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FCA Whistleblowing Guidelines...

...is your business ready?

The Financial Conduct Authority ("FCA") and the Prudential Regulation Authority ("PRA") have introduced new rules on whistleblowing which will take effect from 7 September 2016. All businesses who are deposit-takers with over £250m in assets, as well as PRA designated investment firms and insurers, will need to comply. This note explains the new rules.

The new rules formalise existing good practice and aim to make the financial services sector more accountable by encouraging individuals to disclose suspected misconduct so that those blowing the whistle can do so without the threat of potential regulatory sanctions against the firm. In turn, it is hoped that this will lead to financial concerns that are genuinely in the public interest being promptly and properly investigated.

Who do the rules apply to?

The new rules will apply to deposit-takers (banks, building societies, credit unions) with over £250m in assets, as well as PRA designated investment firms (large investment banks) and Insurers subject to the Solvency II directive. The FCA says that the guidance is non-binding for all other firms under FCA supervision.

The FCA will adopt a "wait and see" approach towards extending the rules to cover other FCA regulated firms such as stockbrokers, mortgage brokers, insurance brokers, investment firms and consumer credit firms.

What does it cover?

The new rules say that "reputable concerns" should be reported and include a breach of any regulatory rule, failure to comply with a firm's policies or procedures and any behavior that "harms or is likely to harm the firm's reputation or financial wellbeing", an almost limitless concept.

What are the new rules? Key Points

The rules' first requirement—that financial companies "appoint a senior person to take responsibility for the effectiveness of these arrangements," also known as a "whistleblowers' champion", took effect on 7 March 2016.

The FCA also mandates that, by 7 September 2016, businesses must:

- Put in place internal whistleblowing arrangements able to handle all types of whistle-blowing disclosures from all types of persons. This does not mean that you will need to investigate every disclosure made. You do, however, need to ensure that every disclosure is considered.

- Put text in settlement agreements explaining that workers continue to have a legal right to blow the whistle even after leaving a firm and signing a settlement agreement.
- Tell UK-based employees about the FCA and PRA whistleblowing services.
- Present a report on whistleblowing to the board annually.
- Inform the FCA if it loses an employment tribunal with a whistle-blower.
- Require its appointed representatives and tied agents to tell their UK-based employees about the FCA whistleblowing service.

What action should your organisation be taking?

Think about….

- Auditing your existing whistleblowing policies and procedures. 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. Private Edge for AIG provides full pre-investigations and investigation cover for individuals up to the full policy limits.

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 "severability" clause providing that one employee's knowledge is not imputed to another.

AIG's D&O policies are by no means "off-the-shelf" products and will be tailored to the particular company in question. Companies should review their D&O insurance cover to ensure it takes account these issues.

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Legal advice in black and white

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