

The UK's new regulatory regime for individuals Part 1: How does it apply to UK branches of EEA and non- EEA banks and PRA-designated investment firms?

This legal alert will be of interest to non-UK firms which have a branch in the UK that has a permission to accept deposits or, where it is a PRA-regulated activity, deal in investments as principal.

Key points:

- (a) A new regulatory regime for individuals who work in financial services firms in the UK will apply to UK branches of EEA and non-EEA banks and large investment firms.
- (b) Firms will have until 8 February 2016 to notify the UK regulators of the individuals in the UK branches who need to be transferred from the old regulatory approval regime into the new Senior Managers Regime.
- (c) The new regime will come into operation on 7 March 2016 but there are some transitional provisions – see further sub-paragraph (e) below.
- (d) The detail of the regime and the exact individuals within its scope differ between branches of EEA and non-EEA firms but the key elements are the same.
- (e) There are three key elements to the regime and they capture different individuals:
 - (i) The Senior Managers Regime focuses on the most senior decision makers.
 - (ii) The Certification Regime focuses on individuals who are not captured by the Senior Managers Regime but who are capable of causing significant harm to the firm or its customers. Branches need to identify employees within the scope of the Certification Regime from 7 March 2016 but will not be required to issue certificates to such individuals until 7 March 2017.
 - (iii) Conduct Rules will apply to all employees save for those in purely ancillary roles. The Conduct Rules will apply to those employees within the scope of the Senior Managers and Certification Regimes from 7 March 2016 and will apply to all staff from 7 March 2017.
- (f) Branches should identify the entities and individuals within those entities who will be within the scope of the Senior Managers and Certification Regime. They should then ensure that the correct responsibilities are assigned to senior managers and that this is documented as required. They should consider who needs to be transferred from the old regime to the new regime and whether any new regulatory approvals are required.

1. The new UK regime for strengthening accountability in banks and large investment firms comes into force on 7 March 2016. This is the first in a series of legal alerts looking at how the new regulatory regime affects specific individuals and considers the application of the regime to UK branches of both European Economic Area (“EEA”)¹ and non-EEA banks and large investment firms.
2. The new regime consists of three elements: a Senior Managers Regime, a Certification Regime and Conduct Rules. The regime as it applies to branches will be tailored to reflect the lower level of risk they offer to the UK economy but it will follow the same basic framework as the regime for UK firms. The “near final”² version of the new rules for UK branches of EEA and non-EEA firms was published on 13 August 2015³. The regime for branches will come into operation on the same date as the main regime (7 March 2016) and the firms affected will have until 8 February 2016 to notify the UK regulators of the individuals who are eligible to transfer from the old regulatory approval regime to the new Senior Managers Regime.
3. We have sought to address all points that are of interest to EEA and non-EEA firms with branches in the UK. Readers who wish to focus on specific areas should click on the links below to be directed to the relevant section of this legal alert :

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¹ At the time of writing, the EEA consists of the 28 Member States of the European Union plus Iceland, Liechtenstein and Norway.

² The rules are described by the UK regulators as “near final” as they are published in advance of the enabling secondary legislation. Final rules will be published later in 2015 after the relevant secondary legislation has been finalised.

³ See FCA Feedback Statement FS15/3 *Strengthening accountability in banking: UK branches of foreign banks* found here: <http://www.fca.org.uk/static/documents/feedback-statements/fs15-03.pdf> and PRA Policy Statement PS20/15 *Strengthening individual accounting in banking: UK branches of non-EEA banks* found here: <http://www.bankofengland.co.uk/pr/Documents/publications/ps/2015/ps2015.pdf>

Background

4. The financial crisis sparked a series of drastic reforms of the banking sector and compelled the UK government to commence a review of the sector's professional culture and practice. To this end, the government established the Independent Commission on Banking ("ICB") in June 2010 to advise it on how to reduce systemic risk and to propose structural reforms to promote financial stability. Its findings and recommendations were published in the Vickers Report in September 2011. The government supported many of the recommendations, notwithstanding some nuances, and these were incorporated into the Financial Services (Banking Reform) Bill (the "Bill") which was introduced into Parliament on 4 February 2013.
5. As part of its pledge to make the banking sector more resilient against losses and impose tougher standards on the banking industry, the government also recruited the Parliamentary Commission on Banking Standards ("PCBS"), established on 17 July 2012, to opine on the legislation. It published further recommendations to reform the banking sector in its report, "Changing banking for good" on 19 June 2013⁴. In the opinion of the PCBS, some of the failings in the banking sector were attributable to the lack of individuals' sense of responsibility and lack of accountability of senior managers. They branded the existing approved persons regime ("APR")⁵ a failure and a "complex and confused mess"⁶. They proposed a new regime intended to make "individual responsibility in banking a reality, especially at the most senior levels"⁷ and to discourage misconduct. The government accepted the PCBS' view that the APR was a failure and it emphasised its commitment to establishing a new framework for individuals within banks. One of the shortcomings of the APR was said to be its failure to demarcate individual responsibilities sufficiently clearly. This led to uncertainty about who should be held to account for specific breaches, something that the new regime is intended to resolve.
6. The PCBS recommendations led to significant amendments to the Bill and the creation of a new regulatory regime for individuals in banks and insurance firms by what is now the Financial Services (Banking Reform) Act 2013 (which amended the Financial Services and Markets Act 2000 ("FSMA")). The new regime will hinge on ensuring that individuals who undertake the main responsibilities in a firm within the scope of the rules are identified, understand their responsibilities and formally accept them. It is possible that eventually the new regime will be applied to all regulated financial services firms in the UK.

Who is within the scope of the new regulatory regime?

7. There is a separate regulatory regime for insurance firms which is the subject of Part II in our series of legal alerts looking at the new regime for individuals. The main regime is commonly said to apply to banks but it has wider application. The specific individual accountability regime that applies to banks also applies to:
 - (a) building societies;
 - (b) credit unions; and
 - (c) PRA-designated investment firms⁸.

4 The report can be accessed via the UK parliamentary website <http://www.parliament.uk/business/committees/committees-a-z/joint-select/professional-standards-in-the-banking-industry/news/changing-banking-for-good-report/>.

5 The UK regulators have powers and responsibilities over individuals carrying on certain roles within all financial services firms. These roles are described as controlled functions, and the individuals performing them are described as approved persons. Hence the regime under which the regulators exercise their powers and responsibilities is known as the approved persons regime.

6 Changing banking for good - Parliamentary Commission on Banking Standards (Conclusions and recommendations) <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtpcb27/2704.htm>

7 Changing banking for good - Parliamentary Commission on Banking Standards (Summary) <http://www.publications.parliament.uk/pa/jt201314/jtselect/jtpcb27/2703.htm>

8 Broadly speaking, a PRA-designated investment firm is an investment firm designated by the PRA which has, or has applied for, permission to deal in investments as principal; has, or would have if authorised, a minimum capital of EUR 730,000 (or a broadly analogous EEA passporting firm or non-EEA firm); and meets certain other conditions.

It is the regime that applies to the UK branches of banks and the entities listed at (a) – (c) above that is the subject of this legal alert. In this legal alert, the word “bank”, unless expressly stated otherwise, includes the entities listed at (a) – (b).

8. UK subsidiaries of EEA and non-EEA banks and PRA-designated investment firms are not the subject of this legal alert. Subsidiaries are solo entities with individual legal identity. A UK subsidiary of an EEA or non-EEA bank or PRA-designated investment firm is thus a UK entity and falls within the main regime for UK firms. This regime is the subject of Part III of our series of legal alerts on the new regulatory regime in the UK. Branches do not have their own legal identity: they are not regarded as an entity separate to their parent. This distinction is important for regulation, particularly prudential regulation as a branch does not have its own balance sheet or capital. Accordingly, a separate regime has been developed for branches to reflect the limits of the UK regulators’ supervision of these entities. Branches of EEA and non-EEA firms are afforded different treatment given the UK’s role in respect of the prudential regulation of UK branches of EEA firms is even more limited than it is in respect of UK branches of non-EEA firms. In this legal alert, we have indicated where UK branches of EEA firms and UK branches of non-EEA firms are treated differently.

What is the new regulatory regime?

9. There are three elements to the new regime:

- (a) A Senior Managers Regime which imposes new obligations on the most senior decision makers in banks or PRA-designated investment firms;
- (b) A Certification Regime for employees who are not senior managers but whose actions or behaviour could seriously harm a bank or PRA-designated investment firm, its reputation or customers;
- (c) Conduct Rules for all other bank or PRA-designated investment firm employees save those carrying out purely ancillary functions.

It was not initially proposed that the regime should be applied to UK branches of non-UK firms. The regime was for individuals working for a “UK institution” that was a “relevant authorised person” (“**RAP**”) as defined by section 71A of FSMA. The reference to “UK institution” excluded branches of non-UK banks and PRA-designated investment firms for the reasons explained at paragraph 8 above. Following a consultation on regulating individual conduct in UK branches of non-UK firms⁹ and the release of a Written Ministerial Statement on 3 March 2015¹⁰, however, HM Treasury decided to exercise powers granted to it under section 71A FSMA to make the Financial Services and Markets Act 2000 (Relevant Authorised Persons) Order 2015 (“**the Order**”). A draft of this order was published on 20 July 2015¹¹, and it is currently expected to come into force sometime in November 2015. The Order brings UK branches of EEA and non-EEA banks and PRA-designated investment firms within the definition of a RAP. The rationale is simply that a branch should be treated in broadly the same way as a UK firm in the same position.

9 The consultation can be found here <https://www.gov.uk/government/consultations/regulating-individual-conduct-in-banking-uk-branches-of-foreign-banks/regulating-individual-conduct-in-banking-uk-branches-of-foreign-banks> and the response to the consultation can be found here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408143/Regulating_individual_conduct_in_banking_response_document.pdf.

10 The full text of this statement as read in the House of Lords can be found here: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2015-03-03/HLWS311/>.

11 The text of the Draft Order can be found here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/372460/Financial_Services_and_Markets_Act_2000_relevant_authorised_persons_Order_2015.pdf.

The Senior Managers Regime

10. The existing APR requires the UK regulators to approve persons carrying out a ‘controlled function’ in a financial services firm. Controlled functions are specified functions carried out by a person that relate to the carrying out of an activity that is regulated in the UK. Many, but not all, controlled functions in banks and PRA-designated investment firms are being replaced by ‘senior management functions’ (“SMF”). The Senior Managers Regime applies to those individuals in a RAP who are deemed to be carrying out a SMF.
11. All PRA¹² controlled functions will be SMFs whilst only a subset of the FCA¹³ controlled functions will be SMFs: FCA controlled functions will only be SMFs if they fall within the definition of a SMF found at section 59ZA FSMA which provides as follows:

“...a function that will require the person performing it to be responsible for managing one or more aspects of the relevant firm’s affairs, so far as relating to regulated activities, and those aspects involve, or might involve, a risk of serious consequences for the authorised person, or for business or other interests in the UK.”

12. There are 17 SMFs for UK firms¹⁴. The types of employee the regime will capture are:
- (a) board members;
 - (b) executive committee members in larger and more complex firms;
 - (c) heads of key business areas meeting certain quantitative criteria;
 - (d) individuals in group and parent companies who exert significant influence over decision-making; and
 - (e) individuals who are responsible for important business, control, or conduct-focused functions within the firm.

There is not the same range of SMFs for UK branches of EEA and non-EEA firms. Further, the SMFs which apply to UK branches of non-EEA firms is different from those which apply to branches of EEA firms. The SMFs that apply to UK branches of non-EEA firms are set out at paragraphs 15 - 16 below and the SMFs that apply to branches of EEA firms are set out at paragraph 19.

13. The person(s) who must be approved to perform a SMF in relation to a branch may not be physically located in that branch or even in the UK. This is the case for both EEA and non-EEA branches: if anyone is performing a SMF in relation to a UK branch, they need to be approved wherever they are located. To help firms to decide whether or not an overseas person is performing a SMF in relation to a UK branch, the regulators have highlighted the difference as between a person who is ‘implementing’ strategy versus one who is ‘setting’ strategy for the UK branch – the former will need to be approved, the latter will not.
14. The SMFs introduced for branches aim to ensure that all the key activities of *that branch* are overseen by one or more person(s) who have been approved by one or both regulators. Activities or areas of business of the wider firm which are not related to the UK branch will not be included in the regime. Where a transaction takes place across the branch and other non-UK parts of the firm, the part of the transaction which was booked in the branch will be caught but the remainder of the transaction will be outside the scope of the new regime.

¹² The Prudential Regulation Authority is responsible for the prudential regulation of banks and insurance firms.

¹³ The Financial Conduct Authority is responsible for the conduct of business of firms regulated by the PRA and the prudential regulation of all other regulated firms.

¹⁴ See Annex 3 (p. 52) of CP 15/22 for a full list of SMFs for UK firms: <https://www.fca.org.uk/static/documents/consultation-papers/cp15-22.pdf>.

UK BRANCHES OF NON-EEA FIRMS

15. The SMFs supervised by the PRA for branches of non-EEA firms are set out below:

PRA SMFs	Description	Existing controlled function(s)
Head of Overseas Branch (SMF19)	Defined ¹⁵ as the function of having responsibility for the conduct of all activities of the UK establishment of a third country firm. At least one person in each branch must be approved for this role. The PRA anticipates that larger branches are likely to have more than one individual in this role. If this is the case, statements of responsibility (see paragraph 26 below) should be drafted carefully to reflect properly the division of responsibility between approved individuals.	Director function (CF1) Significant management function (CF29) Chief executive (CF3)
Group Entity Senior Manager (SMF7)	Defined ¹⁶ as the function of having significant influence on the management or conduct of one or more aspects of the affairs of a branch in relation to its regulated activities if the relevant person is employed by, or is an officer of, a group company of the branch. The PRA acknowledges that this person might be based overseas. Some branches will not have a person performing this role.	Director function (CF1) Non-executive director (CF2) Significant management function (CF29)
Chief Finance function (SMF2)	Defined as the function of having responsibility for management of the financial resources of a branch and reporting directly to the managing body in relation to its financial affairs ¹⁷ . Some branches will not have a person performing this role.	Director function (CF1) Systems and controls (CF28)
Chief Risk function (SMF4)	Defined as the function of having responsibility for management of the risk controls of a branch and reporting directly to the managing body in relation to risk management ¹⁸ . Some branches will not have a person performing this role.	Director function (CF1) Systems and controls (CF28)
Chief Internal Audit function (SMF5)	Defined as the function of having responsibility for management of the internal audit function of a branch and reporting directly to the managing body in relation to internal audit ¹⁹ . Some branches will not have a person performing this role.	Director function (CF1) Systems and controls (CF28)

¹⁵ Defined in the new Senior Management Functions part of the PRA Rules at 7.2.

¹⁶ Defined in the new Senior Management Functions part of the PRA Rules at 5.2. This function is taken from the UK firm regime.

¹⁷ Defined in the new Senior Management Functions part of the PRA Rules at 3.3. This function is taken from the UK firm regime.

¹⁸ Ibid. at 3.4.

¹⁹ Ibid. at 3.5.

16. The SMFs supervised by the FCA for branches of non-EEA firms are set out below:

FCA SMFs	Description	Existing controlled function(s)
Money Laundering Reporting function (SMF17)	Defined as the function of acting in the capacity of money laundering reporting officer of a branch ²⁰ . All branches must have a person approved to perform this role.	Money laundering reporting function (CF11)
Compliance Oversight function (SMF16)	Defined as the function of acting as a director or senior manager who is allocated responsibility for compliance under SYSC 6.1.4R and for any required reporting in the area of compliance ²¹ . All branches <i>must</i> allocate this function to a senior manager <i>if</i> they are required to have an approved person performing CF10 under the current regime. Otherwise they can allocate any compliance-related prescribed responsibilities (see below) to another SMF holder instead.	Compliance oversight function (CF10)
Executive Director function (SMF3)	Defined as the function of acting in the capacity of a director of the firm with responsibility for managing one or more aspects of the firm's affairs so far as relating to the activities of the branch ²² . Some branches will not have a person performing this role.	Director function (CF1)
Other local responsibility function (SMF22)	Defined as the function of having responsibility for a branch's activities, business areas and management functions or having senior management responsibility in relation to CASS (the FCA's Client Assets Sourcebook) ²³ . This function applies where the person having such responsibility does not fit into any other SMF definition or the relevant responsibility has not already been assigned to a SMF holder. The only prescribed responsibility which may be allocated to a SMF22 holder is the CASS responsibility (see table at paragraph 24).	Systems and controls (CF28) Significant management function (CF29) CASS operational oversight (CF10A)

UK BRANCHES OF EEA FIRMS

17. As explained at paragraph 8 above, the primary responsibility for prudential supervision of a branch rests with the home State supervisor of the parent entity. Further, under EU law the PRA has a limited role in the prudential supervision of UK branches of EEA firms. Accordingly, it has not specified any SMFs for branches of EEA firms. The FCA is, however, responsible for regulating the conduct of branches doing business in the UK in much the same way as it regulates the conduct of subsidiaries. Accordingly, it has designated SMF for UK branches of EEA firms.

²⁰ Defined in the new part of the FCA Handbook at SUP 10C.6.2.

²¹ Ibid. at SUP 10C.6.1.

²² Ibid. at SUP 10C.5.1(2).

²³ Ibid. at SUP 10C.8.1R. Examples of how this SMF works are given in a table at SUP 10C.8.3G.

18. The FCA SMFs for branches of EEA firms do not include the Compliance Oversight function (SMF16) because compliance is a matter within the competence of the home member state.

19. The SMFs proposed by the FCA for branches of EEA firms are set out below:

FCA SMFs	Description	Existing controlled function(s)
Money Laundering Reporting Officer (SMF17)	Defined as in the table at paragraph 16 above. All branches must have a person approved to perform this role.	Money laundering reporting function (CF11)
EEA Branch Senior Manager (SMF21)²⁴	The function of having significant responsibility for one or more significant business units of the branch that are carrying on investment business; processing any confirmations or similar related to investment business; accepting deposits or doing anything connected to accepting deposits; or performing activities subject to CASS. All branches must allocate this function to the senior manager responsible for a particular business unit unless his fitness and propriety has already been assessed (or will be assessed) by her home state under EU law.	Director function (CF1) Systems and controls (CF28) Significant management function (CF29) CASS operational oversight function (CF10A)

PERFORMING A SMF: UK BRANCHES OF EEA AND NON-EEA FIRMS

20. There are other key differences between the UK firm regime and the UK branch regime for both EEA and non-EEA firms: none of the UK branch SMFs can be performed by a non-executive director (unlike the UK firm regime) and the criminal offence relating to a decision which causes a relevant firm to fail (which applies to those performing SMFs at UK firms) does not apply to anyone performing an SMF in relation to a UK branch.

21. In order for a person to be able to perform a SMF, as with the APR, they must first be approved by the relevant UK regulator. The regulator(s) will consider – among other things – the individual’s qualifications, personal competence, training, and personal characteristics²⁵. They are testing an individual’s honesty, integrity and reputation; competence and capability; and financial soundness. To apply for approval, a prospective SMF holder and their firm will have to provide a form²⁶ to the regulator, along with any other evidence supporting their application, such as a C.V., as they have done when complying with the APR.

22. A firm should be confident that those who hold SMFs are fit and proper to perform their function before submitting their applications for approval to the regulator. This will involve the firm assessing the same aspects of the individual as the regulator. (The requirement to be ‘fit and proper’ also applies to the Certification Regime and is explored again below.) The Senior Managers Regime for UK firms requires firms to check the potential SMF holder’s criminal record if they are seeking to be approved: a UK branch does not need to do this.

²⁴ The EEA Senior Branch Management function (SMF21) is the equivalent of the non-EEA Executive Director function (SMF3) combined with the Other Local Responsibility function (SMF22). In the original version of the regime, these two functions both came under the heading of Overseas Branch Senior Management function. In response to suggestions that this function was not clearly defined, the FCA has chosen to divide it into two functions to make its scope clearer.

²⁵ The new part of the FCA Handbook at FIT and PRA Rulebook in the Certification part provide further detail on how to assess persons for approval. Where an EEA branch is subject to MiFID, competence does not need to be assessed under the SMR as MiFID requires this to be assessed by the Home State (see the new FIT 1.2.4A).

²⁶ The forms and guidance notes for an application to the PRA can be found here: <http://www.bankofengland.co.uk/pr/Pages/authorisations/smr/default.aspx>, and for an application to the FCA can be found in the Appendices to FS 15/3 (see FN 9). The relevant form for an application for approval is Form A (whether long or short form).

PRESCRIBED RESPONSIBILITIES: UK BRANCHES OF NON-EEA FIRMS ONLY

23. The regime for UK firms requires that once a firm has established which SMFs apply to it, and which individuals need to be approved (or have been approved²⁷) to perform those functions, it must assign prescribed responsibilities to those individuals. The regulators have stated that responsibilities must be allocated ‘clearly and without gaps’ to ensure that all key business areas of the firm are covered by SMF holders. This requirement applies to UK branches of non-EEA firms but not to branches of EEA firms as the UK regulators accept that allocation of responsibilities in EEA firms is a matter for the home EEA regulator.
24. The prescribed responsibilities for UK firms are customised to suit UK branches of non-EEA firms, in the same way as the SMFs are tailored. The prescribed responsibilities (along with their supervising regulator) are listed below²⁸:

Responsibility	Regulator
Responsibility for the branch’s performance of its obligations under the SMR	PRA and FCA
Responsibility for the branch’s performance of its obligations under the Certification Regime	PRA and FCA
Responsibility for compliance with the branch’s obligations in relation to its management responsibilities map	PRA and FCA
Responsibility for the branch’s UK risk management regime	PRA and FCA
Responsibility for compliance with the applicable UK regulatory regime	PRA and FCA
Responsibility for escalation of correspondence from regulators to the governing/management body of the firm or the parent undertaking/holding company of the group	PRA and FCA
Responsibility for management of UK branch systems and controls	PRA
Responsibility for allocation of all UK branch prescribed responsibilities	PRA
Responsibility for management of UK branch liquidity, or submission of information to PRA on liquidity position where a liquidity waiver is in place	PRA
Responsibility for production and integrity of branch’s financial information and regulatory reporting in respect of regulated activities	PRA
Responsibility for policies and procedures in the branch to prevent financial crime	FCA
Responsibility for policies and procedures for the branch’s compliance with CASS ²⁹	FCA

25. A branch is permitted to split a responsibility between two or more persons performing an SMF but usually, where a responsibility has been split, each individual with the responsibility is equally responsible for the whole responsibility rather than each being separately responsible for half of it. The splitting of a responsibility and how this split is defined may make a difference to the reasonable steps each person has to take in order to avoid the presumption of responsibility (see paragraph 31 below).

²⁷ Persons approved under the existing regime may be grandfathered in to the new regime upon notification to the FCA, and may therefore carry over their existing approval. See ‘What happens next?’ below.

²⁸ This list can be found in the new part of the FCA Handbook at SYSC 4.8.9R. The prescribed responsibility on whistle-blowing has been removed in this version of the regime as the regulators want to consult on this for branches before deciding whether to include it.

²⁹ This is the only prescribed responsibility which may be allocated to the holder of SMF22 and will only be necessary at all where CASS applies to the firm.

OTHER SMR REQUIREMENTS: UK BRANCHES OF EEA AND NON-EEA FIRMS

26. There are two documents which the regulators require in relation to SMFs holder and the allocation of responsibilities. The first is a **statement of responsibility**. This is a document produced and signed by each individual holder of a SMF which sets out the aspects of the branch's business for which he is responsible. It must be included with the application to the regulator for approval to perform the SMF. It must be updated and resubmitted whenever there is a significant change in responsibilities. The regulators have provided a proposed template to assist with the creation of this document which can be found in Annex A of FS 15/3³⁰.
27. The branch must produce an overall **management responsibilities map** laying out where and with whom all the key responsibilities of the branch lie. For a non-EEA branch the map will have to detail all reporting lines and lines of responsibility in the branch and provide reasonable detail about the persons who are part of the arrangements (whether SMF holders or otherwise) and their relative responsibilities. The sharing or dividing of any responsibilities must be clearly outlined.
28. For an EEA branch, the map only has to include information relevant for identifying SMF holders and their responsibilities and how these fit into the wider governance arrangements for the branch. Where an EEA branch has passported into the UK and already provided a Programme of Operations³¹, the map does not have to replicate content already included in this Programme of Operations but must include any information that has changed and not already been updated plus any additional information. Where information is omitted, EEA branches should indicate where it can be found³². In practice, an EEA branch may find it easy to provide a full management responsibilities map so that all the information required is in one place.
29. The map must be submitted with an application to the regulator for SMF holder approval and must be kept up-to-date and be available to the regulator whenever requested. It is made clear that one reason for the management responsibilities map is to help the UK regulators identify the correct person in the non-EEA or EEA branch with whom to speak about specific issues and to hold accountable if something goes wrong. The map must be consistent with the statement of responsibilities and both these documents must be prepared in a way that makes it easy to see how the responsibilities allocated under them fit into the firm's overall system of management and governance. Thus it is vital that both the individuals concerned and the branch are content with the detail set out in these documents.
30. It is recognised that the management responsibilities map for a small and non-complex branch will itself be small and non-complex. The regulators recognise that it may be no more than one sheet of paper. A branch is likely to be small and non-complex when it conducts a number of simple business lines and does not rely on group governance arrangements or governance arrangements for other parts of the firm.
31. The biggest change from the old APR is the creation of the **presumption of responsibility**. This presumption reverses the burden of proof in situations of regulatory breach - meaning that the individual who, under their statement of responsibility and the responsibilities map, is responsible for a certain area of a firm's business will be accountable when regulatory requirements are contravened in that area. The only way to rebut this presumption is for the SMF holder to show that they *positively took reasonable steps to prevent or stop a contravention*. The FCA and PRA will provide guidance on what will be deemed to be 'reasonable steps'³³ but this phrase has been deliberately couched at a high level so the guidance is unlikely to be prescriptive.

³⁰ Annex A, pp. 146 – 151 for EEA branches and pp. 152 – 162 for non-EEA branches.

³¹ A Programme of Operations is provided when an EEA branch passports into the UK.

³² More detail can be found at the new part of the FCA Handbook at SYSC 4.6.

³³ This guidance is expected in the autumn of 2015.

The Certification Regime

32. The Certification Regime covers a broader range of employees than the Senior Managers Regime: all those who are regarded as able to cause significant harm to the firm or its customers. It extends to people who have not previously been within the scope of the APR and so have not previously been regulated. In respect of both UK firms and UK branches of non-EEA firms, it only applies to individuals who are based in the UK or dealing with³⁴ a client in the UK. In respect of branches of EEA firms, it only applies to individuals in the UK. It only applies to employees who are not SMF holders.

33. Section 63E FSMA requires that all firms certify that employees who are capable of causing significant harm to the firm or any of its customers are fit and proper to perform their roles. It is for the UK regulators to specify a significant harm function (“**SHF**”) but FSMA sets the parameters. A SHF is a function which “*will require the person performing it to be involved in one or more aspects of ...[the firm’s]... affairs and... those aspects involve, or might involve, a risk of significant harm to ...[the firm]... or any of its customers.*”

WHO IS COVERED?

34. As with the Senior Managers Regime, and reflecting the split between home and host state supervision in the EEA, SHFs specified by the PRA will not apply to branches of EEA firms. Those specified by the FCA will apply to UK branches of both EEA and non-EEA firms.

35. The scope of the PRA’s Certification Regime for the UK branches of non-EEA firms is the same as for UK firms: it covers *significant risk takers*³⁵ the definition of which is the same as a “material risk taker” for remuneration purposes. Both definitions refer to the Material Risk Takers Regulation³⁶ which sets out the quantitative and qualitative criteria for identifying staff whose professional activities have a material impact on a firm’s risk profile. Thus a significant risk taker is someone who meets the criteria in the Regulation or would have met the criteria had the Regulation applied to him³⁷. Not all material risk takers, including in branches of non-EEA firms, will be performing a SHF. Some will be carved out because they are already covered by the Senior Managers Regime and others will be carved out because they are not based in the UK or dealing with a client in the UK.

36. The FCA’s Certification Regime is wider than that of the PRA. It applies to branches of both EEA and non-EEA firms, although some SHFs are disapplied in relation to EEA firms where the subject of the SHF is a matter reserved to the home EEA regulator.

37. A list of the FCA SHFs³⁸ are set out below with the references to the sections of the regulators’ handbook that provides further detail:

34 The FCA gives guidance in SYSC 5.2.20 that the phrase ‘dealing with’ includes ‘having contact with’. An individual is a ‘UK customer’ for these purposes if they are in the UK at the time when the SMF holder ‘deals’ with them; whether they are a permanent resident or not is irrelevant. A corporate body is a ‘UK customer’ if they have any established presence in the UK, such as an office, branch or subsidiary.

35 Certification 1.2.

36 Regulation 604/2014 which can be found here: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0604&from=EN>.

37 The Regulation does not apply to non-EEA firms but the PRA’s approach requires non-EEA firms to identify employees who would meet the criteria in the Regulation if it did apply to them and treat them as material risk takers.

38 They are set out at SYSC 5.2.30

SHF	Description
CASS oversight function	The function of oversight of operational effectiveness under CASS 1A.3.1AR or CASS 11.3.4R. This will not apply to EEA branches unless they have a top-up permission.
Benchmark submission and administration function	The function of benchmark manager under MAR 8.2.3R(1) or benchmark administration manager under MAR 8.3.5R(1).
Proprietary trader function	The function of acting as a proprietary trader whose activity might involve a risk of significant harm to the firm or any customers.
Significant management function	The function of acting as a senior manager, with significant responsibility for a significant business unit of the branch that carries on designated investment business or credit-related regulated activity, that makes material decisions about the branch's finances or that processes confirmations or other similar things in relation to the aforementioned activities ³⁹ .
Functions requiring qualifications	Any function involving an activity for which there is a qualification requirement specified in TC APP 1.1.1R (or an equivalent qualification requirement under EU law).
Managers of certification employees	Managing a certified person may itself be a SHF but only if the relevant manager is considered to be dealing with UK customers by virtue of managing someone who is dealing with UK customers. This function exists to prevent the certified person that is being managed from being pressured to act by someone who is not accountable to the UK regulator. An overseas manager will not need to be certified if a SMF holder is ultimately responsible for the actions of the certified managee. The regulators only need to be satisfied that certified persons ultimately report to someone who is either certified themselves or a SMF holder.
Functions that have a material impact on risk	Any function performed by an employee that has a material impact on the risk profile to the firm and might involve a risk of significant harm to the firm or any customers.

38. Employees who must be certified do not have to be approved by the regulator in the same way as those performing SMFs but their branch must have proper certification policies and safeguards in place to perform its own checks. To pass the checks and become certified, employees must be deemed fit and proper to perform their role by the UK branch. Fitness and propriety must be assessed by someone who has been approved to perform a SMF and assigned the relevant responsibility and this assessment must then be verified by the branch before a certificate can be issued. A certificate is valid for 12 months only.

39. The assessment process will require significant due diligence, including taking all reasonable steps to obtain relevant information from previous employers of the relevant persons⁴⁰. The new FCA rules require assessors to pay particular attention to the relevant person's qualifications, training, competence and characteristics. There will be further guidance on the 'fit and proper' requirement for certified employees at FIT in the new FCA Handbook and in the Certification part of the new PRA rules.

40. The certification of each employee must be renewed at least annually or whenever the employee changes roles within the branch. An up-to-date record of certified persons needs to be maintained by the branch and made available to the FCA or PRA whenever requested.

Conduct rules

41. The UK regulators are empowered to make Conduct rules that will apply to all staff in a UK branch of an EEA and non-EEA firm and intend to do so, save that the Conduct rules will only apply to staff in branches of EEA firms in relation to matters that are within the UK's scope of responsibility as the host state regulator. There will be a phased introduction (as described in paragraph 44 below) of the Rules so that they apply first to the staff within the scope of the Senior Managers and Certification Regime.

³⁹ This function applies where a person is performing a significant management function but does not fall into any SMF definition.

⁴⁰ There will be further guidance on this later in 2015 – see below in 'What happens next?'

42. There are two tiers to the new Conduct rules: Individual Conduct rules (of which there are five) and Senior Manager Conduct rules (of which there are four). As is usual with some UK regulatory rules, these rules are couched as high-level principles. Part of the reason for this is to minimise the risk of the regime conflicting with any internal codes of conduct imposed upon employees.

43. Most of the new Conduct Rules are dual-supervised but there are two Individual Conduct rules which are supervised only by the FCA (indicated in the table below).

Individual Conduct rules
You must act with integrity
You must act with due skill, care and diligence
You must be open and cooperative with the FCA, the PRA and other regulators
FCA only: You must pay due regard to the interests of consumers and treat them fairly
FCA only: You must observe proper standards of market conduct
Senior Manager Conduct rules
You must take reasonable steps to ensure that the business of the firm for which you are responsible is controlled effectively
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
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 delegated responsibility effectively
You must disclose appropriately any information of which the FCA or PRA would reasonably expect notice

44. Initially all SMF holders will be subject to all nine rules, and all certified persons will be subject to only the five Individual Conduct rules. On 7 March 2017, after the new regime has been in force for a year, the Individual Conduct rules will apply to *all staff* of a UK branch of an EEA or non-EEA firm apart from those performing purely ancillary functions. Ancillary functions are listed by the FCA at the new Handbook section COCON 1.1.2R(2)⁴¹. The list includes any role which would be fundamentally the same if performed in a non-financial services firm (e.g. catering, security, receptionist). This means that the new rules will have a far wider application than the existing Statements of Principle and Code of Practice.

45. A branch has to make individuals who are subject to the Conduct Rules aware that this is the case, and train such individuals in how the new regime applies. Branches must also notify the relevant regulator(s) when they are aware or suspect that anyone has breached the Conduct Rules. If the person suspected of being in breach or in breach is a SMF holder, the branch must make this notification within seven calendar days. If the person is not a SMF holder then notification must be made annually (reduced from quarterly in the previous version of the regime). A branch must also notify the regulator when they have taken formal disciplinary action in response to a breach of the Conduct Rules.

What happens next?

46. The rules relating specifically to UK branches of EEA and non-EEA firms will be finalised once the Financial Services and Markets Act 2000 (Relevant Authorised Persons) Order 2015 comes into force and brings the UK branches within the FSMA definition of a RAP. Further regulatory guidance on reference requirements for current and previous employers and on the Presumption of Responsibility and what will be considered to be 'reasonable steps' is expected in the autumn of 2015. The FCA is also going to consult on the application of the regime to wider trading and wholesale market activities in the near future.

⁴¹ See the list in CP 15/22 (see FN 8) at Appendix 1 pp. 27 – 28.

47. The new accountability regime comes into force on 7 March 2016, with firms being given until 7 March 2017 before certificates are required under the Certification Regime and the Conduct Rules are applied to all staff. Grandfathering provisions will operate to allow all existing approved persons about whom the FCA is informed before 8 February 2016 to carry over their approval into the new Senior Managers' Regime. This transitional regime already applies to UK firms, but an Order, similar to the Financial Services and Markets Act 2000 (Relevant Authorised Persons) Order 2015, will be needed to widen the grandfathering provisions to include branches. This Order is expected later in 2015.
48. There is a table showing how grandfathering provisions will operate in FS 15/3⁴². The table shows which existing controlled function approvals can be grandfathered and how they correlate to particular SMF approvals. Electronic forms with which to apply for approval or notify the regulator will become available on the regulators' websites in autumn 2015 but copies of the forms can currently be found in Appendix 1 of FS 15/3⁴³ and on the FCA website.
49. There is thus little time before the new regulatory regime for individuals comes into force. EEA and non-EEA firms with branches in the UK will want to act soon to identify the entities and individuals within the scope of these rules so they can begin to prepare for a regime that is designed to ensure that individuals have a new sense of responsibility for which they can more easily be held to account.

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42 Figure 7 at page 35.

43 At pages 42 – 48 for EEA branches and pages 49 – 63 for non-EEA firms.

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