

What are you thinking? Considerations for those about to become Senior Managers under the SMCR

```
[et_pb_section bb_built="1" background_color="#ffffff"
fullwidth="on" custom_padding_last_edited="on|desktop"
_builder_version="3.0.99"
custom_padding_tablet="50px|0|50px|0"
transparent_background="off" padding_mobile="off"
custom_padding="|||" next_background_color="#000000"
global_module="136"] [et_pb_fullwidth_header
global_parent="136" title="Employment Law News"
_builder_version="3.0.99"
background_image="http://davidk423.sg-host.com/wp-content/uplo
ads/2017/09/bdbf_final-stages-1-4-1.jpg"
background_layout="dark" title_font="|||||||"
subhead_font="|||||||" background_color="rgba(255, 255, 255,
0)" button_one_text_size__hover_enabled="off"
button_one_text_size__hover="null"
button_two_text_size__hover_enabled="off"
button_two_text_size__hover="null"
button_one_text_color__hover_enabled="off"
button_one_text_color__hover="null"
button_two_text_color__hover_enabled="off"
button_two_text_color__hover="null"
button_one_border_width__hover_enabled="off"
button_one_border_width__hover="null"
button_two_border_width__hover_enabled="off"
button_two_border_width__hover="null"
button_one_border_color__hover_enabled="off"
button_one_border_color__hover="null"
button_two_border_color__hover_enabled="off"
```

```
button_two_border_color__hover="null"
button_one_border_radius__hover_enabled="off"
button_one_border_radius__hover="null"
button_two_border_radius__hover_enabled="off"
button_two_border_radius__hover="null"
button_one_letter_spacing__hover_enabled="off"
button_one_letter_spacing__hover="null"
button_two_letter_spacing__hover_enabled="off"
button_two_letter_spacing__hover="null"
button_one_bg_color__hover_enabled="off"
button_one_bg_color__hover="null"
button_two_bg_color__hover_enabled="off"
button_two_bg_color__hover="null"
/][/et_pb_section][et_pb_section          bb_built="1"
admin_label="section"
prev_background_color="#000000"][et_pb_row  admin_label="row"
background_position="top_left"    background_repeat="repeat"
background_size="initial"][et_pb_column type="3_4"][et_pb_text
use_border_color="off"            border_color="#ffffff"
border_style="solid"  _builder_version="3.17.6"]
```

What are you thinking? Considerations for those about to become Senior Managers under the SMCR

The Senior Managers & Certification Regime (the '**SMCR**') will be rolled out to all FCA regulated firms by 9 December 2019 but what will that mean for those individuals becoming Senior Managers and what are the issues they need to be thinking about now?

The SMCR has three elements: (i) the Senior Managers Regime, which is designed to create greater individual accountability of those employees working at the most senior levels of

regulated firms; (ii) the Certification Regime, which applies to all staff who could pose a risk of significant harm to the firm or to customers; and (iii) the FCA's Conduct Rules, which are codes of behaviour which will apply to all but administrative staff at regulated firms, with more onerous rules applying to Senior Managers.

The Senior Manager's Duty of Responsibility

Under the SMCR, Senior Managers will be held to account for any regulatory failings in the areas for which they are responsible unless they can demonstrate that they took reasonable steps to avoid the regulatory breach occurring. Amongst other sanctions, Senior Managers could face fines by the FCA, be barred from taking up future roles within financial services, or even face potential criminal sanctions if they have been reckless and caused a financial institution to fail.

Institutions are required to ensure that each function set out by the FCA (a 'prescribed responsibility') is allocated to an appropriate Senior Manager, and that each Senior Manager has a Statement of Responsibility setting out what they are responsible for in their area of the business. Enhanced Firms must also clearly set out the divisions of responsibility in a Responsibilities Map. The Responsibilities Map is a 'living document' and changes have to be updated and reported by the firms to the FCA.

The scope of personal responsibility

A Senior Manager's Statement of Responsibility will sit alongside their employment contract and perhaps also their job description.

Given the potential liabilities for the individual, the Statement of Responsibility is an important document.

Before accepting a new role, it is highly advisable for Senior

Managers to ask to see a copy of the proposed Statement of Responsibility and, if applicable, the Responsibilities Map. The Senior Manager should ask whether the areas they are being asked to take personal responsibility for are appropriate, and if they have the right skills and experience. If they do not, are there areas of training that could bridge those gaps or is it more appropriate that those areas of responsibility be limited in some way? A prospective Senior Manager also needs to understand the bigger picture of the organisation in terms of the division of responsibilities and which of their future colleagues will be responsible for what.

What is the overall compliance picture?

For incoming Senior Managers, it can be difficult to assess the overall compliance health of the firm they are joining. Interviews will naturally try and 'sell' the role but may not give an accurate reflection of how the firm is performing from a regulatory perspective. It is very important that Senior Managers have a sense of what they are taking on and what their potential exposure may be. For example, whether there are historic risks and if so, whether the steps taken and resources are being allocated to manage those risks going forward are adequate.

It is also important that incoming Senior Managers understand the compliance culture at the firm. For example, what kind of culture is already embedded, what the budget is for training, and the resources available to ensure that the new team they will manage is adequately staffed and trained.

Indemnities and directors and officers insurance

If a Senior Manager were to be investigated by the FCA, in addition to the consequences being potentially career limiting, the individual may incur legal costs in the defence of the investigation, public censure, fines or restrictions on future activities in the regulated sector.

Bearing in mind the degree of personal responsibility of Senior Managers, and the potential exposures they face, it is important that Senior Managers secure adequate contractual protection in case they face such challenges.

Incoming Senior Managers should check whether they would have the benefit of a contractual indemnity from their employer and, if so, what it covers. There are limits to what an indemnity may protect the Senior Manager from, as set out in the Companies Act 2006 for example. Remember also that an indemnity is only as good as the financial position of the firm giving it, and its willingness to pay under it.

For this reason, Senior Managers should also ensure that they will have the benefit of Directors and Officers insurance as part of their employment package. This is also known as 'D&O insurance'. Typically, the employer will obtain the insurance and pay the premium, and the benefit will lie with its directors and senior employees. The purpose is to protect the directors from liability for acts and omissions that occurred during the period of their directorship or employment.

Since the SMCR came into force in the banking and insurance underwriting sectors in March 2016, new D&O insurance products and policy extensions have been devised specifically to cover potential SMCR liability.

Ultimately however, whilst desirable, indemnities and D&O insurance will still have certain limitations. For example, if a Senior Manager is personally fined by the FCA, they will be responsible for paying the fine as it would be against public policy and the FCA Handbook for it to be paid by a third party since it would reduce the fine's deterrent effect.

As the 9 December date for extension of the SMCR looms closer, those affected should consider taking early legal advice on these issues. If you are a prospective Senior Manager and have questions about how you may be affected by the SMCR, please

contact BDBF for further information.

Nick Wilcox (NickWilcox@bdbf.co.uk) is a Partner and Rolleen McDonnell (RolleenMcDonnell@bdbf.co.uk) is a Senior Associate at Brahams Dutt Badrick French LLP

```
[/et_pb_text][/et_pb_column][et_pb_column
type="1_4"][et_pb_sidebar orientation="right" area="sidebar-1"
background_layout="light" remove_border="off" show_border="on"
/][/et_pb_column][/et_pb_row][/et_pb_section]
```