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WHAT EVERY SMF SHOULD BE ASKING THEIR EMPLOYER

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The Senior Manager & Certification Regime is now over six months old and many senior managers at banks and PRA designated firms are already getting used to their new responsibilities and the realities of increased accountability.

The FCA has published details of the degree to which firms are complying with the new regulatory requirements and it makes for rather poor reading!

It has been confirmed that in 2018 the SM&CR will roll out across the entire financial services sector, impinging up to 60,000 firms. These profound changes include governance structures, record keeping, registration and management requirements. This presents challenges to all staff that will be registered under either regime, but in particular those individuals required to accept SMF's and the associated responsibilities, accountabilities and potential consequences that they will bring.



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The challenges also extend to employers, who will effectively need to change the whole employee relationship with those they require to assume such levels of responsibility, addressing the cultural and contractual changes required to bring that about.

For some staff not previously captured under the previous APER arrangements and those being newly required to accept SMF roles the changes could be profound; employers will need to handle them with care.

From a purely legal and contractual perspective, a fundamental change to a job role (in terms of responsibilities) is something that must be achieved through negotiation and agreement. In extreme circumstances some managers might (quite reasonably) demand to know 'what is in it for them'?

Will, for example, this uplift in responsibilities and accountabilities mean a change to remuneration and/or seniority/influence within the firm? They may even be unwelcome changes: some individuals might decide it's 'not worth the risk' and refuse the new role.

A fundamental change to an employee's role and hence contract of employment (such as a change of job description or substantially new responsibilities) should be realised only after appropriate contractual notice has been given and ideally after consultation. I wonder how many of those firms captured under SM&CR will have done this? Should an employee refuse the change (and have it imposed instead), would they have credible grounds for a claim of constructive dismissal?

Employers must think about the consequences of this and as part of the consultation process ensure that new SMF's are reassured that they can discharge their responsibilities effectively. 'Reasonable steps' must be clarified and deliverable, both by the individuals themselves and those under their supervision that are tasked with discharging them. This therefore requires clear definition. A new SMF might reasonably ask that the new responsibilities are clearly defined and, more importantly, what they will be required to do to actually discharge them.

Staff should expect a demonstrable commitment from their employer, providing them with the competence, the means, the MI, the oversight control and the monitoring or recording of key benchmarks that assure the staff concerned that this is all being done thoroughly.

Both employer and (more significantly) employee) might consider the following questions:

- How committed to this whole process is my employer? Culturally and in terms of resources and governance, are you implementing and investing in the development of a responsible, compliant culture of conduct and governance?
 - There are various indicators to the extent of that commitment. Culture and Conduct are always difficult things to quantify. The FCA itself acknowledges this fact but, as usual, has provided little in terms of prescriptive guidelines. It does, however, suggest five key conduct questions that you might like to pose as an employee to your employer (or as an employer to yourself):
 - o First, how do you identify the conduct risks inherent within your business? As with any risk, you cannot hope to mitigate something you don't know exists.
 - o Second, who is responsible for managing the conduct of your business? We expect firms to be asking themselves how they are encouraging their employees to be and feel responsible for actually managing the conduct of their business.
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o Third, what support mechanisms do you have to enable people to improve the conduct of their business or function?

o The fourth question is about how the board and executive committees gain oversight of the conduct of the organization. At a basic level, this is about what information the board and executive see and how they take it into account in their decision-making.

o The fifth and final question is almost a 'catch-all' question. It is whether firms have any perverse incentives or other activities that may undermine any strategies put in place to answer the first four questions. As an example, most employees of any firm will never (or rarely) see the CEO. Their role models are not board members. Their role models are the top trader, the desk head. If they see a colleague rewarded and promoted, even if their behaviour is not consistent with the values of the firm, this does not send a clear message that such behaviour is not tolerated.

If you ask these questions and find a lack of clarity, commitment, investment or purpose – you might want to think twice before putting your name on certain areas of accountability.

Further questions I myself would pose to my employer:

Are you committed to maintaining and developing my competence to appropriate levels? Equally, are you committed to maintaining the competence of those that come under my span of control?

Can you give me proper oversight of my span of control – people and business functions – to ensure that the 'reasonable steps' I am expected to take are being taken?

Are you culturally committed to encouraging good conduct and compliant behaviours? You might ask, for example, if variable remuneration is linked directly and positively to conduct and risk behaviours?

Have you invested in a decent system that gives me the MI I need for peace of mind?

What, if anything, would you do if things go wrong and I find myself being held accountable and under FCA scrutiny? Is there any guarantee that you would defend me and / or fund my defence, should it prove necessary? I would want this in writing. FCA investigations typically take 18 months or more plus – legal fees build up rapidly!

In short there are fundamental changes to contractual employment relationships ahead and those that do not manage these thoughtfully will face the consequences. HR professionals take note!