

The FCA and PRA review of the Senior Manager and Certification Regime (SM&CR)

Brahams Dutt Badrick French LLP - Response

Details of the Respondent

We are a specialist employment law firm based in the City of London. We are experienced in advising on the impact of the SM&CR for individuals, including issues such as:

- the scope and consequences of statements of responsibility;
- the certification process;
- investigations into an individual's conduct or competence;
- the impact of findings regarding fitness and propriety; and
- regulatory references

We have answered those questions from the SM&CR Discussion Paper where we feel our practical experience in this area may be of assistance.

Responses

Q1: To what extent do you agree or disagree that the SM&CR has made it easier to hold individuals to account?

We would strongly agree that it is having the effect of holding individuals to account.

Q2: To what extent do you agree or disagree that the SM&CR regime has improved safety and soundness and conduct within firms?

We are not able to comment in relation to 'safety and soundness'. In relation to 'conduct', we continue to advise individuals who are accused of issues of conduct. Generally speaking, there is a trend away from cases of financial misconduct (e.g. market manipulation) and towards non-financial misconduct (e.g. sexual harassment).

Q3: To what extent do you agree or disagree that the fitness and propriety requirements support firms in appointing appropriately qualified individuals to Senior Manager roles?

Not able to comment.

Q4: Please provide any suggestions that can help ensure that appropriately qualified individuals are not deterred from taking up relevant Senior Manager roles.

Not able to comment.

Q5: To what extent do you agree or disagree that the SM&CR has made it easier for firms to hold staff to account and take disciplinary action when appropriate against them?

In our view, the pendulum has swung too far the other way. Of course it is right that staff should be held to account and, where appropriate, disciplined if there are legitimate concerns about their

conduct and fitness and propriety. The purpose of the SM&CR was to root out the 'rolling bad apple' and that was an admirable aim following the LIBOR and FX rigging scandals and the causes of the Global Financial Crisis. It is an aim that we would say has largely been achieved. However, there is a material absence of checks and balances to the power held by the firms under the SM&CR when it comes to holding staff to account and this is resulting in a cohort of innocent staff effectively becoming 'collateral damage' to achieving the aim.

If an employee is inappropriately held to account and subjected to disciplinary action, resulting in not only an employment sanction (ranging from a warning to summary dismissal) and a finding of a Conduct Rule breach and possibly also a finding that the person lacks fitness and propriety, then, under the SM&CR, there is nothing that the individual can do about that. The individual does not have the power to take the firm's decisions to the FCA, or any other party or body that is independent of the firm to reconsider the firm's findings of Conduct Rule breaches or that they are not fit and proper. They have the right to an appeal, under a typical employment law disciplinary procedure, but that is an appeal that is to the firm again. As such, the firm is prosecutor, judge, and jury in such cases, and this is resulting in appalling injustices to some individuals, who find their careers in regulated financial services roles ended at the whim of an overzealous (and indeed in some cases vindictive) employer. Evidently, this can have catastrophic impacts on individuals from a financial, health, and reputational perspective. This is a glaring problem with the SM&CR which in so many other respects works well, and which really needs to be addressed.

Q6: To what extent do the specific accountabilities of individual directors established by the Senior Managers Regime work in ways that complement the collective responsibility of the board of directors or decision-making committees? Are there ways this could be improved?

Not able to comment.

Q7: To what extent do you agree or disagree that the prospect of enforcement promotes individual accountability?

We agree that it does.

Q8: How could our approach to enforcement be enhanced to better support the aims of the SM&CR?

Not able to comment.

Q9: To what extent do you agree or disagree that the scope of the SM&CR is appropriate?

We agree that it is appropriate.

Q10: Are there actions the regulators could take in respect of the SM&CR that would help enhance competition or international competitiveness?

Not able to comment.

Q11: To what extent do you agree or disagree that the SM&CR is applied proportionately to firms and individuals?

We agree that it is applied proportionately, but please see the answer to Q5 above.

Q12: How could the process for SMF approvals be further improved?

Not able to comment.

Q13: To what extent do you agree that the process for obtaining criminal records and notifying these to the regulators is effective in supporting the aims of the SM&CR?

There is a boundary between a person's private life and their working life and the extent to which what happens in their private life should be considered relevant to their working life and their ability/right/permissions to carry out their job. Where that boundary lies is going to vary in every case and is fact-specific. As with the answer to Q5, above, if processes such as this are introduced, which whilst well-intentioned could have potentially very serious consequences for the individual, there must be appropriate checks and balances and the individual needs to have a meaningful right to challenge.

Q14: To what extent do you agree or disagree that the 12-week rule sufficiently helps firms to manage changes in SMFs?

Not able to comment.

- Q15: To what extent do you agree or disagree that the regulators have in place**
a. an appropriate set of Senior Management Functions to achieve the aims of the SM&CR?
b. an appropriate set of Prescribed Responsibilities to achieve the aims of the SM&CR?

Not able to comment.

- Q16: To what extent does the Duty of Responsibility support:**
a. personal accountability?
b. better conduct of Senior Managers?

In our view the Duty of (Personal) Responsibility on SMFs is an important part of the SM&CR and without it the effectiveness of the regime would be diminished, and probably much diminished. This is because the tone of a firm is set from the top. It is also because inappropriate conduct and risk taking can be led from the top, or the top can be reckless, or indifferent, if there is an absence of accountability at the top. This was a well-understood problem with the previous regime (the Approved Persons Regime) and was one of the reasons why the SM&CR was first introduced.

Q17: To what extent do you agree or disagree that Statements of Responsibilities and Management Responsibilities Maps help to support individual accountability?

We strongly agree.

Q18: To what extent do you agree or disagree that the Certification Regime is effective in ensuring that individuals within the regime are fit and proper for their roles?

We agree that the Certification Regime is generally effective in ensuring that individuals within the regime are fit and proper for their roles. However, as stated in the answer to Q5 above, there is a glaring absence of any mechanism under the SM&CR for an individual to challenge a firm's

determination that they are not fit and proper and that includes if the determination is made during the certification process.

Q19: Regarding the Directory of Certified and Assessed Persons, to what extent do you agree or disagree that:

- a. it captures the appropriate types of individuals?**
- b. the requirements for keeping it up to date are appropriate?**

Not able to comment.

Q20: To what extent do you agree or disagree that regulatory references help firms make better-informed decisions about the fitness and propriety of relevant candidates?

We agree to some extent. However, a firm's view of an individual's fitness and propriety is subjective. What one firm considers to be an issue worthy of inclusion in a regulatory reference, another may not. Without wishing to generalise, firms tend to be extremely conservative, and keen to protect their own regulatory position and relationship with the FCA, which tends to mean that if the firm is in any doubt it will err on the side of being critical of an employee in a regulatory reference. As stated above, it is our view that the firms hold too much power, which is unchecked, and not subject to any meaningful right of appeal by the individual or review by an independent third party, such as the regulator, to determine a person's fitness and propriety. These features of the regulatory references regime mean that a hiring firm may receive inaccurate information about the fitness and propriety of the individual.

Q21: To what extent do you agree or disagree that the Conduct Rules are effective in promoting good conduct across all levels of the firm?

We agree that the Conduct Rules are effective in promoting good conduct across all levels of the firm.

Q22: Are there other areas, not already covered in the question above, where you consider changes could be made to improve the SM&CR regime?

No further comments.

Contact details

If you wish to discuss any aspect of this response then please contact

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