STEPHENSON HARWOOD

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Cracking down on culture

Regulatory scrutiny of workplace culture and the handling of non-financial misconduct

FCA regulated firms and their individual employees, can find themselves subject to the scrutiny of the regulator over the culture of their firm, the way an investigation is handled and the impact of non-financial misconduct on the regulatory status of individuals.

In the wake of the #metoo movement, firms may continue to see an increase in the number of sexual harassment allegations raised in the workplace, as well as those relating to other types of non-financial misconduct such as discrimination, victimisation and bullying. In this climate, it is crucial that regulated firms are aware of the FCA's keen interest in the culture of the workplace, the handling of investigations and whether firms take appropriate action.

Workplace culture

On 6 January 2020, the FCA issued a letter (the "**Dear CEO**" letter)[1] following recent incidents of non-financial misconduct in the wholesale general insurance sector. The letter emphasises the importance of workplace culture, highlighting that a "poor culture" in financial services can lead directly to harm to consumers, market participants, employees and markets. It is notable that the letter coincided with anecdotal reports of ongoing investigations into cultural issues.

Defining 'culture' is a difficult task but there are protocol steps which can be taken. So, what can a firm do about its culture?

Steps can include:

- Considering whether to carry out an internal audit of recurring workplace issues to identify the problematic areas. This is likely to provide firms with an overview of the cultural hot spots that need addressing. Obviously firms will need to think carefully about such a process including issues relating to confidentiality, disclosure, data protection, who is best placed to be involved and any legal privilege that could apply.

- Firms should develop and roll out bespoke training to all staff about appropriate and acceptable behaviour in the workplace (ideally tailored around the results of any audit it has conducted). Whilst, individuals may think it is obvious as to what is appropriate behaviour in the workplace, our experience has shown that individuals (both from different parts of a business and spanning various levels of seniority) have found it tricky to pinpoint the line where "banter" may creep into bullying territory or where seemingly harmless jokes can be considered offensive and discriminatory no matter what medium is used.

Being able to show that a comprehensive review of cultural issues has been conducted and a bespoke training programme delivered, can help to demonstrate the importance a firm places on cultural issues. However, these steps alone are not enough – how can firms show that such steps are not just a box ticking exercise? One way of doing so, will be looking at how the firm manages non-financial misconduct.

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[1] This follows a similar letter issued by the PRA in November 2019.

Handling non-financial misconduct

One of the measures the FCA uses to assess the culture of a firm is to examine how a firm handles non-financial misconduct. This is a multi-faceted area, including the key items set out below.

- **Processes and policies**

  Firms should have robust processes and policies in place to deal with non-financial misconduct (including with respect to dealing with grievances, disciplinary hearings, investigations, harassment, whistleblowing and so forth). It is not only important to have written policies in place, but to ensure that they are actually followed – are staff trained on how to use the policies and, when reviewing recent investigations, is it clear that they have been properly followed in practice or have matters been brushed aside?

  It is also critical to demonstrate that individuals will be held accountable where misconduct is established. A recent case (in the legal sector) concerning sexual harassment in a city law firm has resulted in two senior individuals, who had not been involved in the alleged sexual harassment, being subject to proceedings before the Solicitors Disciplinary Tribunal because of the way they dealt with the investigation and because they did not report the allegations to their regulator. This should serve as a warning for all types of regulated firms (not just law firms) to look at any allegations being raised and ask whether this is something that merits, or requires, a report to be made to a regulator. Rarely (if ever) will it be appropriate for an employer not to take any action in the face of allegations of poor behaviour.

- **Implementing change**

  After the conclusion of any type of misconduct process, firms should consider the lessons learnt from the process and act upon them. It is advisable not only to implement any changes which may prevent a similar situation arising again but also to tackle the root causes. This aligns with the approach which should be taken in response to whistleblowing reports – if whistleblowing disclosures reveal problematic areas within the firm, action should be taken to deal with the underlying issues. On a policy/procedure note, if there were aspects of a particular procedure (e.g. a disciplinary, anti-harassment or whistleblowing procedure) that caused issues, the firm should consider reviewing and amending policies. A firm which allows the same problems to repeat without taking action is unlikely to get a sympathetic view from courts, tribunals or regulators.

- **Senior Managers and Certification Regime**

  Non-financial misconduct is of paramount importance in light of the Senior Managers & Certification Regime (which was recently extended to all regulated firms). This will be relevant in a number of ways including:

  - for any staff who actually commit non-financial misconduct as their "fitness and propriety" may be called into question or they may be deemed to have breached the conduct rules; and
  - with respect to senior managers who have not committed non-financial misconduct but who have responsibility for what happens in their areas. A senior manager's failure to take reasonable steps to address non-financial misconduct by another could lead to an FCA investigation into their own conduct. In the "Dear CEO" letter, an expectation is placed on firms and Boards of firms to take this into account when considering the suitability and performance of (potential) senior managers and other senior leaders – there must be a 'top-down' approach.

EHRC guidance

It is worth noting the FCA is not the only regulatory body currently highlighting the importance of non-financial misconduct. The Equality and Human Rights Commission (the "EHRC"), the regulatory body responsible for enforcing the Equality Act 2010, published technical guidance in January 2020 entitled "**Sexual harassment and harassment at work**" (the "EHRC Guidance").

The EHRC Guidance provides best practice in tackling harassment and emphasises the importance of effective policies and procedures. It suggests that employers should consider preparing separate strategy documents to accompany their anti-harassment policy setting out what measures they will take to tackle the different forms of harassment.

In our view, the EHRC Guidance reinforces the need for employers to be **active** in tackling harassment. It is important to remember that employers can be liable for harassment by their employees conducted in the course of employment. To provide a defence against such liability employers would need to show they took all "reasonable steps" to prevent the harassment. Accordingly, robust policies, workplace training and reacting to issues by implementing changes could be of vital importance in a "reasonable steps" defence.

Practically speaking, what does this mean for regulated firms?

Culture is key. The FCA will hold firms and senior managers to account for their cultures. In the current climate workplace culture and handling non-financial misconduct should be a priority for all regulated firms. In terms of next steps, key takeaways for firms to consider include:

- **Training**: Developing and delivering bespoke training to all staff and contractors on workplace culture and appropriate behaviour. Testing the effectiveness of this training is also important to avoid allegations of a 'tick box' approach to the issue.
- **Policies**: Reviewing and refreshing relevant policies to ensure that robust processes are in place.
- **Regulatory considerations:** Consider whether certain non-financial misconduct issues should be reported to a regulator and assess the impact they have on a regulated individual (e.g. their on-going fitness and propriety). In doing so, have regard to broader guidance. In particular, the EHRC are focusing on non-financial misconduct in the form of harassment, recently issuing best practice guidance that can be taken into account by an employment tribunal when assessing liability.

If you would like to discuss these issues further, or discuss how we can assist with the workplace culture training, then please do get in touch.

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