The Work Agenda podcast by Lewis Silkin: FCA guidance on tackling non-financial misconduct in financial services

Rosie Moore

Hello everyone and thanks for joining us today. You're listening to a podcast from Lewis Silkin and we're so pleased to have you with us. I'm Rosie Moore, a Senior Knowledge Lawyer and I'm delighted to be joined by my colleagues Wendy Saunders, Partner at Lewis Silkin and Co-Head of Financial Services and Helen Adams, a Legal Director in our employment team. Welcome both - it's great to have you with us today.

Helen Adams

It's great to be here, thanks Rosie.

Wendy Saunders

Delighted to be here with you both.

Rosie Moore

Great, so today we're diving into the FCA's final guidance on non-financial misconduct, which was published in December, and most importantly what firms should be doing now.

Shall we start with a bit of context? For years, the FCA has been signalling that non-financial misconduct is a regulatory issue impacting the conduct rules and fitness and propriety, yet there's been uncertainty about the exact scope, particularly when conduct happens outside of work, hasn't there?

Helen Adams

Yes, that's absolutely right. As you said, for years the FCA set out its expectation in letters, consultation papers, speeches etc. that firms tackle non-financial misconduct as a regulatory issue and by that, I mean that they appreciate that it could breach the conduct rules and it could affect someone's fitness and propriety and that they deal with it accordingly. We've lacked formal rules or guidance and that's left some ambiguity. For example, it wasn't clear whether non-financial misconduct covered sexual harassment outside of work that had no connection to someone's role or whether it might cover other sorts of behaviours as well like drug-taking or minor criminal offences. Then for the purpose of the conduct rules, for example, we weren't sure exactly where firms are expected to draw the line between conduct that took place in someone's personal life (which wouldn't be relevant) and conduct that took place in their professional, work life. And so now we have this formal guidance that goes a long way to resolving those kinds of questions.

Wendy Saunders

Yes, exactly. And just to add to that, while the final guidance is more limited than what we saw in the spring consultation, it still confirms that a broader range of conduct - across both work and personal life - may be relevant to fitness and propriety than many firms appreciated. And it also makes clear that a wider range of behaviours than some firms expected may breach the conduct rules.

Rosie Moore

Thank you - and that really raises the question of what firms should be doing now, doesn't it? So let's move on to some practical recommendations. We'll walk through some key areas and discuss what “good” actually looks like. First up, it's channels for identifying and handling potential misconduct. Helen, do think you could give us some initial thoughts on this?

Key area 1: Consider your channels for identifying and handling potential misconduct

Helen Adams

Yes, of course. Firms typically encounter non-financial misconduct through multiple channels so someone might, for example, report a breach of a legal obligation or unethical conduct by a member of staff through the firm's whistleblowing line. Or you might have an employee who raises a grievance about, for example, racism by another colleague through the firm's grievance process. Then, once that's happened, a manager might then decide that that disciplinary investigation is needed into that alleged bullying. Then perhaps an even more senior manager might decide that there's some performance issues in relation to the line manager for those two colleagues, because perhaps they knew about that bullying but didn't deal with it properly and then perhaps that would be directed through a performance management process.

Each of these scenarios could amount to regulatory issues, potentially involving conduct rule breaches and raising questions about the fitness and propriety of some of the people involved - whether that's the case or not will depend on the individual's role, their seniority and the circumstances in which the behaviour occurred. But what this means now is that these kinds of issues shouldn't be treated solely as HR or whistleblowing matters and the people dealing with these processes need to appreciate that and know that these issues have regulatory implications.

Wendy Saunders

I agree. It's essential for firms to look holistically at their reporting channels to ensure that line managers, human resources and, where relevant, compliance can identify when a matter may have regulatory consequences and escalate it appropriately. The key is clarity and integration so that whichever door the issues come through, it's assessed consistently for any potential regulatory impact.

Rosie Moore

Thanks both, and that sets us up really nicely for our next topic, which is policy updates and there are some specific policies we wanted to look at here. Wendy, could you kick us off with a couple of these?

Key area 2: Consider which policies need updating

Wendy Saunders

Yes, of course. Given the scope of conduct that can amount to a regulatory issue is now wider than many firms previously appreciated, it's important for firms to review any policies relating to performance and conduct and consider whether updates are necessary.

This might include, firstly, fitness and propriety and conduct policies or the firm's code of conduct. These may need to be updated to reflect the detailed guidance, particularly around the types of behaviour that could breach conduct rules 1 and 2, and the circumstances in which misconduct in personal life might undermine someone's fitness and propriety, as a broader range of conduct would now be caught. Thankfully, the position on this is now clearer, so firms should make sure their policies are aligned with that.

Secondly, performance management policies may require review. Behaviours that would traditionally be considered as performance issues could, in some situations, amount to a breach of the conduct rules or call into question whether someone is fit and proper to do their role. Helen mentioned a moment ago the example of a manager who seemed to be underperforming because they knowingly failed to act when one of their team was bullying another. In regulatory terms, that could indicate that they lack the competence and capability required for their role, which could mean they're no longer fit and proper. It might also breach conduct rule 2, the requirement to act with due skill, care and diligence. So firms should look again at their performance management policies and consider adding a note to remind anyone running a performance process to think about the potential regulatory implications of the behaviour they're addressing.

Helen Adams

Thanks, Wendy. And just to build on that bullying example - and to move on to a couple of other policies - I think that firms should be looking at their grievance and disciplinary policies as well. Grievances, as we've said before, often bring to light allegations like bullying, as you've mentioned, and then they might then move on to be dealt with under the disciplinary process. In my view, both policies should include a prompt to decision makers to consider whether there's any regulatory angles to the situation that needs to be identified and triaged appropriately.

I'd suggest the disciplinary policy as well should expressly call out as misconduct the wider types of non-financial misconduct that we now know could breach the conduct rules or affect someone's fitness and propriety. Because if an individual's behaviour might have those kinds of regulatory consequences, then the firm will want to make sure it's properly equipped to deal with it fairly as a case of misconduct or gross misconduct and apply the correct internal sanctions to that.

And on a related point, the firm should look at its dignity at work or harassment and bullying policies - however they've named them - and make sure, again, that it's clear that this type of behaviour can breach the conduct rules or render a perpetrator no longer fit and proper. Tackling that kind of behaviour - harassment and bullying - has been one of the FCA's key priorities and so both policies should underline the potential seriousness of the consequences for would-be perpetrators and ensure that anyone handling these cases is able to identify this kind of behaviour as a regulatory issue and escalate it appropriately.

Wendy, did you want to move on to talk about the whistleblowing and remuneration policies?

Wendy Saunders

Yes, thanks very much Helen. So, when we talk about whistleblowing in a regulatory context, we're talking about the reporting of a reportable concern that covers not only protected disclosures – so, whistleblowing in the employment law sense - but also things like breaches of the firm's policies and procedures or behaviour that harms, or could harm, the firm's reputation or financial wellbeing. Not all firms are required to have whistleblowing policies and processes in place, but for those that do, it's important to review them to make sure they reflect the expanded scope around fitness and propriety and non-financial misconduct. They also need to be fit for purpose when concerns about non-financial misconduct are raised through the whistleblowing channel.

And then considering remuneration policies, they may also need attention. These should be updated to reflect the broader range of conduct that could impact fitness and propriety or breach of the conduct rules and the policy should spell out clearly that misconduct of this nature will be taken into account when assessing variable pay awards.

Rosie Moore

Thanks Wendy. I'm conscious of the time, but I think we probably have time to squeeze in one more policy. Helen, could you take us through what people should be thinking about when it comes to their social media policies? It's not something that immediately came to mind for me when I was thinking about these changes so it would be great to hear about it.

Helen Adams

Yes, sure. The final guidance from the FCA has made it clear that when considering whether someone's social media activity is relevant to their fitness and propriety, a firm should treat that activity just like any other behaviour - so whether that behaviour is online or offline. Now, most social media policies will already say that online conduct will be treated the same as any other form of behaviour but if firms are updating their policies generally, then it's worth spelling out that this applies not only for HR or employment processes, but also for regulatory purposes too.

Rosie Moore

Brilliant, thank you. So, moving on, the next area I wanted to cover is training - who needs to know what and why. There are a few groups in particular where training is going to be really critical here: those performing certified functions and senior management functions, conduct rules staff, and of course, HR, compliance and line managers. Wendy, do think you could start by taking us through the first two and what you think is required there?

Key area 3: Run appropriate training

Wendy Saunders

Yes, you're absolutely right, Rosie, training is really important for several groups.

First, for those performing certification functions and senior management functions. These individuals need to understand the types of conduct - both inside and outside of work - that could affect an assessment of their fitness and propriety. Some of this behaviour can be career-ending, so it's only fair to make absolutely clear to them that that's the case. From the firm's perspective, giving that warning upfront may actually encourage people to clean up their act and reduce the likelihood of the firm having to deal with allegations later. And if a firm needs to take disciplinary action, prior warning is an essential part of any fair process.

In terms of conduct rules staff, firms have an obligation to take all reasonable steps to make sure that anyone subject to the conduct rules understands how those rules apply to them. The new guidance gives much more clarity about how non-financial misconduct links to conduct rules 1 and 2 in particular. So now is the time for firms to update and re-run their training for conduct rules staff.

And non-banks will want to make sure they communicate clearly which groups of staff are in scope.

Helen Adams

Thanks, Wendy, and then, as you said a bit earlier, Rosie, HR, compliance and line managers will need to be trained as well. They're really the people on the front line when it comes to identifying and responding to non-financial misconduct and that's because they're the people that will be running the relevant internal processes - whether that's the grievance process, a performance management process, a disciplinary process, or perhaps a whistleblowing investigation.

Even if they're not the ones who are going to ultimately decide whether the type of behaviour they're dealing with breaches the conduct rules or impacts the fitness and propriety of some of the individuals involved, they're still going to need a solid enough understanding of the guidance to be able to identify when something might have those regulatory implications and make sure that it's escalated appropriately to whoever in the firm is responsible for making those assessments.

Rosie Moore

Thanks, and you've led us really nicely onto our next topic there actually and that is: what steps should firms be taking to make sure their decision-making processes around fitness and propriety and the conduct rules are fit for purpose, particularly given the new guidance.

Key area 4: Decisions on fitness and propriety and the conduct rules

Wendy Saunders

Thanks Rosie, I'll take that one. Any documentation that firms rely on when carrying out annual fitness and propriety assessments - whether that's an annual certification checklist or other written guidance on fitness and propriety - will need to be reviewed and updated to make sure it properly captures all relevant non-financial misconduct. The same applies to any policies or guidance describing the types of behaviour that might breach the conduct rules.

And importantly, the people responsible for making those decisions on both fitness and propriety and conduct rule breaches should be trained on the new guidance. This is really key to ensuring that decisions are made consistently and in line with regulatory expectations.

Rosie Moore

So, we're coming to the end of our discussion today, but before we wrap up, I wanted to touch briefly on regulatory references. With the new guidance now in place, what should firms be expecting in relation to these?

Key area 5: Regulatory references

Helen Adams

Nothing's actually changed when it comes to the FCA's template on regulatory references. Firms are still going to need to confirm whether they've taken any disciplinary action for a breach of the conduct rules and whether they're aware of any information that could reasonably be considered relevant to someone's fitness and propriety, so that's not changed. But because we've now got this broader range of potentially relevant non-financial misconduct, firms are probably going to find that they need to make disclosures against those questions more often.

If firms are going to update their policies in the way we've described and run the kind of training that we talked about, then the people that are drafting the regulatory references should be well placed to judge what kind of non-financial misconduct does (and doesn't) need to be disclosed in response to those questions. But it is worth affirming, I think, just double checking that everyone involved understands the processes and who's responsible for what.

Rosie Moore

Brilliant, thanks Helen. We've covered a lot in this episode and I'd like to finish with one final question for you both. If there was one action you'd urge firms to take without delay - the thing they should really be prioritising - what would that be?

Wendy Saunders

Thanks Rosie. I'd say making people aware of the standards of behaviour expected of them. The overall purpose of the changes is to deliver better regulatory outcomes, and the sooner firms can start doing that the better.

Helen Adams

Thanks. Yes, I think I would say running training for conduct rules staff (given that that's a regulatory requirement) and then if I'm not being too cheeky and trying to sneak another one in, I'd say the training for HR, compliance and line managers as well. I deal with people in those roles a lot in my work and they are at the front line, as I said before, in dealing with non-financial misconduct and I'd say that traditionally, looking at it through a regulatory lens has probably been seen as of secondary importance and the balance there needs to be adjusted a bit.

Rosie Moore

Really helpful, thank you both. That brings us to the end of today's discussion. A huge thank you to Wendy and Helen for such a clear and practical conversation and thanks to all of you for joining us - we hope you found today's session useful.