

In Practice

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Regulatory overload: Senior Managers Regime and the status of the General Counsel

In this In Practice article, the authors suggest some practical steps to avoid classification of General Counsel as a Senior Management Function.

BACKGROUND

The Senior Managers Regime (SMR) affecting UK banks and building societies has been in effect since 7 March 2016. Much of the SMR is conceptually familiar and involves newly categorised Senior Management Functions (SMF's) effectively replacing the previous Approved Persons Regime (APR). In this sense, the essential components of the SMR are not novel and as such are, for the purpose of this short discussion, unremarkable.

Implementation of the SMR forced firms to grapple with defining several of the former functions undertaken by Approved Persons, mapping them across into a new responsibility matrix and, in some cases, determining which senior staff of the firm would be captured under the SMR.

In the last 12 months, firms have been perplexed by the status of General Counsel (GC)¹ under the SMR and they continue to be vexed by it in the absence of a clearly articulated stance from the FCA.

THE CONUNDRUM AT HAND

Under the APR, there was no specified controlled function of GC of a regulated firm. If a GC was not conducting other roles bringing them within another controlled function, the FCA did not individually regulate them.

Last year, the FCA provided its indicative list of functions falling within the SMR. The GC role was not listed. The FCA has subsequently expressed its general expectation that:

'... many firms would need to identify the role [GC] as an overall responsibility SMF when allocating senior management responsibilities if it were not covered by another specific SMF in the firm.'²

Given that the FCA presumption is a significant shift in the regulatory landscape, this absence of clarity around the GC role resulted in the FCA announcing a consultation process on the topic, which has not yet been launched.

THE IMPACT OF THE FCA'S CURRENT INDICATIVE STATE OF MIND

Often the GC is not directly concerned with the management of the firms' regulated-activity business; being concerned instead, with

providing legal advice to the management stakeholders of that business, who themselves are appropriately regulated by the FCA. This lawyer-client relationship is fundamental to the GC role and unique within each organisation.

A GC will usually be subject to mandatory observance of the Solicitors Code of Conduct, which, amongst other things, mandates acting with integrity, maintaining confidences, and identifying and managing conflicts of interest, appropriately. These requirements are enforceable by the Solicitors Regulation Authority (SRA); a body that holds disciplinary powers to impose sanctions for transgressions of its rules.

Imposing an additional layer of regulation, as foreshadowed by the FCA, has potential to create uncertainty in the role of GC at regulated firms. If implemented, in-house lawyers may, for example, find themselves under pressure to adhere to a regulatory rule or principle (including for example pressure to divulge otherwise privileged or protected confidential information) which might conflict with their professional obligations; or perhaps to fetter or alter their advice to business stakeholders on the basis of a perceived personal risk to them arising out of additional individual regulation of them by the FCA.

On 10 May 2016, the AFME³ and BBA⁴ issued a joint public letter to the FCA,⁵ setting out their pre-consultation position on behalf of their members. The letter sets out the arguments for exclusion of GC from the SMR and cites the influence of the GC on regulatory culture within firms, the importance of independence, the governance of the SRA-regime and the special status of the lawyer-client relationship in support of that argument.

The impact of the 10 May letter on the formulation of the FCA consultation and/or its result will be seen in due course.

PRACTICAL STEPS TO AVOID CLASSIFICATION OF GENERAL COUNSEL AS AN SMF

Until completion of the consultation process, practical steps can be taken to justify, on a logical and proportionality basis, excluding GCs from falling within the SMR:

- review and refine the GC position descriptions to emphasise the internal advisory nature of the GC role and the firm-as-client relationship;
- review and consider reporting lines, reflecting separation where possible between the GC and executive management at the firm, to reinforce the independence of the GC;
- review and consider composition of and voting rights attributed to the GC at board and committee level to emphasise the independence of the GC from management decision making at the firm; and

- review and consider any other process or policy changes, which would assist in demonstrating the firm-as-client, advisory role of the GC, as opposed to management decision-maker. ■

- 1 The term General Counsel is used to encompass that role specifically, however described, but also other senior legal roles as may be relevant to particular organisations.
- 2 FCA Statement: 'Clarifying our supervisory intentions: overall responsibility for the legal function under the Senior Managers Regime' – 27 January 2016.
- 3 Association for Financial Markets in Europe.
- 4 British Banking Association.

- 5 Copy letter here: <http://www.afme.eu/Documents/Consultation-responses.aspx>

Biog box

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