New UK Regulations to Govern Whistleblowing in Financial Institutions

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This month, the FCA (Financial Conduct Authority) and PRA (Prudential Regulation Authority) announced a new regime for whistleblowing that will start to be phased in from March 2016. This is part of the broader desire on the part of the UK regulators to encourage individuals to raise concerns and challenge poor practice and behaviors within the financial institutions. The regulations build-on and formalize examples of good practice within the financial services industry.

Who will they apply to?

The new regulations will only apply to UK deposit-takers with assets of £250m or greater, PRA-designated investment firms, and certain insurance and reinsurance firms (the “relevant firms”). The FCA will also consider whether these regulations should apply to other regulated firms e.g. investment firms. In the meantime, these regulations will be non-binding guidance to those firms. Consultation will also soon begin on whether the regulations should apply to UK branches of overseas banks. However, irrespective of the scope of the requirements, based on our experience, we expect that they will lead to industry standard best and expected practices even in respect of businesses to whom they do not in fact apply.
What are the new regulations?

The key provisions are as follows:

- **Whistleblowing report** – A whistleblowing report must be presented to the Board at least annually. This will need to be made available to the FCA or PRA on request, but does need to be made public. As yet there are not requirements prescribing the contents of the report, but we expect that it should at the very least contain a statement of whistleblowing policies and practices that are in place, confirmation that they are operating successfully and information about any litigation involving where individuals claim they have been subjected to detriment because they blew the whistle.

- **Whistleblowers’ champion** – A senior individual should be appointed to be a “whistleblowers’ champion”. They must be a non-executive director subject to the Senior Managers Regime or the Senior Insurance Managers Regime. They will be responsible for having oversight of whistleblowing procedures within the firm, including overseeing the implementation of the new rules as well as overseeing the preparation of the whistleblowing report. There is no need for them to be involved in the day-to-day operations of whistleblowing procedures.

- **FCA and PRA whistleblowing services** – Employees who are based in the UK must be told about the existence of FCA and PRA whistleblowing services. Employees should be made aware that they can approach the FCA and PRA and use their whistleblowing services – and that there is no need to use the relevant firm’s internal whistleblowing services. In addition, “appointed representatives” (persons who conduct regulated activities and act on behalf of a firm directly authorized by the FCA or PRA) and “tied agents” (broadly persons who act for and under the responsibility of a MiFID investment firm in respect of a MiFID business) should be required to inform their staff about the whistleblowing services.

- **Internal whistleblowing arrangements** – A system must be set up so that all types of disclosure (not just the specific disclosures which give whistleblowers protection under UK employment law and those related to regulatory matters) can be handled from all types of person. In announcing the new regime, the FCA and PRA have stated that valuable information could come from a range of sources and it is anticipated that relevant firms can simply deal with vexatious disclosures appropriately. Moreover, the arrangements in place should support the whistleblowing procedures required by the new regime, including ensuring that the relevant firm can access and escalate concerns raised by whistleblowers within the firm, or to the FCA or PRA, as appropriate, track the outcome of whistleblowing reports, and provide feedback to whistleblowers, where appropriate. The procedures themselves should be subject to inspection by audit and compliance functions. This is likely to require a modification of existing policies and practices.

- **Training** – Relevant firms should consider whether training can help make their whistleblowing arrangements more effective e.g. specialized training for the whistleblowers’ champion and tailored training for managers on how to recognize whistleblowing.
• **Settlement agreements** – Although already common practice, the new regime confirms that settlement agreements should not prevent protected disclosures from being made (nor should any other contract, including employment contracts). More radically, there will be requirements which prohibit other practices that are currently not uncommon, such as a new prohibition against requiring individual to confirm that they have not made a protected disclosure or they do not know of any information that could lead to them making a protected disclosure.

• **Employment Tribunals** – The FCA must be informed if a relevant firm loses an employment tribunal case when the finding relates to a claim that the whistleblower was treated less favorably because of having made a disclosure.

**What proposals will not come into force?**

There will be no regulatory duty on a firm’s staff to blow the whistle. This proposal had originally been included during the consultation but was ultimately left out because of concerns that making this mandatory risked placing a whistleblower who feared reprisals in a difficult position.

**When do the regulations come into force?**

A whistleblowers’ champion will need to be appointed by 7 March 2016.

The remaining requirements come into force on 7 September 2016.

**What action do you need to take?**

If you are covered by the new guidance, as a start you should:

- Appoint a whistleblowers’ champion to oversee the preparatory steps and advise them on their role and responsibilities;
- Review your template settlement agreement, employment contract and other template documents to ensure they accord with the new regulations;
- Consider how your firm will organize and prepare the whistleblowing report;
- Update your Staff Handbook and relevant policies, including with respect to the FCA and PRA’s whistleblowing services;
- Notify appointed representatives and tied agents of their responsibilities;
- Assess current whistleblowing arrangements to ensure they meet with the new regulations; and
- Consider appropriate training sessions for all staff, including the whistleblowers' champion.

As noted above, given our expectation that these requirements will become best or expected practice (even if they are not rolled out more broadly) you should in any event consider making the above changes.
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