Private Edge Knowledge Bank

FCA and PRA Whistleblowing Guidelines

DIRECTORS & OFFICERS

In September 2016, the Financial Conduct Authority ("FCA") and the Prudential Regulation Authority ("PRA") introduced new rules on whistleblowing which are enshrined in the FCA Handbook, High Level Standards for Senior Management Arrangements, Systems and Controls, Chapter 18 ("SYSC 18"). A wide range of financial services businesses, including deposit-takers with over £250m in assets, as well as PRA designated investment firms and (re)insurers, will need to comply. This note explains these rules.

Who do the rules apply to?

The rules apply to UK deposit-takers (banks, building societies, credit unions) with over £250m in assets, as well as PRA designated investment firms (large investment banks) and insurance and reinsurance firms within the scope of Solvency II, the Society of Lloyd's and managing agents. The FCA also says that the rules serve as non-binding guidance for all other firms under FCA supervision.

The PRA's rules on whistleblowing (found in the PRA Rulebook - SII Firms – Whistleblowing) apply to UK Solvency II firms, the Society of Lloyd's, managing agents and third country branch undertakings (subject to certain carve outs).

Summary of the rules

In summary, the FCA rules (amongst other things):

- set out the requirements on firms in relation to the adoption, and communication to UK-based employees, of appropriate internal procedures for handling reportable concerns made by whistleblowers as part of an effective risk management system (SYSC 18.3);
- set out the role of the whistleblowers' champion (SYSC 18.4);
- require firms to ensure that settlement agreements expressly state that workers may make protected disclosures (SYSC 18.5) and do not include warranties related to protected disclosures;
- set out the requirements which implemented the whistleblowing obligation under article 73(2) of MiFID, which requires MiFID investment firms (except collective portfolio management firms) to have in place appropriate procedures for their employees to report potential or actual infringements of the MiFID regime (SYSC 18.6);
- (outline other EU-derived whistleblowing obligations similar to those in article 73(2) of MiFID, some of which may also be applicable to MiFID investment firms (SYSC 18.6);
- outline best practice for firms which are not required to apply the measures set out in this chapter but which wish to do so; and
- outline the link between effective whistleblowing measures and fitness and propriety

The rules in more details: key points

Since September 2016, the FCA has imposed additional requirements listed in SYSC 18, which state that firms must **"establish, implement and maintain appropriate and effective arrangements for the disclosure of reportable concerns by whistleblowers".** In doing so, the arrangements must at least:

a) be able effectively to handle disclosures of reportable concerns including:
   - where the whistleblower has requested confidentiality or has chosen not to reveal their identity; and
   - allowing for disclosures to be made through a range of communication methods;

b) ensure the effective assessment and escalation of reportable concerns by whistleblowers where appropriate, including to the FCA or PRA;

c) include reasonable measures to ensure that if a reportable concern is made by a whistleblower no person under the control of the firm engages in victimisation of that whistleblower;

d) provide feedback to a whistleblower about a reportable concern made to the firm by that whistleblower, where this is feasible and appropriate;

e) include the preparation and maintenance of:
   - appropriate records of reportable concerns made by whistleblowers and the firm's treatment of these reports including the outcome; and
   - up-to-date written procedures that are readily available to the firm's UK-based employees outlining the firm's processes for complying with this chapter;

f) include the preparation of the following reports:
   - a report made at least annually to the firm's governing body on the operation and effectiveness of its systems and controls in relation to whistleblowing (see SYSC 18.3.1R); this report must maintain the confidentiality of individual whistleblowers; and
   - prompt reports to the FCA about each case the firm contested but lost before an employment tribunal where the claimant successfully based all or part of their claim on either detriment suffered as a result of making a protected disclosure in breach of section 47B of the Employment Rights Act 1996 or being unfairly dismissed under section 103A of the Employment Rights Act 1996;

g) include appropriate training for:
   - UK-based employees;
   - managers of UK-based employees wherever the manager is based; and
   - employees responsible for operating the firms' internal arrangements

The FCA launched a webform for reporting in 2021 (updated in February 2024), with the aim of improving the quality of information from whistleblowers by asking the right questions at the start of the engagement. The introduction to the webform sets out things to consider before contacting the FCA and what happens when contact is made.

Similarly to the FCA's rules, the PRA also require firms to "***establish, maintain and implement appropriate and effective arrangements for the disclosure of reportable concerns by a person, including a firm's employee, internally through a specific, independent and autonomous channel***". This can be provided through arrangements with third parties, subject to requirements. A firm must:

- inform all workers of the channel referred to above;
- inform all workers:
  - that they may disclose directly to the FCA or PRA anything that would be a "protected disclosure";
  - of what would constitute a "protected disclosure";

  - that the PRA and FCA are prescribed persons under the Employment Rights Act 1996; and
  - the means needed to make a protected disclosure.
- ensure that nothing prevents or discourages a worker from making any disclosure to the FCA or PRA;
- ensure that nothing in any employment contract or settlement agreement, between the firm and a worker, entered into after the date on which these rules come into effect, prevents or discourages the worker from:
  - making a protected disclosure, including to the PRA; and
  - making a further protected disclosure connected to a protected disclosure already made.

Consequences of non-compliance

A failure to comply with the above obligations set out by the FCA and PRA depend on the circumstances, but if rules are breached can include financial penalties, loss of authorisation and civil and/or criminal liability. Non-compliance may also leave a regulated firm vulnerable not only to reputational damage and individual claims of unfair treatment, but also to direct enforcement actions from the Regulator, which could result in substantial fines both for the firm and (in the case of the FCA rules) potentially the whistleblowing champion personally.

What action should your organisation be taking?

Think about....

- Auditing your existing whistleblowing policies and procedures to ensure that they meet the requirements outlined herein. Please note specifically the FCA rules and PRA rules noted above.
- Are your procedures robust enough? Do your policies advise employees of the ability to whistle blow direct to the PRA/FCA and how to do so and to reflect the new framework more generally?
- How and by whom the changes and increased obligations will be communicated to the Board? A whistleblowing hotline, for example, would allow employees to make an anonymous report.
- Training employees to help them understand the legal and regulatory framework.
- Reviewing settlement agreement wording to incorporate new clarifying wording.

Impact on D&O insurance

Whistleblowing by its nature will give rise to complaints being made against senior staff, including directors and officers. In light of the new rules, there may be an increase in the number of investigations commenced in connection with whistleblowing. It is therefore advisable to ensure that your company has adequate D&O insurance cover.

Issues to consider include:

INTERNAL INVESTIGATIONS

After the whistle is blown, a company will often run its own internal investigation in relation to the company complained of. Companies should review the extent to which their D&O policies provide cover for a company's internal investigation and the costs of cooperating with the regulator during informal investigations, which may involve substantial costs.

IS THE WHISTLEBLOWER AN "INSURED"?

Some policies contain an "insured v insured" exclusion which excludes cover for a claim brought against a director by the company or other directors. If there is such an exclusion in the policy, it may be worth considering whether an exception to the "insured v insured" exclusion can be agreed for whistleblowing claims.

COULD AN ADMISSION TRIGGER AN EXCLUSION?

What happens in that case if an employee agrees to make an admission in return for leniency? What if the company reaches a settlement with the regulator? What happens if an admission is made in a whistleblower report? Companies must ensure that whistleblowing claims are dealt with carefully to ensure that they do not trigger the conduct exclusions in the D&O policy. It is also important to ensure that your policy contains an appropriate "claims cooperation severability" clause providing that one employee's knowledge is not imputed to another.

This article is not intended to constitute a definitive, up-to-date, or complete statement of the law, nor is any part of it intended to constitute legal advice for any specific situation. You should take specific advice when dealing with specific situations and jurisdictions outside England & Wales.

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