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FEATURE › SENIOR MANAGEMENT ACCOUNTABILITY

Who will manage the managers under the SMCR?

Performance management of an employee under the SMCR is subject to the same considerations as for the contractual arrangements and dismissal procedures pertaining to any senior staff member. However, the regulatory framework provides for some additional and specific considerations, explains **Alexandra Carn**.

The Senior Managers and Certification Regime, which came into force on 7 March 2016, currently covers individuals working for UK banks and building societies including branches of foreign banks operating in the United Kingdom. For those persons it effectively replaced the 'Approved Persons' regime.

Key definitions

Senior Manager (SM)	The most senior members of a firm who perform SMFs and must be approved by the regulator.
Certification Regime (CR)	Employees who fall short of being SMs but still have important firm or customer roles. Approved by the firm and not the regulator.
Conduct Rules	High level principles that apply to SM and CR staff.
FSMA	Financial Services and Markets Act 2000
Senior Management Functions (SMF)	A function is an SMF if: (a) the function will require the person performing it to be responsible for managing one or more aspects of the authorised person's affairs, so far as relating to the activity, and (b) those aspects involve, or might involve, a risk of serious consequences for the authorised person, or for business or other interests in the UK. (FSMA, section 59ZA)

Statement of Responsibilities	Document setting out the areas of a firm's regulated activities for which the SM is responsible. All applications for approval as a Senior Manager at a relevant firm must contain, or be accompanied by, a statement of responsibilities. (FSMA, section 60(2A))

The Prudential Regulation Authority and the Financial Conduct Authority can take action against a SM if they are responsible for the management of any activities in their firm in relation to which the firm contravenes a relevant requirement. In such a case there is also likely to be action taken against the firm, placing the firm's systems and controls under scrutiny. Accordingly, the firm will want to be able to show that it managed its managers and took proper care in assessing their fitness and propriety on an ongoing basis.

Senior staff are notoriously difficult to manage, as the normal route of issuing performance warnings can seem clunky and inappropriate in practice. However, ensuring accountability is essential, as is the ability of firms to show that this has been done.

First principles

Effective performance management requires a firm to put the building blocks in place from the very start of the

relationship. To be able to manage an employee fairly, the employee must be aware of what is expected of him or her. Inherent to the SM regime is that someone is accountable for the fundamental responsibility inherent in a particular SMF. SMs, in particular, need to be fit for the role as well as to understand the business model and strategic plans of the firm, together with its attitude to risk and risk management.

All this starts at recruitment. References need to be sufficiently comprehensive such that the firm can ascertain that the SM will be able to perform the role required and, further, that the person making that assessment on behalf of the firm is suitably qualified to do so.

Contractual and non-contractual documents

Once a suitable employee has been identified, the next stage is to ensure that the firm has the right contractual powers and that it provides a clear framework for how an employee should be managed in the event of poor performance.

Contractual issues include:

Duties

SM contracts should include reference to the Statement of Responsibilities and, for CR employees, a more general statement. It is established practice to have a contractual requirement that employees must comply with their regulatory obligations during the term of the employment contract, including the Conduct Rules. For SMs, it may also be appropriate specifically to require that they comply with their Statement of Responsibility. Particular care should be taken where there is a shared responsibility for SMs. Although this is not the norm, it can occur; for example, in the instance of a job share or a handover. Also, consider what provisions are needed to cater for the absence of an SM, for example because of holiday or sickness and who has SM responsibility during such periods.

Suspension

It is essential that there is a specific right to suspend contained in the employment contract. This is often drafted only to apply in misconduct situations. Poor performance is not a conduct issue, but a right to suspend can be equally important here – particularly for employees performing senior and/or customer functions. In the case of a suspended SM, it is essential that provision should also be made as to how that manager's duties will be re-allocated before the suspension commences.

Termination

Most contracts will cite failing to be a fit and proper person as a reason for termination. This can be expanded to reference specific functions, such as failing to discharge the duties outlined in the Statement of Responsibilities and failing to comply with the Conduct Rules.

There should additionally be a specific contractual obligation to provide assistance on handover of duties on the termination of employment and to supply a written document of relevant matters.

In respect of non-contractual documents, firms often isolate policies and procedures from the employment contract, the reason being that if a policy is contractual and there is a failure to follow it, a firm can face a technical claim for breach of contract.

Policies

Standard performance management policies may not be appropriate for SMCR employees. Given the significance of the role, a truncated process may allow an institution to take firmer and quicker action. Linked to this is the need to ensure that those who are making the assessment know how to recognise under-performance and how to address it. Firms and managers should note that a failure to provide appropriate supervision may be a breach of the Conduct Rules.

Potential sanctions need to be clear and specific. Examples include:

- the right to demote or change role to a non-SMCR role;
- a failure to comply with Conduct Rules is a disciplinary matter;
- different rules as to the expiry of warnings and that they remain 'live' for regulatory reference purposes; and
- advice that regulators will be notified as appropriate, even where no disciplinary sanction applied.

Appraisals

It is the firm's responsibility to ensure that SM have sufficient seniority resources and authority to discharge their responsibilities effectively. Regulators expect an annual assessment of the fitness and propriety of SMCR individuals. This can be done at the annual appraisal but more frequent reviews may be appropriate, particularly as this should provide accurate, comprehensive and up to date records. This assists with a performance management process and also protects the firm.

Training

Training not only assists employees to perform their roles but also protects a firm should there be a breach of a regulatory requirement by an employee.

It is axiomatic that specific training on the Conduct Rules is essential, as they are handbook High Level Standards, and it also needs to be ensured that those who are doing the training and the assessing are appropriately trained.

All the above matters must be properly and accurately recorded. There is little benefit in going through the motions if it cannot be properly and comprehensively shown that this was done.

Termination

Sometimes, despite the best endeavours of both employers and employees, employment relationships ultimately do not work out. For departing senior staff, the financial

considerations may be paramount as they often have long notice periods and deferred compensation.

Specific non-financial considerations also arise on termination of employment, including:

Re-allocation

SM responsibilities cannot be left hanging and to whom these will be assigned, whether on a temporary or permanent basis, must be addressed before termination.

Regulatory notifications

These may need to be done even if there is no misconduct – the duty is to inform the regulators of everything of which they should reasonably be aware under the General Notification Requirement of SUP.15.3.

Settlement agreements

Settlement agreements are commonplace even where there is little potential risk to a firm, as they provide for certainty. Specific issues arising under the SMCR are:

- termination payments should not be made as a matter of course. The FCA/PRA Remuneration Codes require that such payments reflect performance achieved over time and are designed in a way that does not reward failure;
- warranties must not act as an implied deterrent against whistleblowing; and
- there should be a specific obligation to assist with the investigation of any conduct or regulatory matters that arise post-termination.

SMCR staff are employees and they have the contractual and statutory rights of the same – the regulatory framework being an overlay to those rights. However, in some circumstances, the duty to the regulator will be the overriding issue; after all, it is the regulator that ultimately holds a firm to account. Proper management should be a tool that allows firms to get the best from their staff and protect their business.

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