

SM&CR ROUNDUP

TISA'S SM&CR NEWSLETTER



Welcome to the SM&CR Roundup – your guide to the help, updates and resources available from TISA to assist you with implementation. We hope you find it useful, please do give us your feedback and let us know if you have colleagues who would benefit from receiving a copy.

This guest edition, written by Katharine Harle, Senior Associate at TISA member firm Dentons, is intended to give an idea of some employment-related considerations firms may encounter when implementing SMCR and beyond. It is not intended to be an exhaustive list and some aspects of it may not be relevant to all firms or individuals.



Access to independent legal advice

SM&CR is about increasing individual accountability and was driven in part by lack of regulatory enforcement action taken against senior individuals in the wake of the crisis and Libor/FX scandals. This emphasis on the individual and the increased potential for individual liability and/or consequences has resulted in increased demand from senior managers for access to independent advice (often legal advice). SMCR also gives rise to a potentially higher likelihood of conflict between the interests of the firm and an individual in which case individuals will need to be separately represented.

Therefore, in addition to the contract changes and other issues flagged below, firms may wish to offer, or individual Senior Managers may seek to negotiate additional budget for independent legal advice. Examples of instances where independent legal advice may be needed include:

- the scope of Senior Managers' statement of responsibilities;
- the adequacy of each Senior Manager's arrangements to discharge the duty of responsibility; and
- in the event of an FCA investigation into their area.

Firms should consider:

- the adequacy of their existing Directors & Officers cover (e.g. does it cover all Senior Managers? When will cover apply? Up to what amount?)

- What their policy (and budget) will be in relation to requests for independent advice or representation?
- Whether they want to have panel firms who individuals can use?

Regulatory references and Conduct Rule breach reporting

Regulatory reference requirements (SYSC 22) require firms to provide particular information in relation to Senior Managers and Certification Staff, including:

- Any findings that a Conduct Rule was breached where that breach resulted in disciplinary action against the individual; and
- Any findings that an individual was not fit and proper.

The aim of these is to ensure people with poor conduct records do not just move around industry.

Careful consideration will need to be given to wording of references, especially where the firm's findings are disputed, to ensure that firms comply with their regulatory obligations in a way that also satisfies the duty of care they owe to both the subject and recipient of the reference.

Conduct Rules breaches must be reported to the FCA where they result in disciplinary action being taken by the firm.

With the above in mind firms need to consider their disciplinary policies and, in particular, whether disciplinary action is triggered at a level they consider appropriate. They might want to look back at past disciplinary logs to identify which breaches would previously have been reported and whether these seem to be appropriate matters to report (bearing in mind the FCA has indicated that it thinks there is a materiality threshold).

To avoid employment issues firms should also review their processes for dealing with conduct issues.

Dealing with conduct issues

How firms address conduct concerns take on new importance under SMCR because of the implications of adverse findings on an individual's reference and longer-term employment prospects.

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Notifying the FCA of the concerns (under Principle 11 and/or because there has been a Conduct Rules breach and/or in a Qualified Form C) and, where there are multiple notifications ensuring these are consistent.

Inconsistent treatment of individuals could be a consideration in whether an individual can claim unfair dismissal. Points for firms to consider include having a consistent policy/approach to:

- Identifying whether an issue is a Conduct Rules breach, a fitness and propriety concern or both as they potentially have different consequences for different categories of individual;
- Determining whether an issue is a breach of the Conduct Rules in certain circumstances (e.g. the firm's view on when someone is not acting with integrity set out in guidelines or addressed in a Conduct Committee); and
- Determining whether to take disciplinary action.

Failure to consider and address these issues early on is likely to give rise to employment law-related issues down the line.

Conduct Rule breaches or fitness and propriety findings have a potentially very significant impact on individuals' career prospects so firms should expect them to dispute every point they possibly can, and that documentation and processes will be highly scrutinised. Firms must ensure that employees are properly trained, consistently treated and aware of expectations.

Over time firms will become accustomed to seeing what other firms are reporting to them in references and this may lead to them revisiting their approach. The FCA has also indicated that it may issue guidance once it has had more opportunity to see what firms are reporting.

Contract changes

It is likely to be appropriate to make changes to existing employment contracts and letters of engagement (for NEDs). Most banks adopted this approach when implementing SMCR in 2016.

The sorts of changes covered may include:

- Requiring individuals to comply with each of the Conduct Rules;
- Requiring individuals to report potential misconduct or issues relevant to fitness and propriety;
- Introducing handover requirements (for enhanced firms);

- Permitting the firm to carry out checks and monitoring for assessing fitness and propriety; and
- Making it a condition of employment that the individual continues to be fit and proper and/or FCA approved (for Senior Managers and Certification staff).

It may be appropriate to introduce the changes via a collective consultation process (depending on the number of staff affected, materiality of changes, timing of making changes and whether many individuals are likely to object to the changes).

Settlement agreements

Firms' standard form settlement agreements will need review and revision ahead of SMCR coming into force. The sorts of issues that are likely to need consideration include:

- Warranties around compliance with Conduct Rules and notification of conduct and fitness and propriety issues;
- Handover requirements and linking this to payment of any settlement sum;
- Provision of funding for independent legal advice in the event of a subsequent investigation; and
- The ongoing appropriateness of using a generic standard form reference for Senior Managers and Certification Staff.

Firms should bear in mind that:

- If a settlement agreement includes an obligation to provide a form of reference that is contrary to what is required by SYSC 22 the regulatory requirements will override the settlement agreement.
- They need to ensure that any payment under a settlement agreement does not reward poor conduct or performance.

Don't miss our upcoming SM&CR events!

We are planning SM&CR events in April and June to address key areas and issues to help firms in their journey, more details coming soon.

If you have any queries or comments on the Roundup, please email enquiries@tisa.uk.com

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