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SM&CR – Considerations for Human Resources

The Senior Managers and Certification Regime (SM&CR) comes into force on 9 December 2019 for all FCA solo-regulated firms, replacing the Approved Persons Regime with the aim of increasing the accountability of senior individuals. Previous Hot TopICS have covered the ramifications of this for insurance intermediary firms. This article looks from the Human Resources (HR) point of view at some of the changes that firms in the 'Core' category may need to make.

HR considerations

All senior personnel including board directors and managers should understand the scope and implications of the SM&CR so that they can decide what changes are needed. Although SM&CR presents significant challenges, most firms already have structures and processes in place which can be reviewed and adapted to fit the new regime.

An internal review might start with an up-to-date organisational chart. Along with individual job descriptions this could be used to identify who will be carrying out Senior Management Functions (SMFs) and whether any employees will fall under the Certification Regime.

In addition to this, there are numerous considerations for HR that need to be addressed - whether or not the firm has its own specialist HR personnel - including:

Agreeing and preparing a Statement of Responsibilities (SoR) for each Senior Manager:

- The SoR must set out what the Senior Manager is accountable for, including any Prescribed Responsibilities, based on the FCA template. The SoR should correlate with (but not be the same as) the individual's job description. Senior Managers are responsible for maintaining and updating their own SoR but the involvement of HR and/or other senior personnel in this process should help to ensure a consistent approach.

Maintaining procedures for carrying out Fit and Proper assessments (FIT):

- SM&CR involves a formal process under which FIT assessments are carried out annually in respect of all Senior Managers and any Certification Staff and NEDs. Senior Managers who are currently Approved Persons will have been vetted on appointment and should also have been monitored (usually through annual appraisals).
- A FIT assessment is likely to cover qualifications, competence, any disciplinary issues and responses based on the FCA's Fit and Proper questionnaire (as in Form A, which has been updated from the version currently used for Approved Persons).
- For new appointments it will be necessary, in addition, to obtain Regulatory References from former employers and in the case of a Senior Manager, to carry out a criminal records check.
- Anyone performing a Certification Function must be issued with a certificate by the firm each year as evidence that they have passed their FIT assessment.
- FIT assessment and certification can be part of annual performance appraisals.

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Making arrangements for Conduct Rules training:

- The first step would be to identify all Conduct Rules staff. With the exception of 'ancillary staff' such as receptionists, catering and security staff, all those involved in regulated activities will be subject to Tier 1 Conduct Rules – they must therefore be trained in and abide by them.
- Senior Managers (to whom additional Conduct Rules apply) and Certification staff should receive specific training on the Conduct Rules by 9 December 2019. All other Conduct Rules staff must have received training on the Conduct Rules by 9 December 2020.
- A Senior Manager within the firm will have the Prescribed Responsibility for ensuring such training is carried out effectively and that Conduct Rules are complied with.
- Conduct Rules training may be face-to-face or remote (such as by E-learning) but it should always be designed so that it is relevant to particular roles within the firm and tailored to the individual as far as possible.

Revising contracts of employment:

- All staff who are subject to the Conduct Rules should be obliged under their contract of employment to abide by the Conduct Rules and understand that breaches will be reported to the FCA. They should also be obliged to undertake Conduct Rules training and to cooperate with any FCA or firm investigations.
- Contracts for Senior Managers and Certification Staff should make reference to the fact that their role is subject to FCA rules, including the FIT assessment and make clear their on-going commitment to inform the firm of any relevant changes in their personal circumstances.
- Firms should obtain an acknowledgment from each individual of any contractual changes.
- Consequential changes to Staff Handbooks might be necessary.

Updating recruitment and induction arrangements:

- Any new Senior Manager must be approved by the FCA before carrying out any Senior Management Function. It may be possible for a prospective Senior Manager to start working under supervision while their competence is assessed and their application form is sent to the FCA; otherwise the start date must be delayed (for up to three months) whilst the FCA vets the application.
- Firms need to ensure the requirements and responsibilities for Senior Managers are clear at the initial stages of recruitment and any possible hurdles recognised. In particular, firms must be able to carry out rigorous FIT assessments and criminal records checks for Senior Managers and NEDs.
- Although criminal record checks are not mandatory for Certified Staff under SM&CR, firms may choose to check for unspent convictions when carrying out their internal FIT assessment.
- As with any personal data, firms should ensure their Employee Privacy Notices clearly inform applicants and employees as to the use of their personal data to comply with Data Protection law and regulations.
- Induction for all employees should include the relevant Conduct Rules training.

Updating company policies:

- Firms need to consider their internal policies and how they might be affected by the SM&CR. For example, disciplinary proceedings will need to be revised to take into account possible Conduct Rule breaches which must be notified to the FCA and disclosed in any regulatory references. There is a risk of unfair dismissal claims if decisions are inconsistent.
- Whistleblowing procedures may need to be revised to ensure the FCA can be notified where Conduct Rule breaches are involved.
- It might be necessary to introduce new policies, such as for criminal records checking and other vetting procedures.

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- The firm's training and competence (T&C) arrangements will need revising to take account of the need for Conduct Rules training.
- Company policy on performance appraisals and performance management may need revising (so that, for example, the FIT assessment becomes part of the appraisal process).
- Any changes to policies should be agreed at senior level and communicated to staff as appropriate.
- Firms should have robust arrangements for record keeping - including past versions of SoRs, personnel records to facilitate regulatory references and records of the apportionment and allocation of responsibilities.

Making arrangements for Conduct Rules breach reporting:

- The need to report breaches of the Conduct Rules by Senior Managers and all other Conduct Rules staff to the FCA places a new obligation on firms.
- A process should be developed to establish and validate the firm's breach reporting arrangements, linking its HR disciplinary processes with FCA reporting requirements
- The rationale for determining in each case whether a misdemeanour constitutes a breach of the Conduct Rules and triggers disciplinary action should be consistent.
- It should be clear who, within the firm, is primarily responsible for FCA notifications.
- For Senior Managers, firms must notify the FCA of breaches within 7 business days of the conclusion of disciplinary action, using the appropriate regulatory form. For Certified Staff and other Conduct Rules staff, firms must notify breaches through Gabriel annually, although any particularly serious breaches should be reported to the FCA immediately.
- It is important for firms to retain all relevant supporting evidence.

Having arrangements to supply and request Regulatory References:

- Regulatory references must be provided in relation to an existing or former employee or NED, upon the request of their new or prospective regulated employer.
- When providing a reference, firms must comply with common law - the references must be true, accurate, and fair – in addition to the FCA rules. The reference will be set out in accordance with the FCA template and should include details of:
 - any disciplinary action due to alleged breaches of Conduct Rules;
 - any findings that the candidate was not considered fit and proper;
 - any cases of serious misconduct (even outside the six-year period); and
 - any other relevant information
- Firms are expected to notify new employers if significant information that would have been included in the reference comes to light later on.
- If recruiting someone to a Senior Manager or Certification role from another firm or promoting someone who has been with the firm for less than six years to a new Certification or Senior Manager role, the firm will need to ask all previous employers, covering the last six years, for a regulatory reference.

Devising exit and handover procedures for senior personnel:

- As well as notifying the FCA of changes to senior personnel using the appropriate forms, there are other important considerations; for example, arrangements for planned exits can be made in advance and a successor appointed in good time; otherwise the '12-week' rule may enable the firm to appoint a suitable person who is not approved to cover the role on a temporary basis.

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- Any settlement agreements with departing staff members should take account of the firm's duty to provide a regulatory reference. It should be explicit that the firm will make all necessary disclosures to the FCA.
- The departing individual should be informed that the firm will need to keep relevant documents for 6 years after their departure, including SoRs, training records and any regulatory correspondence.
- Incoming Senior Managers will need to be fully briefed on the relevant issues for which they are becoming accountable. A handover document (although not compulsory for core firms) would ease the process.

Conclusion

The new Regime has implications for many aspects of the business and it is particularly relevant to HR. Applied with a positive approach, the changes should complement and enhance existing business functions and could help to improve the way the firm is managed and operated.

Firms and individuals face sanctions from the regulator involving fines and potential reputational damage if they do not comply. They should, however, have little to fear if they take the necessary steps now and maintain suitable records covering their decisions, procedures and processes.

Those firms who receive on site visits from ICS Consultants will be able to discuss the HR implications outlined above at their next meeting. In the meantime please contact your usual Consultant or the ICS Helpline if you have any immediate queries. Tel: 01892 539600 or email: admin@insurancecompliance.co.uk

The above information is a summary of certain matters which will affect the majority of firms conducting Insurance Mediation and reflects ICS's views at the date of publication. Each firms' requirements are individual and rules are regularly changing; it is therefore important that you always seek specific advice from ICS before acting on anything contained in this publication.

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