

Employment in Financial Services

Contributing Editor

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03. What documents should be put in place when engaging employees within the financial services industry? Are any particular contractual documents required?

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As a matter of general UK employment law, employers must give employees written particulars of certain terms and conditions of employment. This is known as a “section 1 statement” after section 1 of the Employment Rights Act 1996, which sets out the mandatory information that employers must give to employees no later than the first day of their employment. This includes fundamental information such as the names of the employer and employee; the date of commencement of employment; the rates and timing of pay; and working hours. Other prescribed particulars (such as information regarding pensions, collective agreements and training) can be provided to employees in instalments within two months of commencement of employment. Typically, a written employment contract will contain the relevant information to satisfy these requirements.

Financial services employers should ensure that, in addition, their employment contracts reinforce the requirements of SM&CR. This will help the employer manage the employment relationship in a manner compliant with SM&CR and demonstrate to the relevant regulators the employer’s commitment to compliance with SM&CR. The employment contract will usually include, therefore, additional provisions regarding the completion of SM&CR-compliant background checks; confirmation of the employee’s regulated function (eg, their SMF or certification function); required regulatory standards of conduct; cooperation with fitness and propriety assessments; and tailored termination events.

In addition, all senior managers must have a statement of responsibility setting out their role and responsibilities. Certain firms must also allocate certain regulator-prescribed responsibilities (prescribed responsibilities) among senior managers. It is common to set out a senior manager’s regulatory responsibilities in their employment contract.

Dual-regulated firms must also ensure that individuals approved to carry out a PRA-designated SMF are subject to any specific contractual requirements required by the PRA. For example, depending on the type of firm, a firm may be required to ensure that the relevant individual is contractually required to comply with certain standards of conduct, such as to act with integrity and with due care and skill (among other

requirements).

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04. Do any categories of employee need to have special certification in order to undertake duties for financial services employers? If so, what are the requirements that apply?



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See question 2.

All individuals performing an SMF, as classified by the FCA or PRA, will be subject to the SMR. SMFs are described in the Financial Services and Markets Act 2000 (FSMA) as functions that require the person performing them to be responsible for managing one or more aspects of a firm's affairs authorised by the FSMA, and those aspects involve, or might involve, a risk of serious consequences for the firm or business or other interests in the UK. As noted, any individual performing an SMF will need to be pre-approved by the relevant regulator before they can start their role, and thereafter they must be certified as fit and proper by their firm annually. Applications to the regulator for pre-approval must disclose all matters relating to a candidate's fitness and propriety and be accompanied by a statement of responsibilities. Firms must carry out a criminal records check as part of the application for approval.

Additionally, employees of firms who are not senior managers but who, because of their role, could still pose a risk of significant harm to the firm or any of its customers, may be subject to the CR. The certification functions that place an employee within the ambit of the CR are different under the rules of the FCA and the PRA but include persons such as those dealing with clients or those subject to qualification requirements. These employees must be certified by their firm as fit and proper for their roles both at the outset of their employment and on an annual basis thereafter (certified staff). Firms are not required to carry out criminal records checks for certified staff, but firms can choose to do so to the extent it is lawful.

The regulators have set out detailed guidance for firms to consider when assessing an individual's fitness and propriety. This includes assessing an individual's honesty, integrity and reputation; competence and capability; and financial soundness.

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05. Do any categories of employee have enhanced responsibilities under the applicable regulatory regime?



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Every senior manager under the SMR has a “duty of responsibility” concerning the areas for which they are responsible. If a firm breaches a regulatory requirement, the senior manager responsible for the area relevant to the breach could be held accountable for the breach if they failed to take reasonable steps to prevent or stop the breach.

In addition, for most firms, the FCA requires that certain responsibilities – “prescribed responsibilities” – are allocated to appropriate senior managers. These responsibilities cover key conduct and prudential risks. They include, among others, responsibility for a firm’s performance of its obligations under the SMR; responsibility for a firm’s performance of its obligations under the CR; and responsibility for a firm’s obligations around conduct rules training and reporting. Firms must give careful thought to the best person to allocate each prescribed responsibility.

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06. Is there a register of financial services employees that individuals will need to be listed on to undertake particular business activities? If so, what are the steps required for registration?

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The FCA maintains a public list of authorised firms and the activities for which each firm has permission. This list is known as the Financial Services Register. The register also includes a directory of certified and assessed persons working in financial services – this includes for each firm (as applicable) senior managers; certified staff; directors (executive and non-executive) who are not performing SMFs; and other individuals who are sole traders or appointed representatives.

Firms are responsible for keeping the directory up to date. Firms must report certain information to the FCA about persons included in the register and directory, including information on an individual's role, their workplace location, and the types of business they are qualified to undertake. The FCA provides guidance and Q&As to assist firms with navigating the register and directory.

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07. Are there any specific rules relating to compensation payable to financial services employees in your jurisdiction, including, for example, limits on variable compensation, or provisions for deferral, malus and/or clawback of monies paid to employees?

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The remuneration of financial services employees working at certain firms (such as banks, building societies, asset managers and investment firms) is heavily regulated. The relevant rules can be found in various FCA “Remuneration Codes” (each Code tailored to different firms) and also (for dual-regulated firms) in specific remuneration parts of the PRA Rulebook and directly applicable retained EU law.

The remuneration rules are complex and their application is dependent on each firm. The key principle of the rules, however, is that firms subject to them must ensure that their remuneration policies and practices are consistent with and promote sound and effective risk management.

Some elements of the rules apply to all staff, whereas others apply only to material risk-takers within a particular firm.

By way of a snapshot, the rules generally cover such matters as:

- the appropriate ratio between fixed pay and variable pay, to ensure that fixed pay is a sufficiently high proportion of total remuneration to allow for the possibility of paying no variable pay;
- the amount of any discretionary bonus pool, which should be based on profit, adjusted for current and future risks, and take into account the cost and quantity of the capital and liquidity required;
- performance-related bonuses, which should be assessed based on a variety of factors, including the performance of the individual, the relevant business unit and the overall results of the firm;
- restrictions on guaranteed variable pay and payments on termination of employment; and
- malus and clawback requirements.

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08. Are there particular training requirements for employees in the financial services sector?



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The PRA and FCA training and competence regimes set the minimum standards that must be achieved by individuals working in the financial services industry. These regimes aim to ensure that authorised firms have arrangements in place to satisfy themselves that their employees are competent.

All FSMA-authorised firms are required to have adequately trained and competent senior management and employees. The training and competence requirements include:

- Threshold conditions on suitability – All firms must show that persons connected with the firm are fit and proper, taking into account all the circumstances. When assessing the suitability threshold of an employee, the FCA and the PRA will consider:
 - the nature of the regulated activity the firm carries on or is seeking to carry on;
 - the need to ensure that the firm's affairs are conducted soundly and prudently;
 - the need to ensure that the firm's affairs are conducted appropriately, considering especially the interests of consumers and the integrity of the UK financial system; and
 - whether those who manage the firm's affairs have adequate skills and experience and act with probity.
- FCA Principles for Businesses or PRA Fundamental Rules – These rules lay out the parameters of the “fit and proper” standard set for firms in the threshold condition on suitability, and require firms to

undertake the following:

- recruit staff in sufficient numbers;
 - provide employees with appropriate training, with competence assessed continuously;
 - make proper arrangements for employees involved with carrying on regulated activities to achieve, maintain and enhance competence; and
 - train employees to pay due regard to the interests of a firm's customers and treat them fairly.
- Competent employees rule in chapters 3 and 5 of the Senior Management Arrangement Systems and Controls Sourcebook – This is the main employee competence requirement in the training and competence regime under the FSMA and applies to individuals engaged in a regulated activity in UK-regulated firms. The application of this rule can be complex and dependent upon the firm and the activities it undertakes, but in general, it provides that firms must employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them.
 - Detailed training and competence requirements in the FCA's training and competence handbook (TC) – The TC rules are designed to supplement the competent employees rule, especially concerning retail activities carried on by firms. Among others, these rules include the following:
 - rules on assessing and maintaining competence;
 - supervision of employees who have not yet been assessed as competent;
 - appropriate qualifications; and
 - recordkeeping and reporting for firms within its scope, including how a firm assessed its employees as competent, and how it has ensured that its employees remain competent.

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09. Is there a particular code of conduct and/or are there other regulations regarding standards of behaviour that financial services employees are expected to adhere to?



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Yes. Both the FCA and PRA have established their own high-level required standards of conduct known as the Conduct Rules. The FCA's conduct rules are set out in the FCA's Code of Conduct sourcebook. The PRA's conduct rules are set out in the PRA Rulebook (and different versions apply to different types of PRA-regulated firms).

The FCA's conduct rules apply to most individuals working at an SM&CR firm. The PRA's conduct rules apply to more limited individuals working at dual-regulated SM&CR firms: senior managers (approved by the PRA or FCA); individuals within the PRA's certification regime; key function holders; and non-executive directors.

The Conduct Rules apply to conduct relating to the carrying out of an individual's role. They do not extend to conduct within an individual's private life, provided that the conduct is unrelated to the activities they carry out for their firm. Nevertheless, an individual's behaviour outside of work can still be relevant to the separate consideration of their fitness and propriety.

There are two tiers of Conduct Rules: a first tier of rules applicable to all individuals subject to the Conduct Rules; and a second tier applicable to senior managers only.

The rules of the first tier are:

- 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 cooperative with the FCA, PRA and other regulators.
- Rule 4 – You must pay due regard to the interests of the customer and treat them fairly.
- Rule 5 – You must observe proper standards of market conduct.

The rules of the second tier (applicable to senior managers) are:

- SC1 – You must take reasonable steps to ensure that the business of the firm for which you are responsible is controlled effectively.
- SC2 – 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.
- SC3 – 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.
- SC4 – You must disclose appropriately any information for which the FCA or PRA would reasonably expect notice.
- SC5 (certain dual-regulated firms only) – 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.

Firms must notify the FCA if they take disciplinary action against an individual for a breach of the Conduct Rules.

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10. Are there any circumstances in which notifications relating to the employee or their conduct will need to be made to local or international regulators?

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Yes. There are multiple potential reporting obligations with various timing imperatives. We include below a snapshot of some of the key obligations:

- under FCA Principle 11, firms have a general duty to inform the FCA of matters about which it would reasonably expect notice;
- a firm must notify the FCA immediately it becomes aware, or has information which reasonably suggests, that a matter which could have a significant adverse impact on the firm's reputation has occurred, may have occurred or may occur in the foreseeable future;
- a firm must notify the FCA immediately it becomes aware, or has information which reasonably suggests, that a significant breach of a rule (including a significant breach of a Conduct Rule) has occurred, may have occurred or may occur in the foreseeable future; and
- a firm must also notify the FCA if it takes disciplinary action against an individual for a breach of the Conduct Rules. Where the relevant individual is a senior manager, the notification must be made within seven business days. Where the relevant individual is certified staff, the notification must be made in the firm's annual reporting.

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11. Are there any particular requirements that employers should implement with respect to the prevention of wrongdoing, for example, related to whistleblowing or the prevention of harassment?



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Whistleblowing

In addition to the requirements of the SM&CR outlined above which relate to the prevention of wrongdoing (including the Conduct Rules, fitness and propriety assessments, Senior Managers' Duty of Responsibility, the certification and approvals processes and associated training requirements), the PRA and the FCA maintain rules on whistleblowing. These are intended to encourage whistleblowers to come forward to report wrongdoing and protect them from retaliation when they do.

For certain types of SM&CR firms, the rules mandate measures that employers must implement, for others they provide guidance on measures to consider.

The key measures are as follows:

- Whistleblowers' champion – a non-executive director and senior manager with responsibility for whistleblowing compliance within the firm, including oversight of internal policies and procedures and certain reporting requirements.
- Whistleblowing channel – a system which allows whistleblowers to report concerns confidentially and anonymously, and which allows such concerns to be assessed, addressed, and escalated where appropriate.
- Notification regarding external whistleblowing channels – that is, making staff aware of their right to report matters directly to the PRA and FCA and explaining how they can do so.
- Whistleblowing training – this must cover arrangements on whistleblowing within the firm and be provided (and tailored) to employees based in the UK, their managers, and employees responsible for operating the firm's whistleblowing arrangements.

Prevention of harassment

Harassment and related unacceptable workplace behaviours (such as bullying and discrimination) are not specifically addressed in the SM&CR rules on individual accountability. However, it is clear from regulators' public statements that the culture of firms (in its broadest sense) is central to their approach. Having a healthy firm culture is seen as critical to consumer protection and well-functioning markets, and firms with healthy cultures are considered to be less prone to misconduct.

Firms that are subject to the SM&CR need to be alive to the possibility that instances of harassment and other non-financial misconduct could amount to breaches of the individual accountability regime or trigger certain requirements under it, such as a requirement to investigate, reassess an individual's fitness and propriety, or notify certain matters to the regulators. The same could apply to any failure by relevant staff to investigate and deal appropriately with allegations of this kind, such as a senior manager who turns a blind eye to reports of sexual harassment or workplace bullying. While there have been relatively few instances of non-financial misconduct resulting in an enforcement action to date, this is likely to become an emerging trend.

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12. Are there any particular rules or protocols that apply when terminating the employment of an employee in the financial services sector, including where a settlement agreement is entered into?



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Settlement agreements

The whistleblowing measures outlined above are complemented by mandatory requirements for SM&CR firms concerning settlement agreements, namely that any such agreement must include a term stating that it doesn't prevent the individual from making a protected disclosure, and must not require the individual to warrant that they have not made a protected disclosure or that they do not know of any information which could lead to them doing so (a "protected disclosure" is a type of disclosure recognised in English employment law that gives the person making it legal protection from retaliatory detrimental treatment).

SM&CR firms entering into settlement agreements must also ensure that they are not drafted in a way that is incompatible with other relevant regulatory requirements. For example, there is a specific prohibition in the FCA Handbook on firms entering into any arrangements or agreements with any person that limit their ability to disclose information required by the regulatory reference rules (see question 2). As such, terms relating to confidentiality and the provision of employment references should allow the firm sufficient flexibility to comply with regulatory reference requirements, which could include a requirement to update such a reference. In addition, any obligations of confidentiality should include a carve-out to permit relevant regulatory disclosures and reports.

Handover procedures

The SM&CR includes requirements designed to ensure that adequate handovers take place between outgoing and incoming senior managers. Firms must take all reasonable steps to ensure that senior managers (and anyone who has management or supervisory responsibilities for them) have all the information and material that they could reasonably expect to have to perform their responsibilities effectively and under the requirements of the regulatory system. This applies when someone becomes a senior manager and when an existing senior manager takes on a new job or new responsibilities (or when their responsibilities or job are being changed).

Firms must have a handover policy in place to ensure compliance with these requirements. They must also make and maintain adequate records of steps taken to comply with them.

The information and material handed over should be practical and helpful, with an assessment of what issues should be prioritised, and judgement and opinion as well as facts, figures and records. It should also include details about unresolved or possible regulatory breaches and any unresolved concerns expressed by the FCA, the PRA or any other regulatory body.

The format and arrangements of a handover should allow for an orderly transition, which should include the outgoing senior manager contributing to the handover everything that it would be reasonable to expect them to know and consider relevant, including their opinions. This could be achieved by requiring outgoing senior managers to prepare a handover certificate, but the FCA recognises that this will not always be practical.

To ensure that these requirements are satisfied, it is good practice to include in senior managers' employment contracts (and settlement agreements) specific obligations relating to handovers.

Reallocating senior managers' responsibilities

In addition to ensuring that adequate handovers take place between outgoing and incoming senior managers, firms should also ensure on the departure of a senior manager that their responsibilities are reallocated and that this is recorded in a way that is compliant with relevant regulatory requirements. This may include temporary reallocation to one or more existing senior managers where the replacement does not take over immediately on the departure of the departing senior manager, as well as updating the firm's management responsibilities map and statements of responsibilities.

Reporting requirements

When an individual ceases to perform an SMF, the firm must generally notify the relevant regulatory within seven business days.

SM&CR firms must notify the relevant regulators if certain types of disciplinary action are taken, which can include dismissal – see question 10.

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13. Are there any particular rules that apply in relation to the use of post-termination restrictive covenants for employees in the financial services sector?

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The SM&CR does not regulate the use of post-termination restrictive covenants for employees in the financial services sector. It is fairly typical for financial services firms in the UK to include non-dealing, non-solicitation, non-compete and similar restrictive covenants in their employment contracts. These are subject to the same common law rules on interpretation and enforceability as in any other sector. The only caveat to this is that firms should ensure that such terms do not include any provision that might conflict with the regulatory duties of either the firm or the employee. This will be a rare occurrence in practice for most types of restrictive covenant, but could arise in respect of post-termination contractual obligations that are closely associated with restrictive covenants, namely those relating to confidentiality. As such, firms should ensure that confidentiality clauses in employment contracts or other agreements such as NDAs include appropriate carve-outs.

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