

COLUMN: One year on – A review of the Senior Managers Regime

Mar 07 2017 [Claire Cross](#)



The senior managers regime, (SMR), is governed by the Senior Manager Conduct Rules, SC1-4, which can be found in [COCON 2.2](#) of the Financial Conduct Authority (FCA) Handbook. All four rules require senior managers to take reasonable steps to prevent contraventions in the areas for which they are responsible. SC1 and 2 require senior managers to take reasonable steps to ensure that the business of the firm for which they are responsible is controlled effectively and in compliance with the regulatory system.



SC3 requires the taking of reasonable steps regarding the delegation and discharge of responsibilities, while SC4 requires the appropriate disclosure of any information of which the FCA or Prudential Regulation Authority (PRA) would reasonably expect notice.

Originally it had been proposed that there should be a "presumption of responsibility" which would have placed a burden of proof on senior managers to prove to the regulator that the steps they had taken were reasonable.

Fortunately for the industry (although less fortunately for the FCA's Enforcement Division, whose job would have been made much easier by this presumption) a retreat was beaten and the burden of proof was instead placed on the regulator to prove that a senior manager has failed to take reasonable steps.

Guidance as to what constitutes reasonable steps can be found in [COCON 4.2](#).

The guidance is exactly that; it does not provide a definitive list of what is and what is not sufficient to amount to reasonable steps. It is not hard to predict that this will provide fertile ground for disagreement, and ultimately litigation, between the FCA/PRA and senior management.

The potential effect on FCA Enforcement

When the SMR was being initiated there was much talk about how much easier Enforcement's job would be. Using firm-produced management responsibilities maps and the individual statements of responsibilities would, it was said, save investigators vast amounts of time in determining who was responsible for what: less of a partially-eaten breadcrumb trail to follow, more of a neon sign proclaiming, "It's Me!" It has now been recognised, however, that this was a naïve view.

Knowing who was responsible on paper is not the end of the matter; arguably, it is just the start, and even the FCA itself has accepted the SMR is likely to create a different dynamic within its Enforcement Division. Whereas firms under investigation tend to adopt a, "we'll pay to make it go away" attitude, and settle and pay fines to get the matter over and done with, individuals have always been a more difficult proposition for the FCA, being far less likely than firms to "take their medicine".

Senior managers are highly unlikely simply to lie down and accept the FCA's findings should they find themselves caught in the regulator's net, and nor should they. They have a huge amount at risk — financially crippling fines and the strong possibility of losing their hard-worked-for livelihoods — and will undoubtedly want to fight tooth and nail to prevent any adverse findings. This will in turn affect the FCA's preferred modus operandi for quick wins and increase the amount of time and resources dedicated to cases.

Potential negative effects are also likely to extend beyond senior managers themselves and may ultimately permeate into firm investigations. In a [speech](#) given in late January 2017, by Mark Steward the FCA's director of enforcement, spoke about his concern that firms were unlikely just to roll over and pay up in cases where resolution against the firm would not also resolve cases against senior managers.

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He said the SMR was also likely to cause the FCA problems regarding how much weight it was able to attach to internal investigation reports prepared by firms. Steward said this might well involve an inherent conflict of interest as "the reports have been commissioned by and prepared for senior management who may well be part of the problem".

Concerns for senior managers

On the other hand, senior managers will undoubtedly be very concerned that their firm may take a "the buck stops here" attitude which may result in them either being cut loose, or offered up on a plate in an internal report, to divert attention from wider firm issues or to allow quick resolution for the firm.

There is also the worry that firms may take the opposite attitude to that envisaged by Steward, and may be keen to settle with the regulator to allow business to continue, with little or no thought as to how a particular finding agreed as part of the settlement process might affect the senior manager of the relevant area. It would be an unenviable position for any senior manager to find themselves facing enforcement action under the SMR when their firm has already, in effect, agreed wrongdoing relating to the allegations in settlement proceedings.

The future

Although the potential issues that may arise from SMR action are purely a matter of conjecture at present, as the first anniversary of the regime looms it can surely only be a matter of time before FCA Enforcement announces its first investigation. Perhaps the biggest issue of all is who will be the subject of that investigation.



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