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Are you SMCR ready?  
A 10 point guide for Human Resources

## ARE YOU SMCR READY?

# A 10 point guide for Human Resources

The Senior Managers and Certification Regime (SMCR) comes into force on 9 December 2019 for all Financial Conduct Authority (FCA)-regulated asset management firms, replacing the old Approved Persons Regime.

The FCA expects these changes to increase the accountability of individuals who make decisions that affect markets and customers. The SMCR was first introduced for banks and Prudential Regulation Authority (PRA)-designated investment firms in March 2016, however some changes are being made to the regime as it applies to FCA solo-registered firms to reflect the varying size of asset management firms.

The FCA has communicated with relevant firms about the new regime, and these firms should now be starting their SMCR preparations. This will include reviewing and mapping where various Senior Manager responsibilities sit across their organisation. Firms should also consider what 'level' of firm they are (Limited Scope, Core or Enhanced) based on the FCA's guidance, and be putting processes in

place to deal with ongoing requirements under the regime. The FCA's aspiration is for the regime to fit with existing processes. However, firms will need to carry out an audit of their existing systems and make any necessary changes to ensure compliance.

While the regime focuses on the individual accountability of Senior Managers and, operationally, will need to be driven by the business and those Senior Managers who are responsible for it, often those in a compliance or human resources (HR) role will be heavily involved in the audit and implementation phases, and there are likely to be a number of consequences for HR processes. In this guide we take a look at the implications for HR, and what you and your HR team should be doing now to prepare for the extension of SMCR to your firm.

# Overview

To comply with SMCR, firms will need to meet the basic regime and the specific requirements that apply to them.

## THE BASIC REGIME

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This is the basic standard with which all regulated firms must comply. It covers three things:

1. Senior Managers Regime. The most senior individuals within a firm must be approved by the FCA. Applications need to be submitted that include a statement of that individual's responsibilities.
2. Certification Regime. Employees who are not senior managers, but whose actions could have a significant impact on customers/the market/the firm must be certified by their employer as fit and proper.
3. Conduct Rules. Nearly all employees in the financial services sector will need to abide by the new conduct rules, which are a high level statement of the standards of conduct expected. Senior managers have supplementary conduct rules which apply to them in addition to the conduct rules applicable to almost all other staff.

## SPECIFIC REQUIREMENTS

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These specific requirements will depend on the 'level' of firm. Different categories of senior manager are necessary for different types of firm. The FCA has published a flowchart that can be used to check what category your firm falls into ([p33 of the near-final rules published on July 2018](#)).

**Limited Scope:** These firms are those that currently have a limited application of the Approved Persons Regime, and will be subject to fewest requirements. For example, this applies to sole traders, subsidiaries of local authorities/registered social landlords, service companies and participants in certain markets amongst others.

**Core:** The classification of most asset management firms. This guide focuses mostly on the requirements applicable to Core firms. However, the steps are also applicable to Enhanced firms.

**Enhanced:** These firms have additional requirements related to handover arrangements and responsibility maps. This only applies to a very small percentage of firms – those that are FCA solo-regulated, large and complex.

# Glossary

**Certified Staff** – these individuals perform 'certification functions', which means they work in roles which could pose a risk of significant harm to a firm or to any of its customers.

**Conduct Rules** – minimum FCA conduct rules applicable to all staff in financial services firms other than 'ancillary' staff such as cleaners, receptionists, catering and security staff. More stringent Conduct Rules apply to Senior Managers.

**F&P** – 'Fitness and Propriety'. Firms must assess the F&P of Senior Managers, Non-Executive Directors, and Certified Staff on appointment and at least once a year thereafter.

**NED** – 'Non-Executive Director'. Some NEDs may hold senior manager functions (SMFs), and therefore be subject to approval by the FCA, but others will not and so it will be up to the firm to assess their F&P.

**Senior Managers** – senior individuals who are accountable for one or more SMFs and subject to approval by the FCA.

**SMF** – 'Senior Manager Function'. There are a number of SMFs that must be allocated to senior individuals who are accountable for the relevant function.

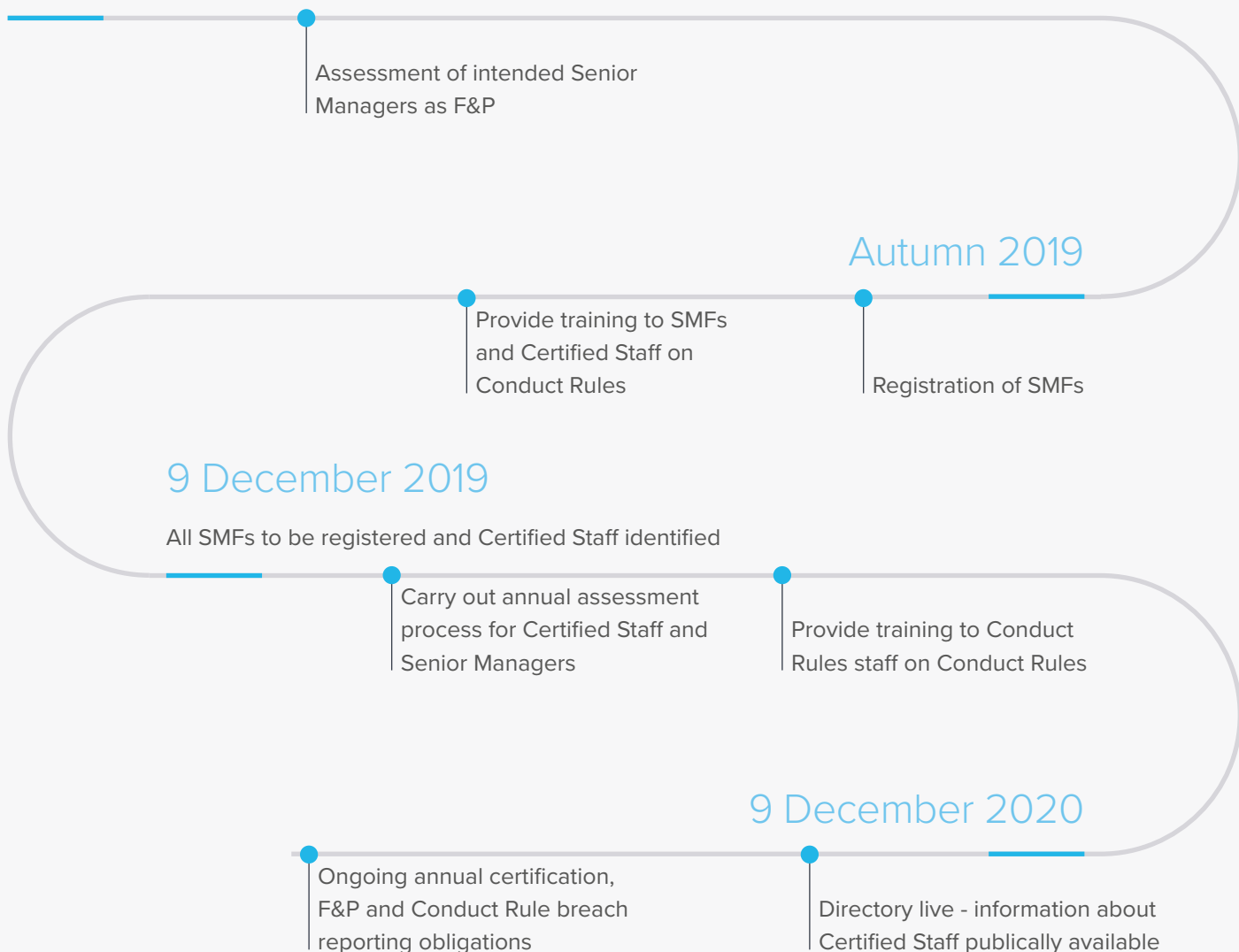
**SoR** – 'Statement of Responsibility'. Each Senior Manager must have a SoR, which must be a short statement setting out their responsibilities. This must be done on a per-entity basis.

# Timeline

SMCR will become operational for asset management firms from 9 December 2019, but there is plenty to do between now and then.

In addition to the mandatory steps set out in the timeline below, there are a number of additional tasks to be undertaken set out on the following pages.

## Preparatory work



# 1. Senior Manager Statements of Responsibilities

Each Senior Manager must have a SoR that sets out clearly what they are accountable for, based on the template provided by the FCA. This has to be done per entity, so managers with responsibilities across more than one group company will have several SoRs. The FCA has published useful guidance ([fca.org.uk/publication/finalised-guidance/fg19-02.pdf](https://www.fca.org.uk/publication/finalised-guidance/fg19-02.pdf)) on this subject, giving examples of best practice.

The basic principle is that the SoR should be clear and easy for regulators, the Senior Manager and others in the firm to understand. The SoR should contain enough information to clearly describe the Senior Manager's actual responsibilities and accountabilities, but without unnecessary detail. A SoR needs to be self-contained and not refer to other documents.

Senior Managers are legally responsible for maintaining and updating their own SoRs but it is important that HR are involved in this process to ensure that there are no gaps or uncertainties arising when all of the Senior Managers' SoRs are considered together.



## Points to consider

- How will you work with Senior Managers to ensure that their SoRs are kept up-to-date?
- What checks and balances will ensure the relevant prescribed responsibilities are distributed across Senior Managers?

# 2. Certification regime: F&P Assessments

Firms will already have been assessing the fitness of their employees by vetting them on appointment and then monitoring performance through annual appraisals. Under SMCR, this becomes more formal. Firms must now:

- carry out F&P assessments at different points in the employee life-cycle for all Certified Staff, NEDs, and Senior Managers; and
- issue a certificate to Certified Staff to evidence that the assessment has been carried out and passed. The certificate should state the date of the F&P assessment and period of validity (up to one year). Senior Managers who do not carry out certification functions do not need a certificate but firms may choose to issue one in order to have an audit trail.



What forms part of the F&P assessment will vary depending on whether the assessment is:

- at the start of the individual's entry into the regime (by promotion or recruitment);
- part of an annual certification / assessment process; or
- triggered by an ad-hoc event.

We have listed below the factors that firms should consider for each type of assessment.

Some factors will be relevant for all roles, such as a criminal records check. The assessment as a whole must also be tailored to the particular role (for example, the knowledge required of a Money Laundering Reporting Officer to perform their role correctly will be different from that required of a Chairperson).

#### **INITIAL F&P ASSESSMENT**

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When recruiting externally, typically the firm will consider an individual's qualifications; their competence (based on their application form and interview); the results of criminal/credit checks; and regulatory reference(s) from any past firms.

If the individual is being promoted, then past annual appraisals will also be relevant.

#### **ANNUAL F&P ASSESSMENT**

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Firms will normally have more information when undertaking annual F&P assessments. The main source will be the individual's annual review/appraisal, but other sources are relevant. For example: CPD/training records; a self-declaration that they have behaved in a fit and proper manner and commit to upholding high standards of behaviour and competence; and checking if they have any cumulative minor breaches of conduct rules that would not have triggered an ad-hoc F&P assessment in and of themselves. Some firms may conduct a sample criminal record check.

#### **AD-HOC F&P ASSESSMENT**

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There are circumstances that can trigger an ad-hoc assessment as to whether or not the individual is still fit and proper to perform their regulated role. For example, this would occur when someone returns from an extended absence; as part of a disciplinary/capability/breach reporting process; if they have failed a required exam; if there has been a change in their regulatory responsibilities; or if an updated regulatory reference is received from a previous firm. The appropriate procedure will depend on the relevant circumstances.



### Points to consider

- Are changes needed to ensure annual appraisals fit into your assessment of F&P?
- Do you need to engage with Senior Managers to let them know that they may have an additional assessment before 9 December 2019?
- How will processes be updated to consider ad-hoc F&P assessments?
- What will your escalation process be, for example for when a criminal records check returns a driving conviction?
- What records will be kept of these assessments, particularly if something potentially adverse is uncovered?
- What route of appeal will be open to employees if they are assessed as not fit and proper, and how does this tie in with existing appeals of disciplinary or performance management decisions?

## 3. Changes to employment contracts

Changes will need to be made to staff contracts as follows:

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### Conduct Rules staff

Should have an explicit requirement to abide by the Conduct Rules and an acknowledgement that breaches will be reported to the FCA. They should also be obliged to cooperate with any FCA or firm investigations.

### Certified Staff

As for Conduct Rules staff, plus reference to the fact that the role is regulated by the FCA, and that they must comply with F&P assessment requirements and provide prompt details of any changes to their personal circumstances, which means the firm will need to update the Directory.

### Senior Managers

As for Certified Staff, plus reference to their handover obligations, and including their SoR.

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We expect that in most cases firms will make amendments unilaterally as the changes are a regulatory requirement, rather than seeking consent from staff. Despite not relying on consent it will still be important to ensure that staff are aware of, and understand, the new requirements so you should obtain express acknowledgment of any contractual changes.

Offer letters for new Certified Staff, NEDs, and Senior Managers should also specify that their appointment is subject to you assessing them as fit and proper, and receipt of satisfactory regulatory references.



### Points to consider

- Will you use the new regime to issue new contracts to all staff, or incorporate these changes by way of an amendment letter?
- What is the best timing of a contract change?
- What will your response be to any attempts by Senior Managers to negotiate a pay increase or increases to directors' and officers' liability (D&O) insurance as a result of SMCR responsibilities?

## 4. Changes to policies

The key policies likely to be affected are:

- Disciplinary policy – noting that the outcome of disciplinary proceedings relating to a conduct rule breach will need to be disclosed in a regulatory reference; ensuring breach of the Conduct Rules is classed as misconduct; noting that suspension on pay will need to be (in the case of Senior Managers) reported to the FCA; and noting that steps taken under the policy may result in a reconsideration of whether an employee is fit and proper to perform their role.
- Compliance training policy – making it clear that it is mandatory to complete Conduct Rules training applicable to an employee’s role, and that timely completion of compliance training will be a component of F&P assessment.
- Screening/verification policy – noting any relevant changes to the criminal records checking that the firm is carrying out, and how often and when people will be vetted.
- Remuneration policy – checking any impact of SMCR on clawback provisions.

One additional policy that will be necessary for Enhanced firms, but may be useful for all firms, is a handover policy, setting out how the firm is going to deal with requirements relating to handovers for Senior Managers.



### Points to consider

- Which policies do you have, and how will they be affected by SMCR?
- Do you need to introduce any new policies?
- Do you need to send specific communications to employees about these changes?

## 5. Conduct rules and training requirements

### CONDUCT RULES

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The majority of individuals working at FCA-regulated firms will need to abide by the Individual Conduct Rules. Senior Managers will also be covered by the Senior Manager Conduct Rules. The only exemption from the requirement to abide by the Individual Conduct Rules will be for ‘ancillary staff’ such as cleaners, receptionists, catering and security staff.

The Individual Conduct Rules are:

1. You must act with integrity;
2. You must act with due skill, care and diligence;
3. You must be open and co-operative with the FCA, the PRA, and other regulators;
4. You must pay due regard to the interests of the customer and treat them fairly; and
5. You must observe proper standards of market conduct.

The Senior Manager Conduct rules reflect the management duties these people have for the specific part of the firm for which they are responsible, as well as their responsibility for the effective running of their firm as a whole. The rules are:

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



4. You must disclose appropriately any information of which the FCA or PRA would reasonably expect notice.
5. When exercising your responsibilities, you must pay due regard to the interests of current and potential future policyholders in ensuring the provision by the firm of an appropriate degree of protection for their insured benefits.

NEDs are subject to the five Individual Conduct Rules, and also to the 4th Senior Manager Conduct Rule.

Certified Staff and Senior Managers must have received tailored training on the Conduct Rules before 9 December 2019. All other Conduct Rules staff must have received training on the Conduct Rules by 9 December 2020.

## TRAINING REQUIREMENTS

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Training will be required on the new SMCR regime. It is likely that firms will look to HR to facilitate these sessions. There is a specific prescribed responsibility for Conduct Rules training, and so a Senior Manager will be designated as accountable for ensuring such training is carried out effectively. The main areas where training will be required are:

- managerial training on how to assess F&P;
- Conduct Rules training for Senior Managers – this will normally require face-to-face, tailored training;
- Conduct Rules training for Certified Staff – this should still be tailored to their role, but may be face-to-face or computer-based; and
- Conduct Rules training for all other staff (except ancillary) – this is likely to be computer-based.



### Points to consider

- Who will deliver this training?
- How can the training be tailored so it is relevant to particular roles?



## 6. Breach reporting

Firms must report to the FCA any disciplinary action taken against a person for a Conduct Rules breach.

For Senior Managers, firms must notify within seven business days of the conclusion of disciplinary action using the appropriate regulatory form.

For Certified Staff and other Conduct Rules staff, firms must notify breaches through the FCA's electronic reporting system on an annual basis each October. However, particularly serious breaches should be reported to the FCA immediately.

For the purposes of breach reporting, 'disciplinary action' is defined as the issuing of a formal written warning; suspension or dismissal; or reduction or recovery of remuneration (clawback). The inclusion of suspension is notable as this decision is normally taken before any facts have been determined, and is not commonly used as a sanction. Careful consideration is required before any decision to suspend. Recent case law has found that suspension is not a neutral act, and its classification as 'disciplinary action' under SMCR is relevant.



### Points to consider

- How is your firm going to combine the breach process with the disciplinary process in a way which avoids the potential for inconsistent decisions, and avoids a cycle of appeals and grievances?
- What interaction will there be between Compliance and HR functions in relation to this process?
- When will a breach of the Conduct Rules trigger an ad-hoc F&P assessment?

## 7. New hires

SMCR has implications for recruitment. It will take time to bring in a new Senior Manager, given the need for FCA approval (taking up to three months) before they can properly exercise their function.

Firms have two available routes when recruiting a Senior Manager: bring them on and have them work under supervision while their competence is assessed and their approval form is sent to the FCA; or delay the start date until the FCA pre-approves them. The FCA prefers the latter approach on the basis that someone should not be brought into a firm and be privy to confidential information unless they are fit and proper to fulfil their role as Senior Manager. However, this delays the process and can deter individuals from accepting a role in principle without knowing when they will start.

The FCA may also interview new Senior Managers, causing further delay in recruitment. You should take steps to ensure that your potential new Senior Manager is familiar with their intended responsibilities and can answer the FCA's questions.

Firms must conduct criminal records checks for Senior Managers and NEDs as part of checking they are fit and proper. There is an exemption under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 that permits disclosure of information regarding spent convictions if the individual's role requires FCA approval, so a 'standard' check should be used here (and the individual informed of this).

The FCA has specified that criminal record checks are not mandatory for Certified Staff, however firms may choose to conduct these checks for other staff where legally they are allowed to do so. In practice, this means that firms may only carry out 'basic' checks that would disclose unspent convictions. As with any personal data, in order to conform with GDPR, firms should ensure their Employee Privacy Notices and retention policies inform employees as to what use is being made of their personal data, and the regulatory purpose behind these checks.



### Points to consider

- Will there be changes to the level of criminal record screening that you carry out for each level of staff?
- What changes will you make to your recruitment process and at what stage will you apply to the FCA for approval if directly on-boarding a Senior Manager – before or after you have taken them on in an initial, supervised capacity?

## 8. Employee exits

SMCR will have an impact on all senior exits, triggering forms being sent to the FCA to let it know of changes to the accountability structure of the organisation. In the case of planned exits (for example, retirement), then preparations can be made in advance and a successor Senior Manager lined up. Where a Senior Manager's departure is reasonably unforeseen, the '12-week' rule may be used to provide cover on a temporary basis by someone who is not approved.

In potentially contentious departures of Certified Staff or Senior Managers, HR should work closely with Compliance colleagues and seek legal advice at an early stage. Consistent messaging is important to ensure that the FCA is given the same information as would go into a regulatory reference.

Firms cannot provide a reference agreed via a settlement agreement when an employee is seeking to move to a regulatory role. Any style settlement agreements should be updated to refer to an overriding duty to provide a regulatory reference in this scenario, and to state explicitly that the firm will make all necessary disclosures to the FCA.

In all exits, Senior Managers will need to be reminded of the importance of preparing a thorough handover. Incoming Senior Managers need to be comfortable they have been briefed on the relevant issues for which they are becoming accountable, and a full handover document is essential for this.

You must also consider what information you will retain in the case of a future FCA investigation of your firm or the exiting Senior Manager to consider whether they complied with their duties. A careful balance should be drawn between giving Senior Managers comfort that they will have access to the information if necessary (to avoid them taking copies of confidential information 'just in case'), while avoiding a storage burden that is too onerous for the business. A recommended approach is setting out in a letter confirming their departure what documents you will keep for them for seven years after their departure, including SORs, training records, regulatory correspondence, and giving them 14 days to highlight any further documents that may be relevant to their duty to take reasonable steps to avoid contravention of a regulatory duty.



### Points to consider

- Will you need to update template settlement agreements to reflect that you must still comply with reporting requirements to the FCA?
- Are you prepared for more employees contesting disciplinary/performance findings, on the basis that this could impact their regulatory references and future career prospects?
- If Senior Managers are suspended, what access will they have to necessary data in order to comply with handover obligations?
- What arrangements will you have in place to provide temporary cover in the case of a quick exit?
- Does termination documentation need to be updated to communicate to Senior Managers what they will have access to if an FCA investigation happens after they have left?

## 9. Regulatory references

References for individuals in regulated roles must be provided in a specific FCA template format. This sets out what regulated role the individual held and, critically, whether the firm concluded that the individual was not fit and proper to perform a function or took disciplinary action against them. These regulatory references were introduced to prevent 'bad apples' rolling from one firm to another, protected by a series of settlement agreements. They are relevant for certain internal promotions and all external recruitment, and apply to Senior Managers, Certified Staff, and all NEDs.

### REQUESTING REFERENCES

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If the firm is promoting someone to a new Certified or Senior Manager role who has been with the firm for less than six years, or recruiting someone externally, then they will need to ask their previous employer(s), covering the last six years, for a regulatory reference. This can then be considered by the firm as an input into their initial F&P assessment. If a reference discloses something negative, the firm must consider whether it is appropriate in the circumstances to withdraw the offer.

### GIVING REFERENCES

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When providing a reference, firms must comply with common law requirements (that is, the references must be true, accurate, and fair), in addition to the regulatory reference rules.

Firms should investigate allegations before including them in a reference. The FCA has commented that fairness would normally require that an employee has had the opportunity to comment on the information included in a reference. This may occur at the time of a disciplinary process, or at the time of the reference if they have not previously had this opportunity. Good practice should mean that there are no surprises for the individual, especially given the serious consequences of adverse references.

What to include in a reference will need to be judged on a case-by-case basis, but a useful rule of thumb would be for a firm to consider whether they would have taken particular information into account had the individual remained with the firm, and the firm was required to make an F&P assessment. If so, it will be relevant enough to include in the reference.



### Points to consider

- What will your firm's approach be if an employee has come from an overseas firm, or from a non-regulated role (as their previous employer will not be bound to give a regulatory reference)?
- When giving references, how will you build in consideration as to whether to include allegations of misconduct where an investigation was not started (or concluded) due to an employee's departure? This will be a delicate balancing act between a firm's obligations to the FCA, and to the employee.
- How can you ensure consistency between references given and reports made to the FCA? If a report is made to the FCA that a Senior Manager has been removed due to concerns about their fitness, this should be reflected in any reference provided.

## 10. Directory submissions

Following the introduction of SMCR to asset managers, the FCA's Financial Services Register will continue to detail Senior Managers who are approved by the FCA, but will no longer contain information on Approved Persons – or Certified Staff.

Given the loss of this information from the Financial Services Register, the FCA has decided to introduce a centrally-hosted directory that each firm will be responsible for updating. This will make the following information publically available:

Employer details	Restrictions applying to a firm's regulated activities	Individual's name
Individual reference number	Relevant roles held	Start and end date of each role
Type of business the individual is qualified to undertake	Workplace location	Customer engagement methods
Memberships of relevant accredited bodies	Regulatory sanctions and prohibitions	Date information was last updated

Firms will have seven business days to update information on joiners, leavers, and changes in circumstances. Behind the scenes, firms will also have to provide the registered individual's NI number and/or passport number to enable them to identify the person correctly.

Asset management firms will have until 9 December 2020 to upload their data to the directory for the first time. The FCA suggests that this is done after Certified Staff are certified for the first time as fit and proper, however information that is entered earlier will not appear until after this date.

Under the Conduct Rules, everyone listed on the directory is responsible for providing accurate information to their employer – the employer is then responsible for carrying out necessary checks to verify this information and to notify the FCA.



### Points to consider

- Who will be responsible for updating the directory – Compliance or HR?
- How do you communicate the importance to employees of timely notification to you of any relevant changes?

## Conclusion

Our employment team has specialist experience supporting asset management firms.

While the FCA has stated that the regime should not be too burdensome on employers, the reality is that SMCR marks a sea-change in accountability and in procedures that asset management firms need to have in place to enforce it and assess F&P.

If you have any questions or would like support updating your contracts and policies to prepare for SMCR, please get in touch with one of our SMCR specialists, or your usual contact in the employment team.



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