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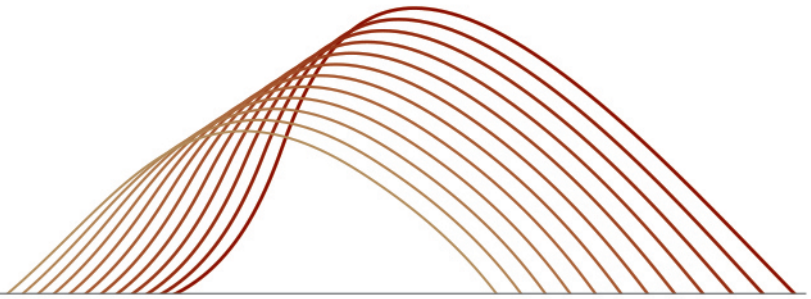

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Top 5 Takeaways From the UK's New Whistleblower Rules for Financial Services and Insurance Companies

By The Workplace Retaliation and Whistleblower Defense and The Investigations and White Collar Defense Practice Groups

On 6 October 2015 the UK's Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) introduced new rules on whistleblowing through the publication of the attached Policy Statements. These new rules will significantly impact whistleblowing procedures in the applicable firms and companies with UK based employees and are likely to result in a further upturn in reports that will now be scrutinised by both the board and the regulator.

The 5 things firms and companies in these sectors should know about these rules:

1. **Who is covered by the new rules?** UK deposit takers with total gross assets of over £250m (including banks, building societies and credit unions), PRA designated investment firms and insurance and reinsurance firms within the scope of the Solvency II EU directive and the Society of Lloyds and managing agents. However, the new rules are considered non-binding guidance for firms or companies that are supervised by these regulators.

2. **What do you need to do?** Any firm or company covered by these new rules will need to take the following steps to comply:

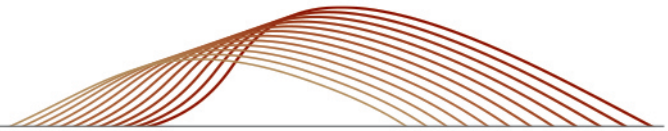
    a. Appoint a Senior Manager as its whistleblowers' champion, who will be responsible for oversight of the firm's or company's whistleblowing arrangements, including the whistleblowing policies and procedures, the preparation of the report to the board and any report to the regulator following a successful whistleblowing claim;

    b. Put in place internal whistleblowing arrangements capable of handling all types of reportable concerns from anyone, not just employees;

    c. Inform UK based employees about the regulators' services and require its appointed representatives and tied agents to do likewise;

    d. Change the text of settlement agreements to include text explaining the individual's legal rights and a prohibition on firms or companies asking signatories to warrant and represent that they have not made a protected disclosure and they do not know of any information that would form the basis of a protected disclosure;

    e. Present a report on whistleblowing to the board at least annually; and



f. Inform the FCA if it loses a whistleblowing employment tribunal claim.

3. **When do they come into force?** The whistleblowers' champion must be appointed by 7 March 2016. The remaining rules come into full effect on 7 September 2016.

4. **What are the key implications?** The regulators refused to go so far as to put the employee under a regulatory duty to disclose concerns to them. Instead, they have increased the burden on firms and companies by going beyond the legal coverage under existing whistleblowing legislation (the Public Interest Disclosure Act) that applies to 'protected disclosures'[1] and requiring procedures for handling the more broadly defined 'reportable concerns.'[2] Reports to the FCA increased from 138 in financial year 2007/08 to 1340 in financial year 2014/15. The need for firms and companies to make UK employees aware of the FCA and PRA whistleblowing services and the broad definition of what constitutes a "reportable concern" will no doubt lead to (a) a further rise in reports, (b) a need for board level involvement and accountability, and (c) the allocation of additional resources to set up the arrangements, to conduct appropriate training for UK based employees, their managers and those responsible for implementing the arrangements, to investigate reports or at the very least give them 'due consideration,' and to change policies, procedures and settlement agreements.

5. **What to expect down the line?** A number of challenges for firms and companies, including: (a) finding and training the appropriate person to be the whistleblowers' champion; (b) reconciling these new rules with existing global whistleblowing hotlines and procedures; (c) effectively dealing with anonymous reports and requests for confidentiality; (d) addressing false and malicious complaints; (e) understanding the interplay with existing protections under PIDA and the relevant case law; (f) avoiding any allegations of victimisation; and (g) defining the scope and evidential burden of board level reporting requirements. On the horizon is a commitment by regulators to consult about the extension of these rules to other entities they regulate, as well as UK branches of overseas banks.

In 2013 the UK government made a significant change to the whistleblowing legislation to ensure that qualifying disclosures had to satisfy a public interest test to minimise their use for personal grievances and employment contract claims. These new rules do not contain any such limitation. So whilst the new rules are part of the package of reforms to increase accountability, they also clearly offer employees scope for leverage in individual employment negotiations and litigation given their link to fitness and propriety.

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To learn more about the detail of these rules and their impact on your firm or company, please contact Suzanne Horne or Michelle Duncan (or your usual contact in the Workplace Retaliation and Whistleblower Defense and the Investigations and White Collar Defense Practice Groups):

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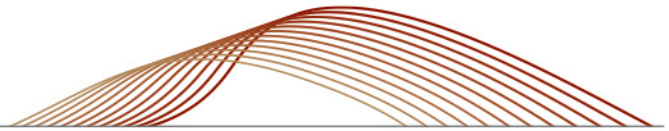
[1] (a) a "qualifying disclosure" as defined in section 43B of the Employment Rights Act 1996 (and summarised in (b) below) made by a *worker* in accordance with sections 43C to 43H of the Employment Rights Act 1996; (b) a qualifying disclosure is, in summary, a disclosure, made in the public interest, of information which, in the



reasonable belief of the *worker* making the disclosure, tends to show that one or more of the following (a "failure") has been, is being, or is likely to be, committed:

(i) a criminal offence; or

(ii) a failure to comply with any legal obligation; or

(iii) a miscarriage of justice; or

(iv) the putting of the health and safety of an individual in danger; or

(v) damage to the environment; or

(vi) deliberate concealment relating to any of (i) to (v);

it is immaterial whether the failure occurred, occurs or would occur in the *United Kingdom* or elsewhere, and whether the law applying to it is that of the *United Kingdom* or of any other country or territory.

[2] a concern held by any person in relation to the activities of a *firm*, including:

(a) anything that would be the subject-matter of a *protected disclosure*, including breaches of *rules*;

(b) a breach of the *firm's* policies and procedures; and

(c) behaviour that harms or is likely to harm the reputation or financial well-being of the *firm*.