the function and setting out what affairs they will be performing.

Certified staff are subject to first tier **conduct rules** but not second tier conduct rules.

Other staff

All other staff in a firm – except for 20 designated categories of auxiliary staff e.g. cleaners – are subject to first tier **conduct rules**.

Short term appointments

Short term appointments (e.g. holiday or emergency cover for a senior manager for less than 12 weeks in any 12 month period) are not subject to the regime.

Being certified as **fit and proper** requires certain attributes including:

- Honesty and integrity
- Competence and capability
- Financial soundness

Conduct rules

Firms must ensure everyone subject to conduct rules is notified of this fact and must take all reasonable steps to ensure that they understand how they apply to them, including by training.

First tier conduct rules

Rule 1: You must act with integrity.

Rule 2: You must act with due skill, care and diligence.

Rule 3: You must be open and co-operative with the FCA, the PRA and other regulators.

Rule 4: You must pay due regard to the interests of customers and treat them fairly (only enforceable by the FCA).

Rule 5: You must observe proper standards of market conduct (only enforceable by the FCA).

Second tier conduct rules

Rule 1: You must take reasonable steps to ensure that the business of the firm for which you are responsible is controlled effectively.

Rule 2: You must take reasonable steps to ensure that the business of the firm for which you are responsible complies with the relevant requirements and standards of the regulatory system.

Rule 3: You must take reasonable steps to ensure that any delegation of your responsibilities is to an appropriate person and that you oversee the discharge of the delegated responsibility effectively.

Rule 4: You must disclose appropriately any information of which the FCA or PRA would reasonably expect notice.

	Senior managers	Certified staff	Other staff (except for excluded categories e.g. cleaners)
Must be pre-approved by regulators	✓	✗	✗
Must agree a statement of responsibilities	✓	✗	✗
Must be certified by firms as fit and proper	✓	✓	✗
Subject to first tier conduct rules	✓	✓	✓
Subject to second tier conduct rules	✓	✗	✗

Employment law and HR issues

The regime is likely to impact nearly all staff in affected firms and internal HR processes will play an important role in managing the effect of the regime on all stages of the employment relationship, including recruitment, promotion and termination. Early preparation will assist firms in ensuring that compliance with the regime is as straightforward as possible when the regime is extended.

Note that for the purposes of the regime, 'employee' has a broader definition than that in the wider employment law context and includes anyone working under the supervision, direction or control of the firm, potentially including secondees, consultants and agency staff.

HR checklist	✓
<p>Identify and categorise your workforce. Which staff are likely to be covered by the senior manager regime and the certification regime, who will only be subject to the conduct rules, and who is likely to be excluded from the regime?</p>	
<p>Recruitment. Consider how the recruitment team conduct due diligence on potential hires and check that they are aware of upcoming developments. This is important to ensure that pre-employment checks / approvals are obtained.</p>	
<p>Certification as fit and proper. In addition to assessing individuals as fit and proper when recruiting a new hire and when an individual's function changes, firms will generally reassess fitness and properness on an annual basis as part of the appraisal process. Consider whether your appraisal process can accommodate such an assessment.</p>	
<p>Handovers. Firms must take all reasonable steps to ensure that a person becoming a senior manager, whether starting a new job or acquiring different responsibilities, and their supervisor (and possibly other managers) have all the necessary information for the senior manager to perform their role effectively and compliantly. Handover packs may include the previous 12 months' management reports/accounts, internal audit/compliance/regulatory reports.</p> <p>Consider what handover arrangements are in place and whether they will be sufficient to comply with the regime.</p>	
<p>References. Firms must take reasonable steps to obtain at least six years' references from current and past employers (whether or not those employers are regulated), in relation to both senior managers and certified staff. Regulated past employers are under a continuing obligation to update references given in the previous six years if new information comes to light. Firms are only required to update the current employer (where that employer is a FSMA authorised firm). There is a mandatory template for providing references, although firms can change its format as long as this does not affect what is discussed.</p>	
<p>Training. Training must take place to educate individuals about their responsibilities, including compliance with the conduct rules. Consider how the regime will be incorporated into the existing training arrangements.</p>	
<p>Employment documents – handbooks, contracts and settlement agreements. Staff handbooks and standard contracts of employment should be reviewed and updated to ensure they support the requirements of the regime e.g. obligations on handover arrangements and compliance with conduct rules, and consents to ongoing checks to be certified as fit and proper (e.g. criminal records checks) and the firm's provision of six years of references. Settlement agreements may also need to be amended.</p>	
<p>Whistleblowing. Firms are required to comply with whistleblowing procedures, establish a whistleblowing channel/hotline, and appoint a 'whistleblowers' champion' who will be responsible for overseeing a firm's whistleblowing policies and reporting to the board on how the policies are operating on an annual basis.</p>	



Key contacts



Simon Morris

Partner, Financial Services, London
T +44 20 7367 2702
E simon.morris@cms-cmck.com



Gillian MacLellan

Partner, Employment, Glasgow
T +44 141 304 6114
E gillian.maclellan@cms-cmck.com



David Pygott

Of Counsel, Financial Services, London
T +44 20 7367 2543
E david.pygott@cms-cmck.com



Sarah Ozanne

Of Counsel, Employment, London
T +44 20 7367 2650
E sarah.ozanne@cms-cmck.com



Joseph Hewton

Associate, Financial Services, London
T +44 20 7367 2047
E joseph.hewton@cms-cmck.com



Tom Cloke

Senior Associate, Employment, Glasgow
T +44 141 304 6256
E tom.cloke@cms-cmck.com



Rob Briggs

Lawyer, Employment, London
T +44 20 7367 2399
E rob.briggs@cms-cmck.com



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CMS Cameron McKenna LLP
Cannon Place
78 Cannon Street
London EC4N 6AF

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000

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