

# Fit and Proper Person certification guidance



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## Introduction

If you or your company is a provider of consumer credit (**lender**) or a mobile trader, you must be certified under Part 5A of the Credit Contracts and Consumer Finance Act 2003 (**CCCF Act**) by the Commerce Commission (the **Commission**). To gain certification you must satisfy us that you (if you are sole trader) or your directors and senior managers (if you are a company) are fit and proper persons to hold your positions. We need to be satisfied these individuals are financially sound, honest, reputable, reliable and competent to perform their role.

In this guidance we will refer to a sole trader or an entity requiring certification as “you”. Where we talk about a director or senior manager, we refer to an “individual”.

Certification becomes compulsory from 1 October 2021 as part of changes to the CCCF Act. From this date, you must be both certified by the Commission and registered on the Financial Service Provider Register (**FSPR**) to provide lending or mobile trading services.

The aim of certification is to set a high standard of personal and professional integrity for those involved in providing a lending or mobile trading service.

In this guidance, we explain the criteria for determining whether someone is fit and proper to perform their role.

## Who must be certified?

You must be certified by us if you provide a consumer credit or a mobile trading service. You are exempt from this requirement if you are already licensed or authorised by the Financial Markets Authority or Reserve Bank of New Zealand.<sup>1</sup> However, if your licence from the Financial Markets Authority or authorisation from the Reserve Bank of New Zealand expires, or is cancelled then the exemption no longer applies and you will not be able to offer consumer credit or mobile trading services until you have obtained certification.



1. A person is exempt from certification if licensed, registered, authorised or otherwise approved to provide a licensed service by a licensing authority listed in Schedule 2 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008; or is a prescribed exempt person or exempt service.

## Lender

You provide consumer credit if:

- you have a contract which allows a person to defer payment of a debt, incur a debt and defer payment, or to purchase goods or services and defer payment
- the contract allows you to charge interest or credit fees or take a security interest
- the borrower is a natural person who will use or intends to use the credit wholly or predominantly for personal, domestic or household purposes; and
- you are:
  - in the business of providing credit– although lending does not have to be your only business or main business
  - in the practice of providing credit as part of your business
  - entering into credit contracts on behalf of someone else; or
  - introduced to the borrower through a paid advisor or broker.

You will also need to be certified by the Commission and registered on the FSPR if you have taken over the rights of the original lender under a consumer credit contract, either by buying consumer loans or by having them assigned to you in some other way.

See more about consumer credit contracts [here](#).

## Mobile traders

You provide a mobile trading service if, in person and not at fixed premises, you offer or agree to supply consumer goods to someone under a credit sale, or a company associated with you provides finance to buy goods under a credit sale.

A credit sale is a sale of goods or services where payment of the price is wholly or partly deferred. For example, if a person buys a laptop from your truck on July 1st and agrees to pay it off at \$20 per week, then it is a credit sale.



## Timing of certification process

Certification becomes compulsory from 1 October 2021 however timing of certification will vary depending on whether you are already registered on the FSPR on 30 September 2021.

### *I am a lender or mobile trader who is already registered on the FSPR on 30 September 2021*

If you are already registered on the FSPR on 30 September 2021 you do not need to be certified until the date of your next annual confirmation. If, for example, your annual confirmation month is March 2021, you will need to be certified by March 2022. To find your annual confirmation filing date, look under the “General details” section of your FSPR dashboard.

If you apply to us for certification at least two months before your annual confirmation is due, you can still legally continue offering lending or mobile trading services after that date if we have not yet made a decision (the exception being if we asked you for information to help us assess your certification and you have failed to respond within 20 working days). If, however, you apply less than two months before your annual confirmation is due, and we have not made a decision, you must stop providing lending or mobile trading services from your annual confirmation date until we approve your application.

### *I am a new lender or mobile trader that will be registering on the FSPR for the first time on or after 1 October 2021*

If you are **NOT** already registered on the FSPR at 1 October 2021, you will need to be both certified and registered as a Financial Service Provider **before** you can provide consumer credit or mobile trading services.

### *I am an existing mobile trader*

If you are currently providing mobile trading services and you are not registered on the FSPR, you should apply for certification at least two months before 30 September 2021. (This is done by applying for FSPR registration and selecting ‘Mobile Trader’ as the service you wish to provide). This will allow you to continue to legally offer mobile trading services after that date if we have not yet made a decision on your application (the exception being if we asked you for information to help us assess your certification and you have failed to respond within 20 working days). If, however, you apply less than two months before 30 September 2021, and we have not made a decision, you cannot provide mobile trading services from 1 October 2021 until we approve your application.

## Fees

We will charge a processing fee of \$1055 (excluding GST) for each director or senior manager listed in your application. The processing fee is non-refundable, even if you withdraw your application or we decline your application.

Failing to obtain certification or portraying yourself as being certified when you are not can result in a court ordering you to pay up to \$600,000 for a corporate entity (such as a company or partnership) and up to \$200,000 for an individual.

## Definitions

### Who is a director?<sup>2</sup>

Anyone with a governance role comparable with that of a director in a limited liability company is classed as a director for the purposes of certification. That includes a person who is a sole trader. Specifically, a director includes:

- any person in a company occupying the position of a director regardless of the title assigned to that person
- any partner in a partnership (other than a limited partnership)
- any general partner in a limited partnership
- any person in an incorporated or unincorporated body (other than a company, partnership or limited partnership) occupying a position comparable with that of a director of a company.

### Who is a senior manager?<sup>3</sup>

A senior manager is a person other than a director whose position allows him or her to exercise significant influence over the way a business is managed or administered. Senior manager means different things in different organisations.

- In **larger organisations** this might be those employees who report directly to the chief executive (for example, the chief financial officer). In other words, it would be those individuals with top level management responsibility rather than everyone who has senior manager in their job title.
- In **smaller organisations** it will probably mean all or most of your senior people. Often in smaller organisations, an employee may not have a position title such as chief executive or chief financial officer, or the position title may not reflect the role they actually perform. The focus is on the role the person performs for you rather than their title or job description.

Who is a senior manager depends on the particular circumstances of your business, but a senior manager may be someone who implements and has input into the way the board exercises its powers (if there is a Board of Directors), and is engaged in decision making, regardless of whether they make the final decision.

Senior managers are not only employees. Whether a person is a senior manager or not is analysed through the influence that person has on a lender or mobile trader, rather than their employment status or position.



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2. Section 5 of the CCCFA which uses the definition in section 6(1) of the Financial Markets Conduct Act 2013 (**FMCA**).

3. Section 5 of the CCCFA which uses the definition in section 6(1) of the FMCA.

## Making an application for certification

You can apply for certification from 01 June 2021 through the “Maintain Financial Services” tab on your FSPR dashboard by selecting “Consumer Credit Contract” or “Mobile Trader” as a service you wish to provide. Selection of either of these services will trigger the certification process and an email will be sent informing you of how you can make the required payment and the forms you will need to complete. The payment amount is calculated based on the number of directors and senior managers requiring fit and proper person assessment. Once payment has been actioned on the FSPR you will need to complete the following forms (as emailed to you) for each individual director and senior manager that requires a fit and proper person assessment.

- **The Commerce Commission Certification application form:** It will ask for details about your business, including trading names and places of business, and details about your directors and senior managers (or proposed directors or senior managers), including their names, date of birth and a description of their roles.
- This form must be filled out and signed by each individual director and senior manager and emailed to [certification@comcom.govt.nz](mailto:certification@comcom.govt.nz).

The Commission will begin the assessment of the application once all the forms are received and deemed to be correctly filled out. Complete and accurate information is critical for us to verify your application.

When assessing an application, we will also seek information from other agencies and organisations, including the Police (for any history of criminal convictions). We will also ask other regulatory authorities to supply relevant information. If we receive information prejudicial to your application, we will give you and the individual directors or senior managers concerned an opportunity to respond. (See “Declining an application” below.)

We may ask for more information from you, such as more details about a particular event, situation or breach involving you or your directors or senior managers, or more details about an individual’s experience or role. We may refuse your application if you do not provide information we have requested.

If we approve your application, we will notify you and send details of your certification to the Registrar of the FSPR. The FSPR will be updated to show which services you are certified to provide. We may publicise any details about your certification that we think should be published.



## Assessment criteria

There are no legally prescribed considerations we must consider when determining the fitness and propriety of an individual to hold their position. We developed our assessment criteria after consultation with the finance sector and other interested parties. Our criteria fall into two categories:

- 1) Probity, reputation and financial integrity, and
- 2) Competency and capability.

Failure to meet any one criterion will not necessarily disqualify you. The one exception is if you are prohibited from registering on the FSPR because you or one of your directors or senior managers is disqualified, for example, they are an undischarged bankrupt, or any of you are prohibited under the Companies Act 1993, the Financial Markets Conduct Act 2013 or the Takeovers Act 1993, or are subject to a management banning order under the CCCF Act.<sup>4</sup>

### Probity, reputation and financial integrity

In assessing probity, reputation and financial integrity we look at the suitability of an individual to perform their role as a director or senior manager. Specifically, we look at whether they:

- have been convicted of a crime punishable by imprisonment in New Zealand or equivalent offences overseas (see “clean slate legislation” below)
- have been adjudicated bankrupt or discharged from bankruptcy in the past 10 years in New Zealand or overseas
- are or have been a director or senior manager of a company put into liquidation, receivership or voluntary administration in New Zealand or overseas
- have been prohibited from acting as a director or promoter of a company and/or acting directly or indirectly in managing a company while prohibited in New Zealand or overseas
- have been investigated by us or another New Zealand or overseas regulator, resulting in a conviction, penalty, adverse judgment, warning, settlement, enforcement action or enforceable undertaking
- have been a director or senior manager in a company at a time when it engaged in conduct that resulted in a criminal conviction or regulatory action by a New Zealand or overseas agency such as a declaration, a judgment award, penalty, or warning caution, or has signed enforceable undertakings or reached a settlement with the regulator
- have been prohibited from providing credit or has been the director or senior manager of a company at a time when it was prohibited from providing credit in New Zealand or overseas
- have been the subject of disciplinary action by a professional body, organisation or regulatory body
- either as an individual certified by us or as a director or senior manager of a certified corporate entity, have failed to comply with any certification conditions imposed<sup>5</sup>

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4. See section 14 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 for grounds for disqualification from registration as a financial service provider.

5. A settlement is a formal agreement between a person and a regulator to resolve issues relating to non-compliance. It normally, but not always, involves the person admitting a likely contravention. An enforceable undertaking is a written undertaking to either act or refrain from acting that is offered by a person (and accepted by a regulator) and which is enforceable by the courts.



- either as an individual or as a director or senior manager of a corporate entity has had a previous application for certification declined by us<sup>6</sup>
- either as an individual or as a director or senior manager has had an application for certification, registration or licencing to provide financial services declined, removed or cancelled by a regulatory body in New Zealand or overseas.

If any of these situations applies to an individual, it does not mean we automatically decline the application. Rather, we take into account all relevant circumstances, which is why it is vital applicants provide us with a full explanation about information contained in the application. We may still seek further information. Matters of interest to us include:

- the seriousness of the relevant conduct, offence or action (including its cause, any actual or potential harm to the public and any remedial steps taken)
- how long ago it occurred
- the applicant's role, if the matter relates to a corporate entity.

## Clean slate legislation

Individuals convicted of a crime punishable by imprisonment in New Zealand may still be able to say they have no criminal record because they meet criteria to do so under the Criminal Records (Clean Slate) Act 2004. See the Ministry of Justice website for more information. This Act does not apply to anyone who has had a conviction within the previous seven years.

## Competency and capability

In assessing capability, we look at an individual's skills, competency to perform the role, work history and qualifications. Specifically, we look at:

- the nature and size of the business in which the individual is working (and, where applicable, has worked), along with the range of services offered and activities undertaken
- the current position held, the roles and responsibilities it entails, and the length of time in the position
- any other directorship or senior management positions held in the past 10 years, and the nature of each company's business
- any other relevant employment history and experience
- qualifications, date attained and the institution that granted them
- any professional body memberships and dates of membership
- any professional training courses, seminars or workshops attended, or study undertaken, that highlight expertise or competence relevant to current role
- any other information provided by the applicant that he or she considers relevant to the capability assessment.

We also consider the expertise of other directors or senior managers in the application who may fill in gaps in an individual's knowledge or experience. In the case, for example, of an inexperienced director, we will consider the capability of other listed directors and senior managers who can support the individual while they build their knowledge or experience.

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6. This will only apply after October 2021 when the certification regime takes effect.

## Imposing and requesting conditions

We can impose conditions on your certification, but you can also ask us to apply conditions on certification. The conditions must either relate to something that will ensure each of your directors or senior managers is and remains a fit and proper person to perform their respective roles, or to the duration of the certification. You may, for example, ask that one individual remains in their current role or undertakes specific training or receives a certain level of supervision. You should set out in your application why you are making the request.

If we intend to impose conditions when you have not requested them or to impose stricter conditions than you have sought, we will let you know the proposed conditions and the reasons for imposing them. We will give you and the individual(s) concerned 10 working days to make a written submission about why we should not take this step. We will consider your submission when making our final decision.

We will notify you of our decision and send details of the certification and any conditions to the Registrar of the FSPR. We can publicise any details about a certification that we think should be published.

You can appeal to the District Court if you do not agree with our decision to impose conditions.

## Changing conditions

We can change or revoke any conditions of certification at any time. In turn, you can apply to us to have the conditions changed or revoked at any time. We can ask you for information to help us assess your request.

If we intend to change or revoke any condition or to refuse your request to change or revoke any condition, we will tell you why and give you 10 working days to make a written submission about why we should not take this step. We will consider your submission when making our final decision.

We will notify you of our final decision and send details of the new, amended or deleted conditions to the Registrar of the FSPR. We can publicise any details about such a change as we think fit.

You can appeal to the District Court if you do not agree with our decision to change or revoke conditions.



## Declining an application

We can refuse to certify you if we are not satisfied each of your directors and senior managers is a fit and proper person to perform their role. Without that certification, you cannot offer consumer credit or mobile trading services.

If we intend to decline your application, we will notify you and the individual(s) concerned, explaining why and giving you and the individual(s) concerned 10 working days to respond with written submissions. We will consider your submission when making our final decision. If we refuse your application for certification we will let you know the decision and why we reached it.

You can appeal to the District Court if you do not agree with our decision to refuse your application.

If we decline your application because we do not consider one of your directors or senior managers a fit and proper person to perform their role, then it may be appropriate to remove the unfit director or senior manager and reapply for certification. There is no extra cost to do this. If you choose to substitute the unfit director or senior manager for another person, we will charge a fee for the new person only.



It is important that the individual who did not meet the fit and proper person threshold does not assume a role equivalent to that of a director or senior manager in the lender or mobile trader.

## Change of circumstances

You must notify the Commission of any material change that could affect your certification.

→ If a director or senior manager;

- is appointed or has resigned, is removed, or otherwise ceases to hold their positions; or
- has been charged with, or convicted of, a crime punishable by imprisonment in New Zealand or overseas; or
- is adjudicated bankrupt or is likely to be adjudicated bankrupt (whether in New Zealand or overseas); or
- is a director or senior manager of a corporate entity that has been placed into liquidation, receivership, or voluntary administration in New Zealand or overseas; or
- has been prohibited from acting as a director or promoter of a company or taking part directly or indirectly in the management of a company in New Zealand or overseas; or
- has been prohibited from providing credit or other financial services in New Zealand or overseas; or
- is a director or senior manager of another corporate entity, and a relevant proceeding or action has been commenced or taken against either or both of that corporate entity or that person as a director or senior manager of that corporate entity; or
- has relevant proceeding or action has been commenced or taken against a certified person and/or a director or senior manager.

A **relevant proceeding or action** means any of the following (other than a proceeding commenced, or action taken, by the Commission):

- (a) a civil or criminal proceeding or regulatory action (in New Zealand or overseas) in relation to the contravention, or involvement in the contravention, of any:
  - (i) consumer credit and fair-trading laws; or
  - (ii) financial markets legislation; or
  - (iii) overseas law that regulates the supply of any financial service, any dealing in financial products, or the management of an entity:
- (b) a regulatory or disciplinary action for a breach of a professional or industry code of conduct or the rules of a financial product market (in New Zealand or overseas):
- (c) a criminal proceeding for a crime involving dishonesty.

You will have 10 working days from a material change occurring to notify the Commission of any prescribed material changes through the following email address [certification@comcom.govt.nz](mailto:certification@comcom.govt.nz). We will treat you as having known about any of these changes as soon as any one of your directors, senior managers, employees or agents became aware of it. For this reason, you should have processes in place to ensure you identify relevant changes and communicate them to us.

We will assess whether the changes affect our decision to certify you. We may ask you for more information to help make that assessment. We may suspend or cancel your certification if we consider any change means any one of your directors or senior managers is no longer fit and proper to perform their role.

## Suspending or cancelling certification

We may suspend or cancel your certification if, among other things, we receive information about a material breach of a condition or information that leads us to believe any one of your directors or senior managers is no longer fit and proper to perform their role.

If we intend to suspend or cancel your certification, we will tell you and the individuals(s) concerned, explaining why and giving you both 10 working days to tell us in writing why we should not suspend or cancel your certification. We will consider your submission when making our final decision. If we suspend or cancel your certification we will advise you of that decision and the reasons for reaching it.

If we suspend your certification, you cannot offer consumer credit or mobile trading services until the stated suspension period ends. If we cancel your certification, you cannot offer lending or mobile trading services from the date of cancellation.

Continuing to offer services in such circumstances can result in a court ordering you to pay a fine up to \$600,000 for a corporate entity or up to \$200,000 for an individual.

You can appeal to the District Court if you do not agree with our decision to suspend or cancel your certification.

## Renewing certification

Recertification is required every 5 years unless the certification period has been shortened under conditions imposed on your certification.

You should apply for recertification at least two months before your existing certification is due to expire. If you do this, your existing certification will continue until your application has been decided. If you apply less than two months before your existing certification is due to expire, you will not be able to offer lending or mobile trading services if your certification expires and you have not been issued a new one.



## Penalties

There are serious consequences if the requirements of the certification regime are breached. The court may order you to pay up to \$600,000 for a corporate entity or up to \$200,000 for an individual if:

- You provide consumer credit or mobile trading services without being certified or if your certification has been cancelled or during the period it is suspended
- You represent that you are certified when you are not
- You do not notify us of changes in your circumstances that you are required to within 10 working days
- You provide false or misleading information on your application.

## Our contact details

For general enquires please email us at [certification@comcom.govt.nz](mailto:certification@comcom.govt.nz).

## If in doubt, seek legal advice

This guidance is intended to help you understand the certification process. It is not intended to be a substitute for independent legal advice. If you are unsure about any aspect of this guidance, and how it applies to you, your business or entity, please refer to the detailed information through the links provided and, if necessary, seek legal and financial advice.



ISBN: 978-1-869459-03-1

