



HM Treasury

Senior Managers & Certification

Regime:

Financial Market Infrastructures

July 2021

Senior Managers & Certification Regime: Financial Market Infrastructures



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Chapter 1

Introduction

- 1.1 The government intends to create a Senior Managers and Certification Regime (“SM&CR”) for Financial Market Infrastructures (“FMIs”) supervised by the Bank of England (“BoE”). In practice, these FMIs are: (i) Central Counterparties (“CCPs”), (ii) Central Securities Depositories (“CSDs”) and (iii) payment systems recognised under the Banking Act 2009 (“recognised payment systems”), and specified service providers to these recognised payment systems¹. This consultation paper will refer to CCPs, CSDs, recognised payment systems and their specified service providers collectively as “FMIs”.
- 1.2 FMIs are institutions that underpin the UK’s economy and financial system. They act as conduits between many of the other types of institution which make up the financial services system. A well-functioning system of FMIs creates stability in the financial services sector and provides critically important functions that help make markets more efficient and enables many of the everyday transactions that people rely on, such as helping individuals and businesses transfer money to pay for goods and services. The corollary of their significance is that failure of an FMI could threaten the financial stability of the UK or cause significant disruption to the wider UK economy and to consumers.
- 1.3 Since the financial crisis, given their importance to the stability of the financial services system, FMIs have been subject to greater levels of regulation. Existing domestic regimes, combined with new international standards implemented through EU legislation (now part of retained EU law), have enabled the BoE to effectively supervise these entities and impose penalties on them as institutions if they breach legislative requirements. As noted in the BoE’s 2020 Annual Report on the supervision of FMIs², this supervision has been critical in ensuring FMIs’ financial and operational resilience throughout the challenges posed by Covid-19. The BoE’s assessment is that FMIs have performed effectively under these stressed conditions.
- 1.4 However, the existing regulatory regimes for FMIs make very limited provision for oversight of *individual* conduct within these entities as most supervisory and enforcement powers are focused on the legal entity (i.e. the

¹ The regime would apply to UK CCPs, recognised clearing houses and CSDs, regulated by the Bank of England under Part 18 and Schedule 17A of the Financial Services and Markets Act 2000.

² [The Bank of England’s supervision of financial market infrastructures - Annual Report - 2020](#)

FMI itself). The government intends to address this deficiency through the introduction of a SM&CR for FMIs.

- 1.5 The key features of the proposed SM&CR for FMIs are intended to be similar to the existing SM&CR for banks, insurers and other authorised persons as set out in Part 5 of the Financial Services and Markets Act 2000 (“FSMA”), but modified to recognise the fact that FMIs are not authorised persons within the FSMA meaning of the term. The BoE would be granted new powers to implement, supervise and enforce the following:
- A **Senior Managers Regime**. This would give the BoE the power to determine whether individuals who perform roles that pose a potential risk to financial stability or to the continuing functioning of the FMI have the appropriate competence, expertise and probity to carry out their roles. It would require firms to submit documentation to the BoE on the scope of these individuals’ responsibilities and would establish a statutory requirement for senior managers to take reasonable steps to prevent and/or stop regulatory breaches in their areas of responsibility.
 - A **Certification Regime**. This would require firms to certify any individual who performs a “specified function” that could cause significant harm to the FMI or its users as fit and proper, both on recruitment and annually thereafter.
 - **Conduct rules** for all employees, which set minimum, high-level requirements regarding the conduct of individuals where necessary or expedient for advancing the BoE’s financial stability objective.
- 1.6 The proposed regime would strengthen the individual accountability of senior managers within FMIs and would provide an effective and proportionate means for ensuring high standards of conduct amongst all staff. This would ensure that the firms which underpin the proper functioning and overall stability of the UK’s financial system are subject to the highest regulatory standards.

The existing SM&CR for banks, insurers and other FSMA authorised persons

- 1.7 Following the financial crisis in 2007-08 and the Libor scandal in 2012 it was clear that there was a need for more effective regulation of the conduct of individuals working in the financial services industry. In light of this, the Parliamentary Commission on Banking Standards (“PCBS”) published in June 2013 several recommendations to improve individual conduct and standards in banking³. The government implemented these recommendations through the Financial Services (Banking Reform) Act 2013 (“the 2013 Act”), which made a series of amendments to FSMA. PCBS identified the lack of individual accountability amongst senior individuals in the banking sector as a key contributory factor to the financial crisis, and, as a result, one of these reforms was the introduction of the SM&CR. The SM&CR is aimed at reducing harm to consumers and strengthening market integrity by

³ <https://www.parliament.uk/documents/banking-commission/Banking-final-report-volume-i.pdf>;
<https://www.parliament.uk/documents/banking-commission/Banking-final-report-vol-ii.pdf>

changing behaviours and culture within firms. It encourages a culture where staff at all levels take personal responsibility for their actions and ensures that firms and staff clearly understand and can demonstrate where responsibility lies within the organisation.

- 1.8 This was achieved by amending FSMA to augment the Approved Persons Regime with the SM&CR for certain types of financial institutions. Since 2016 there has been a phased commencement of the SM&CR to all authorised firms. The regime was implemented for all banks, building societies, credit unions and Prudential Regulation Authority (PRA) designated investment firms in 2016 and was extended to cover insurance firms in December 2018. The regime was further extended to most other FCA (Financial Conduct Authority)-regulated firms from December 2019 and benchmark administrators from December 2020.
- 1.9 The impact of the existing SM&CR has been positive. The PRA's evaluation of the SM&CR⁴ (published in 2020) found its introduction had helped ensure that senior individuals in PRA-regulated firms took greater responsibility for their actions and had made it easier for both firms and the PRA to hold individuals to account. This was supported by a range of evidence, and a large majority (around 95%) of the firms surveyed said the SM&CR was having a positive effect on individual behaviour.
- 1.10 Similarly, according to a stocktake report carried out by the FCA in August 2019⁵ many firms described a stronger tone and ownership from the top and expressed that the regime was having an impact on the mindset of senior managers. In addition, the emphasis on clearly documented individual responsibilities has facilitated firms' interactions with regulators and helped foster internal oversight and challenge within the boards of regulated firms. The SM&CR has also helped regulators to monitor firms' progress on complying with new regulatory requirements which is important for regulators' understanding of the safety and soundness of the firm.

The SM&CR for FMIs

- 1.11 The government now intends to create an SM&CR for FMIs. Introducing a regulatory framework for individual accountability within FMIs would encourage effective governance within these firms, incentivise good behaviour and require employees in FMIs to give adequate oversight to the areas for which they are responsible. Individual accountability could also encourage employees in FMIs to identify gaps in responsibility within the FMI and to address them appropriately. The government hopes that the combination of these benefits would improve risk management at FMIs, and therefore their safety and soundness. This would in turn support UK financial stability.
- 1.12 In the July 2019 Financial Stability Report, the Financial Policy Committee at the BoE noted that there was a strong case for extending the SM&CR to

⁴ <https://www.bankofengland.co.uk/prudential-regulation/publication/2020/evaluation-of-the-senior-managers-and-certification-regime>

⁵ <https://www.fca.org.uk/publications/multi-firm-reviews/senior-managers-and-certification-regime-banking-stocktake-report>

FMI⁶. The Committee recognised the vital services that FMIs provide to the financial system and economy and the need for governance arrangements and risk culture to appropriately reflect this. The Treasury Select Committee also made the same recommendation in their 2019 report into IT failures in the financial services sector⁷. The Committee noted the potential impact on customers of an operational incident in an FMI and the need for senior managers to be held to account for their management of these incidents.

- 1.13 The government would welcome views in response to this consultation on the overall intent to create an SM&CR for FMIs, as well as on how an SM&CR for FMIs might be most appropriately and proportionately applied to these entities. Any aspects of the new regime that will be delivered by the BoE through rules will also be subject to public consultation by the BoE.
- 1.14 Whilst the policy effect of this measure is intended to be similar across CCPs, CSDs, recognised payment systems and specified service providers, how the new regime would be applied to each different type of FMI in legislation, and where the detailed rules would sit, may differ. This is because each subset of FMI is already subject to its own distinct legal regime and each of these regimes may already contain requirements of a similar effect to certain provisions within the SM&CR. Therefore, the SM&CR for FMIs would need to account for these existing arrangements and this may require a tailored approach in legislation for each type of FMI. However, for ease, this consultation will refer to one singular SM&CR regime for FMIs.
- 1.15 The government intends to legislate for this new regime when parliamentary time allows. Under the new regime, the BoE would be given new rule-making powers, such as the power to designate Senior Management Functions at FMIs and the power to make conduct rules. Through these rule-making powers, the BoE would be able to ensure that the new regime is applied in the most effective and proportionate manner to each specific subset of FMI. The BoE would publicly consult on these new rules in advance of them coming into effect.
- 1.16 Chapter 2 explains what FMIs do and their importance to the financial system. Chapter 3 sets out how the proposed framework for the SM&CR for FMIs would work. Chapter 4 lists the consultation questions and explains how to respond to this consultation.

⁶ <https://www.bankofengland.co.uk/-/media/boe/files/financial-stability-report/2019/july-2019.pdf>: “FMIs’ governance arrangements and risk culture should reflect fully the vital services they provide to the financial system and the economy. Thus, the FPC notes that there is a strong case for extending the Senior Managers and Certification Regime to FMIs. This would help the Bank to ensure that individuals in key positions of influence within FMIs have suitable skills, experience and understanding of the systemic importance of FMIs.”

⁷ <https://publications.parliament.uk/pa/cm201920/cmselect/cmtreasy/224/22406.htm>: Para 66. “As we have seen from recent examples, such as the Visa outage in 2018, operational incidents at Financial Market Infrastructure (FMI) firms can have as much effect on customers as bank incidents. It is therefore vital that senior management at FMI firms are accountable for their management of operational incidents. There does not appear to be any justification for keeping FMI outside of the Senior Managers Regime. The government should expand the Senior Managers Regime to include FMI supervised by the Bank of England.”

Chapter 2

Financial Market Infrastructures

- 2.1 FMI are critically important, providing functions that are relied upon by the financial system every single day. Some FMIs, specifically CCPs and CSDs, are set up to help control and minimise risk in financial markets. They achieve this by overseeing sets of rules, contracts, processes and operational arrangements which manage, reduce and allocate risk arising from transactions between market participants.
- 2.2 Well designed and reliable FMIs can also increase operational efficiency in the markets. Recognised payment systems include certain retail payment systems which are critical to the wider economy and enable both individuals and businesses to transfer money and pay for goods and services. The UK's financial stability therefore depends on the orderly functioning of these FMIs and their robust management of systemic and operational risk.
- 2.3 The BoE has responsibility for supervising the following FMIs:
- CCPs
 - Non-CCP Recognised Clearing Houses
 - CSDs
 - payment systems recognised under the Banking Act 2009 and specified service providers to such payment systems

Central Counterparties

What are CCPs?

- 2.4 Firms use CCPs to reduce certain risks that arise when trading on financial markets, such as derivatives and equities markets.
- 2.5 CCPs sit between the buyers and sellers of financial contracts, providing assurance that the obligations of those contracts will be fulfilled. When a buyer and seller agree that a financial contract will be centrally cleared, the CCP sits between them. Instead of holding the contract with each other, the buyer and seller each hold their side of the contract with the CCP instead. Collateral is placed with the CCP in case either party fails to meet their contractual obligations, so that the CCP can use that collateral to make good on the contract.
- 2.6 CCPs also set up a default fund that can be used to cover losses that exceed a defaulting member's collateral. These pre-funded financial resources at UK CCPs' derivatives clearing services totalled approximately £120 billion on average in 2016. These processes help ensure that if one CCP member defaults and is unable to fulfil its financial obligations to its counterparties, the member's own resources would be used to cover the losses. If the member's own resources are not sufficient, the loss would be mutualised amongst the other members of the CCP. This restricts contagion to the wider financial system.
- 2.7 CCPs also reduce counterparty credit risk and simplify the network of exposures by enabling the "multilateral netting" of financial exposures and payments. Multilateral netting is a process that sums up all offsetting positions to create one overall position. This has the benefit of reducing the gross exposure a firm has to the market down to a single net exposure to the CCP. This also allows for firms to reduce the amount of collateral they are required to hold for the same net exposure.
- 2.8 The financial crisis in 2007-08 highlighted how essential CCPs are for safeguarding financial stability. When Lehman Brothers defaulted in 2008, their trades at CCPs went through as expected. LCH Limited (the UK's largest CCP) used around one third of the \$2 billion of the collateral it had called from Lehman to ensure the trades were completed. Thus, those trading with Lehman through a CCP did not incur a loss.
- 2.9 Following this, at the Pittsburgh summit in 2009 G20 leaders agreed that most standardised and liquid derivatives contracts shall be cleared through a CCP. The EU introduced the European Market Infrastructure Regulation (EMIR)⁸ in 2012 to comply with this obligation and improve the resilience of CCPs. Since then, the volume of clearing at CCPs has increased significantly. For example, for credit default swaps, central clearing has increased from 5% at end-June 2010 to 34% at end-June 2017. The increasing use of CCPs has furthered their importance in the financial system.

⁸ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories

- 2.10 EMIR forms part of retained EU law following the end of the Transition Period and UK CCPs must be authorised under EMIR and recognised under FSMA in order to provide clearing services in the UK. If the BoE, as the competent authority for CCPs in the UK, is content that a CCP is compliant with EMIR and other recognition requirements established in the UK, it will issue a recognition order for that CCP under section 290 of FSMA. This will allow the CCP to provide specified clearing services in the UK.
- 2.11 There are currently three UK CCPs recognised by the BoE:
- LCH Limited
 - LME Clear Limited
 - ICE Clear Europe Limited
- 2.12 Given CCPs' critical position between the buyers and sellers of financial contracts, any disruption at a CCP has the potential to impact other market participants and therefore be a source of stress within the wider financial system. Stress within the system could be amplified and spread in several different ways, impacting the ability of market participants to trade.
- 2.13 It is therefore important that CCPs are both financially and operationally resilient. Financial resilience ensures CCPs can survive financial shocks, particularly those arising from the failure of one or more market participants to fulfil their obligations to the CCP. Operational resilience enables CCPs to prevent, respond to and recover from operational disruptions. To achieve resilience in both these areas, CCPs need to ensure they have sufficient financial resources, risk management arrangements and contingency plans to withstand financial or operational disruptions, as well as robust governance arrangements to oversee these.

Central Securities Depositories (CSDs)

What are CSDs?

- 2.14 A CSD operates the infrastructure (the securities settlement system) which keeps a record of who owns individual securities, such as shares or bonds. They also play a key role when ownership of a security is transferred, including transferring the cash and securities between market participants and managing all the rights and obligations linked to the ownership of a security (such as corporate action and cash movements arising on the securities).
- 2.15 The EU introduced the Central Securities Depositories Regulation (CSDR)⁹ in 2014, to create a harmonised framework for the provision of CSD services across the EU and to impose a common set of prudential and organisational requirements on CSDs. As with EMIR, CSDR forms part of retained EU law after the end of the Transition Period. If the BoE is content that a UK CSD is compliant with applicable CSDR requirements, as well as any other domestic recognition requirements, it will issue a recognition order for that CSD under section 290 of FSMA. This allows the CSD to provide CSD services in the UK.
- 2.16 There is currently only one CSD in the UK, Euroclear UK and Ireland (EUI). EUI is part of the wider Euroclear Group based in Belgium. EUI operates the securities settlement system, CREST¹⁰, through which 250,000 transactions are processed every day on average, the daily settlement value of which is in excess of £900 billion¹¹.
- 2.17 Without CSDs, modern securities markets could not exist in their current form. CSDs allow for a high volume of securities transactions to be settled in a secure and efficient manner and they also provide a secure record of who owns each security. An operational outage at a CSD, such as an IT failure or cyberattack, could therefore create significant disruption to the financial markets. A failure could mean, for example, that securities would not be able to be traded on UK markets or that investors could lose access to the records of the securities they own.

⁹ Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012.

¹⁰ CREST stands for Certificateless Registry for Electronic Share Transfer.

¹¹ P.23 of the [Bank of England's supervision of financial market infrastructures - Annual Report - 2020](#)

Payment systems

- 2.18 Payment systems are sets of rules, procedures and arrangements for the electronic transfer of money between participants. Different payment systems provide different functions which are critical to the operation of financial markets and the wider economy.
- 2.19 Some payment systems process payment transactions made by millions of UK payment service users, for example, enabling card payments, direct debits or cash withdrawals. If there were a failure of one of these systems, such as an operational outage, transactions could fail and cause disruption to users and the wider economy. Other recognised payment systems, embedded within entities such as CCPs or CSDs, enable the transfer of securities, and are integral to the functioning of these entities and financial markets generally.
- 2.20 The legal entity with responsibility for managing or operating a payment system is known as the operator. The operator sets the rules and processes which govern participants' (such as banks) use of the payment system. Separate firms may supply operational support services to the operator of a payment system.
- 2.21 Given their systemic importance to the economy, there are several legislative frameworks under which payment systems can be regulated, each of which is designed to advance specific objectives with respect to the operation of payment systems. A payment system can be:
- **Recognised by HM Treasury under the Banking Act 2009 for regulation by the BoE**, where deficiencies in design, or disruption to operation, would likely threaten the stability of, or confidence in, the UK financial system, or have serious consequences for business or other interests throughout UK. Given the potential significance of service providers for the operational functioning of a payment system, service providers to recognised payment systems can also be specified for regulation in an analogous way to payment systems. These are known as specified service providers¹². The government proposes to create a SM&CR for recognised payment systems and service providers to these payment systems.
 - **Designated by HM Treasury under the 2013 Act for regulation by the Payment Systems Regulator**, where any deficiencies in the design of the system, or any disruption of its operation, would be likely to have serious consequences for those who use, or are likely to use, the services provided by the system.
 - **Designated under the Financial Markets and Insolvency (Settlement Finality) Regulations 1999**. This provides specific insolvency protections to payments made through these systems, where a system can demonstrate that it has met certain criteria and standards.
- 2.22 It is intended that the SM&CR for recognised payment systems and specified service providers will be integrated with the wider regulatory regime as established in Part 5 of the Banking Act 2009. Where recognised payment

¹² [In accordance with s206A of the Banking Act 2009](#)

systems (e.g. LCH Ltd, ICE Clear Europe and EUI) are embedded within a CCP or CSD, it is intended that the SM&CR will be applied at the level of the CCP or CSD.

Chapter 3

Proposed framework for the SM&CR for FMIs

- 3.1 This chapter sets out the government’s proposal for how the SM&CR for FMIs would work. The SM&CR for FMIs would replicate the existing SM&CR in Part 5 of FSMA in most respects, whilst integrating with the different existing regulatory regimes for FMIs and the differences in the way they operate. This would ensure consistent powers and enable a comparably rigorous regulatory approach across the financial sector.
- 3.2 The proposed SM&CR for FMIs would have the following major components, described in further detail below:
- A Senior Managers Regime
 - A Certification Regime
 - Conduct rules
- 3.3 The principal difference between the existing SM&CR regime in Part 5 of FSMA, and the proposed SM&CR for FMIs, is that the BoE, rather than the FCA or PRA, would be the sole regulator for the purposes of making rules, supervision and taking enforcement action against those in breach of the regime.
- 3.4 To accomplish this, the BoE would be given new rule-making, supervisory and enforcement powers for the new SM&CR for FMIs, analogous to the existing powers which the FCA and PRA have in respect of the existing SM&CR. The government considers that it is appropriate that the BoE holds regulatory responsibility for these institutions under the new SM&CR given it is currently responsible for the supervision of these FMIs. The BoE would be able to implement these new powers in a flexible manner and with appropriate discretion, taking into account the diverse nature of the FMIs it is responsible for supervising. The existing duty of regulators, including the BoE, to co-ordinate the exercise of functions with respect to payment systems, as established in the 2013 Act, would be maintained.

Senior Managers Regime

- 3.5 The proposed Senior Managers Regime (“SMR”) would apply to persons who manage an aspect of the FMI’s affairs which involves, or might involve, a risk of serious consequences for the FMI or for business or other interests in the United Kingdom (“the direct, significant influence test”). These roles (known in the existing SM&CR as Senior Management Functions or “SMFs”) would be specified in rules made by the BoE. Individuals located overseas who are

managing an aspect of a UK FMI's affairs can be designated as SMFs if these roles meet the direct, significant influence test.

- 3.6 The purpose of the SMR is two-fold:
- to enable the BoE to evaluate the fitness and propriety of senior managers, including whether they have the proper personal characteristics, capability and experience to perform a SMF; and,
 - to ensure that FMIs appropriately document the responsibilities of senior managers, enabling the BoE to hold them accountable for the FMI's actions in their area of responsibility.
- 3.7 The government proposes to replicate as far as appropriate the process as set out in Part 5 of FSMA. Under this model, the FMI would be required to evaluate the fitness and propriety of an individual before making an application to the BoE for that individual to perform a SMF. The FMI should be satisfied that the individual is a fit and proper person to perform the function, according to specified criteria. The BoE would then have up to three months to assess the application. Conditional or time-limited approval may be given if the BoE considers it desirable for facilitating the advancement of its financial stability objective. The government will also have regard to the findings of the PRA's evaluation of the SM&CR¹³ when designing these powers, to ensure they can be used flexibly. Approvals can also be varied at a later date under similar circumstances.
- 3.8 Further detail on the application process would be determined following the BoE's public consultation. This would include more detail on the approach to conditional and time-limited approvals. This would then be set out in their rules.
- 3.9 The FMI's application must contain a 'Statement of Responsibilities' setting out the aspects of the firm's affairs which the individual will be responsible for managing. The Statement of Responsibilities must also be updated and resubmitted if there is a significant change in the firm's affairs for which the senior is responsible.
- 3.10 SMF functions would be determined by the BoE following public consultation. Examples of SMFs that are caught by the existing SMR include:
- Certain senior executives and non-executives, such as the CEO of the firm and the Chair of the Board.
 - Regional or global business line heads with direct, significant influence over the activities of a UK entity e.g. a global head of audit.
 - Individuals in operations and technology roles at group level e.g. Chief Operating Officer.
- 3.11 FMIs would be required to assess the fitness and propriety of individuals on at least an annual basis and notify the BoE if, as a result of this assessment, it discovers grounds for their approval being withdrawn.

¹³ <https://www.bankofengland.co.uk/prudential-regulation/publication/2020/evaluation-of-the-senior-managers-and-certification-regime>

- 3.12 If following a notification, or its own assessment, the BoE considers that a person is no longer 'fit and proper' to perform a SMF, the BoE may withdraw that person's SMF approval. An FMI may also, with the consent of the individual, withdraw an application before it is determined by the BoE.
- 3.13 If the BoE does not approve an application, or withdraws or varies an approval, then the interested parties, including the individual concerned and the applicant firm, could appeal the matter to the Upper Tribunal, under the existing process established in Part 9 FSMA.

Certification Regime

- 3.14 The proposed Certification Regime would apply to employees performing "specified functions", meaning those which are not carrying out SMFs but whose roles have been deemed capable of causing significant harm to the firm or its users. These roles are referred to as "significant harm functions". The definition of employee for the purposes of the Certification Regime would be wide and could include contractors and secondees. The types of roles that fall in scope of the Certification Regime would be determined by the BoE following public consultation.
- 3.15 The regime would require FMIs themselves to assess, and formally certify to the BoE, the fitness and propriety of persons performing significant harm functions on an annual basis. These individuals would not need to be approved by the BoE.
- 3.16 In making the judgement that an individual is fit and proper, FMIs would be required to take into account a person's qualifications, training, level of competence and personal characteristics.

Conduct rules

- 3.17 The BoE would have the power to make conduct rules where it is necessary or expedient for the purpose of facilitating the advancement of its financial stability objective. Conduct rules set minimum, high-level expectations regarding the conduct of individuals and provide a framework against which FMIs and the BoE can form judgements about an individual's behaviour and actions. The rules would apply to all employees of FMIs.
- 3.18 Conduct rules would be determined by the BoE following public consultation. Examples of conduct rules from the existing SM&CR in Part 5 of FSMA are:
- 3.19 For all employees:
- 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.
- 3.20 For SMFs only:
- 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 the delegated responsibility effectively.
- You must disclose appropriately any information of which the FCA or PRA would reasonably expect notice.

Prohibition orders

- 3.21 As a complement to the SM&CR, the BoE would have the power to make prohibition orders, analogous to the existing powers of the FCA and PRA to make prohibition orders under Part 5 of FSMA. If it appears to the BoE that an individual is not a fit and proper person to perform a function in relation to an activity carried out by an FMI, the BoE would be able to make an order prohibiting the individual from carrying out any function in which the individual would be involved in the performance of a regulated activity or an activity carried out by an FMI. The BoE would also be able to vary or revoke a prohibition order.
- 3.22 If the BoE were to make a prohibition order in relation to an individual, that individual may appeal the matter to the Upper Tribunal, under the existing process established in Part 9 of FSMA.

Disciplinary Powers of the Bank of England

- 3.23 Under the new SM&CR for FMIs, the BoE would have disciplinary powers in relation to FMI employees based closely on the disciplinary powers in Part 5 of FSMA. Furthermore, existing supervision powers in relation to FMIs, including information gathering powers, would be extended to encompass the new SM&CR regime. The new SM&CR would give the BoE the power to impose penalties where an individual performs a SMF without approval, and the individual knew, or could reasonably be expected to have known, that they were doing so without approval. This is based on the provisions in section 63A of FSMA.
- 3.24 Furthermore, the BoE would have the power to take action against an individual for misconduct. These provisions would be based on sections 66A and 66B of FSMA. A person would be guilty of misconduct where:
- they have failed to comply with a conduct rule;
 - they have been knowingly concerned with a breach of a regulatory requirement by the FMI where they are a senior manager, an employee or a director; or
 - that person is a senior manager, and they fail to take reasonable steps to prevent or stop the FMI breaching a regulatory requirement when they are the senior manager responsible for the area where the breach occurred.
- 3.25 Similar to the existing SM&CR powers set out in section 66 of FSMA, the BoE would be able to take one or more of the following actions where it appears to the BoE that the individual is guilty of misconduct:

- impose a financial penalty on the individual of such amount as the BoE considers appropriate;
- suspend, impose conditions on, or limit the period for, an approval to carry out a SMF;
- publish a statement of the person's misconduct.

3.26 Individuals who are subject to these disciplinary actions would have the right to appeal their cases to the Upper Tribunal.

Criminal Offences

3.27 The government intends to make it a criminal offence for an individual to perform a function in breach of a prohibition order issued by the BoE. On summary conviction, an individual would be liable to a an unlimited fine in England and Wales and a fine not exceeding level 5 on the standard scale in Scotland and Northern Ireland. This is consistent with the provisions for breaching a prohibition order under the existing SM&CR in section 56(4) of FSMA.

3.28 Other criminal offences that already apply to individuals in FMIs under existing legislation¹⁴ would also be extended to encompass the SM&CR. For example, individuals would be guilty of an offence if they knowingly or recklessly provide false or misleading information to the BoE in relation to the SM&CR for FMIs.

¹⁴ See section 204 Banking Act 2009 in relation to recognised payment systems.

Chapter 4

Responding to this consultation

Responding to this consultation

- 4.1 This consultation will close on 22nd October 2021. We would welcome your views on any aspects of the proposals set out above. In particular, the government would welcome views on the following questions:
- I) Do you agree with the proposal to create a SM&CR for FMIs?
 - II) Are there any specific considerations for FMIs (as a whole or in part) which you think should be accounted for, to ensure the effectiveness of the proposed SM&CR when applied to FMIs?
 - III) Are there any other considerations on the proposals outlined in this consultation which should be brought to our attention?

How to submit responses

- 4.2 Please submit your responses to:
- smcr.fmi.consultation@hmtreasury.gov.uk or post to:
- HM Treasury – Financial Market Infrastructure
1 Horse Guards Road
SW1A 2HQ
- 4.3 More information on how HM Treasury will use your personal data for the purposes of this consultation is available in the Annex.

Annex

Privacy Notice

Processing of Personal Data

- A.1 This notice sets out how HM Treasury will use your personal data for the purposes of the Senior Managers & Certification Regime: Financial Market Infrastructures consultation and explains your rights under the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA).

Your data (Data Subject Categories)

- A.2 The personal information relates to you as either a member of the public, parliamentarians, and representatives of organisations or companies.

The data we collect (Data Categories)

- A.3 Information may include your name, address, email address, job title, and employer of the correspondent, as well as your opinions. It is possible that you will volunteer additional identifying information about themselves or third parties.

Legal basis of processing

- A.4 The processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in HM Treasury. For the purpose of this consultation the task is consulting on departmental policies or proposals or obtaining opinion data in order to develop good effective government policies.

Special categories data

- A.5 Any of the categories of special category data may be processed if such data is volunteered by the respondent.

Legal basis for processing special category data

- A.6 Where special category data is volunteered by you (the data subject), the legal basis relied upon for processing it is: the processing is necessary for reasons of substantial public interest for the exercise of a function of the Crown, a Minister of the Crown, or a government department.
- A.7 This function is consulting on departmental policies or proposals, or obtaining opinion data, to develop good effective policies.

Purpose

- A.8 The personal information is processed for the purpose of obtaining the opinions of members of the public and representatives of organisations and

companies, about departmental policies, proposals, or generally to obtain public opinion data on an issue of public interest.

Who we share your responses with

- A.9 Information provided in response to a consultation may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 2018 (DPA) and the Environmental Information Regulations 2004 (EIR).
- A.10 If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence.
- A.11 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Treasury.
- A.12 Where someone submits special category personal data or personal data about third parties, we will endeavour to delete that data before publication takes place.
- A.13 Where information about respondents is not published, it may be shared with officials within other public bodies involved in this consultation process to assist us in developing the policies to which it relates. Examples of these public bodies appear at: <https://www.gov.uk/government/organisations>
- A.14 As the personal information is stored on our IT infrastructure, it will be accessible to our IT contractor, NTT. NTT will only process this data for our purposes and in fulfilment with the contractual obligations they have with us.

How long we will hold your data (Retention)

- A.15 Personal information in responses to consultations will generally be published and therefore retained indefinitely as a historic record under the Public Records Act 1958.
- A.16 Personal information in responses that is not published will be retained for three calendar years after the consultation has concluded.

Your Rights

- A.17 You have the right to request information about how your personal data are processed and to request a copy of that personal data.
- A.18 You have the right to request that any inaccuracies in your personal data are rectified without delay.
- A.19 You have the right to request that your personal data are erased if there is no longer a justification for them to be processed.

- A.20 You have the right, in certain circumstances (for example, where accuracy is contested), to request that the processing of your personal data is restricted.
- A.21 You have the right to object to the processing of your personal data where it is processed for direct marketing purposes.

How to submit a Data Subject Access Request (DSAR)

- A.22 To request access to personal data that HM Treasury holds about you, contact:

HM Treasury Data Protection Unit
G11 Orange
1 Horse Guards Road
London
SW1A 2HQ

dsar@hmtreasury.gov.uk

Complaints

- A.23 If you have any concerns about the use of your personal data, please contact us via this mailbox: privacy@hmtreasury.gov.uk.
- A.24 If we are unable to address your concerns to your satisfaction, you can make a complaint to the Information Commissioner, the UK's independent regulator for data protection. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

0303 123 1113

casework@ico.org.uk

Any complaint to the Information Commissioner is without prejudice to your right to seek redress through the courts.

HM Treasury contacts

This document can be downloaded from www.gov.uk

If you require this information in an alternative format or have general enquiries about HM Treasury and its work, contact:

Correspondence Team
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

Tel: 020 7270 5000

Email: public.enquiries@hmtreasury.gov.uk