Extension of the SMCR: What it means for firms and individuals

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Extension of the SMCR: What it means for firms and

individuals

The Senior Managers & Certification Regime (the SMCR) was first introduced in the banking sector in March 2016. It was introduced in response to a series of scandals. For example, those relating to LIBOR and FX rigging. Among its aims was to create much greater individual accountability of those working within financial institutions. In our experience, that aim has gone a significant way to being achieved. As a consequence, the impact on the employer/employee relationship in banking has been hard to overstate.

The FCA has announced that it will extend the SMCR beyond banking to the remainder of the financial services sector by 9 December 2019. It will replace the Approved Persons Regime (APER). What's more, it will replace the Senior Insurance Manager's Regime at insurance underwriting firms by 10 December 2018.

As it did in banking, the roll out of the SMCR is likely to have a substantial impact on HR processes for regulated firms. In particular, it will materially change the risks for those individuals working in the most senior roles.

Preparations for regulated firms

The SMCR will have an impact at various stages of the employment life cycle. As such, firms affected should begin preparations now to ensure they are ready for the new regime.

For example:

Responsibility under the SMCR

Senior managers will be personally accountable for business failings. Moreover, the FCA requires regulated firms to draw up a 'responsibilities map' to make it clear who is responsible for which areas of the business. This is a 'living document' which is designed to ensure that there are no gaps in accountability. In preparation for the regime, firms need to be thinking about the current divisions of responsibility and identifying potential gaps in accountability.

Appraisal processes

Previously, under APER, it was the regulator's responsibility to assess the fitness and propriety of those carrying out controlled functions. However, under the SMCR, the burden falls on firms to assess the fitness and propriety of certified persons (i.e. of all but the most senior staff). This must be done at the point of recruitment and on an annual basis. Therefore, firms will have to build the assessment of fitness and propriety into their annual appraisal processes.

Regulatory references

Hiring firms must obtain regulatory references covering candidates' fitness and propriety from past employers going back six years. Firms' references for former employees will need to record any information which goes to their fitness and propriety. However, the scope to negotiate a regulatory reference will be very limited. Firms are likely to take a cautious approach to what they say in it but must also ensure that what they say is fair, accurate and not misleading. Where the circumstances of a negotiated exit are contentious, this career defining tension creates a heightened risk of litigation. It becomes more difficult for the employer and employee to settle their dispute.

Conduct Rules

The FCA's individual Conduct Rules will apply to the vast majority of staff in firms caught by the extended regime, except for staff in purely administrative roles. Firms will have to ensure that all staff understand their obligations under the Conduct Rules and receive training on them.

The regime will require more discipline on internal audit processes and the ability to demonstrate compliance. Also, Internal HR teams will require training on what will be expected of them for each process that is affected.

What the extended regime will mean for Senior Managers

Internal pressures on audit processes

The SMCR places a duty of responsibility on Senior Mangers for different functions of the firm. For example, if there is a regulatory failing in a Senior Manager’s business area, he or she is responsible. What’s more, they must demonstrate they took reasonable steps to avoid the breach occurring, or they will be personally liable. Given the risk, Senior Managers are likely to place firms under pressure. They will want to ensure internal audit processes are sufficient and compliant with the SMCR.

Remuneration

Holding a Senior Management Function is likely to increase the workload, and will increase risk, for those taking on these positions. This may result in Senior Managers seeking to renegotiate contractual terms. For example, greater remuneration or other protections about the scope of their role. In addition, incoming senior managers may want to understand what their prescribed responsibilities are and may try to limit them contractually. This is a move that most regulated firms will want to resist.

Insurance

Many of those holding statutory directorships will already negotiate the benefit of directors’ and officers’ insurance, as well as other suitable indemnities as part of their contractual terms. Those occupying Senior Management Functions should do likewise.

Handover

It will also be in the interests of all Senior Managers to ensure they receive a thorough handover from their predecessors. They will want to make sure they are alive to the business risks, particularly in the areas of the firm that they are taking personal accountability for. Incoming Senior Managers are likely to want confirmations from their new employer that any handover will be satisfactory.

The SMCR has already had a marked impact on firms' business practices, particularly on financial services professionals in those parts of the sector where it already applies. Firms are well advised to be thinking now about how they can get ready for compliance.

BDBF are employment law specialists in the insurance and financial services sectors. If you have any queries about how the extension of the SMCR may affect your firm, or you personally, please contact [Nick Wilcox](), Partner ([nickwilcox@bdbf.co.uk]()). Or [Rolleen McDonnell](), Senior Associate ([rolleenmcdonnell@bdbf.co.uk]()) on 020 3828 0350.

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