

## FCA releases four new policy statements affecting banks, insurance firms and investment firms

The past week has seen a flurry of publications from the Financial Conduct Authority (FCA), in particular on Wednesday, 3 May 2017 they released four new policy statements variously affecting banks, insurance firms and investment firms. The statements relate to:

- Applying FCA conduct rules to non-executive directors in the banking and insurance sectors;
- Remuneration in Capital Requirements Directive IV (CRDIV) firms;
- Whistleblowing in UK branches of foreign banks; and
- Guidance on the duty of responsibility.

All the statements are intended to deal with the FCA key priority of conduct, culture and governance within financial services firms.

### Applying FCA conduct rules to non-executive directors in the banking and insurance sectors

This policy statement contains new rules, which enter into effect on 3 July 2017, it affects banks subject to the Senior Managers & Certification Regime (SMR), insurance firms subject to the Senior Insurance Managers Regime and the FCA-revised Approved Persons Regime, as well as non-executive directors (NEDs) within those firms.

The policy addresses and fixes a gap in existing legislation whereby NEDs did not require approval, nor were subject to conduct rules. The policy will extend the Code of Conduct sourcebook (COCON) to standard non-executives in banks, building societies, credit unions and dual-regulated investment firms

and insurance firms. Standard NEDs are those non executives who do not hold a senior management function such as board committee chair.

Firms affected by the policy change, need to ensure that standard NEDs receive appropriate training on COCON and how it applies to them. Going forward affected firms will also need to report to the FCA any breaches of COCON by standard NEDs resulting in disciplinary action.

The FCA's expressed intention is that applying COCON to standard NEDs will help raise standards of conduct and reduce the risk of future misconduct and mis-selling in firms.

### Remuneration in CRD IV firms

The FCA has published its final guidance and changes to the handbook to help firms understand the rules that apply to their remuneration policies and practices. The new FCA guidance took effect on publication (3 May 2017).

Guidance affects all firms that fall within the scope of the CRDIV namely banks, building societies, investment firms and overseas firms, who are required to comply with the FCA Remuneration Code under SYSC 19A, 19C or 19D of the FCA handbook.

Other firms outside of CRDIV may also find the statement useful to understand what the FCA expects from firms' remuneration policies and practices.

Changes to CRDIV have been made in light of the European Banking Authority's (EBAs) guidelines, setting out views on how CRDIV should be applied, which came into force on 1 January 2017.

Some of the main changes from the FCA's initial consultation in September 2016 concerned:

- *Clarification over the approach to retention payments.*

The FCA considers 'retention awards' different from guaranteed variable remuneration. In order to make this clear and remove any potential for different interpretations, the FCA have edited the relevant subheadings in SYSC 19A and 19D to explicitly include the term 'retention awards'.

- *The need for 'significant' subsidiaries of companies to establish a remuneration committee themselves, in addition to the parent and group level committee.*

When establishing a remuneration committee, the EBA Guidelines set out that the 'significant' subsidiary test must be carried out on a standalone entity basis. The FCA has set out its interpretation of significance for these purposes in Q4 of its [FAQ: Governance](#) guidance. Broadly, this encompasses significant IFRPU firms, or institutions referred to in Article 131 of CRDIV. This is different to the proportionality test under the General Guidance on Proportionality, the FCA expects a firm to have a remuneration committee on a standalone basis where they met the additional criteria for 'significance' set out in Q4. Where a firm is dual regulated, they will also need to consider the significance criteria established by the PRA.

- *Further guidance on how firms can meet the obligation to assess performance conditions of long-term incentive plans (LTIP) post grant and prior to vesting.*

In relation to LTIPs, under SYSC 19A and 19D, firms are required to ensure that all variable remuneration is based on an assessment of financial and non-financial performance of the individual, business unit and the firm as a whole. The FCA would expect to see individual performance considered both at the point of granting the award, and in the period prior to vesting, irrespective of whether the future performance measures are linked to firm level or division targets and measures. This is in addition to any ex-post risk adjustment to reflect a specific crystallised risk or adverse performance outcome.

In addition, firms should review the provisions of the EBA Guidelines alongside the rules in SYSC 19A and SYSC 19D, and the FCA will continue to engage with firms to understand how they are implementing the Guidelines and to consider where further feedback is needed.

- *A concern about the disclosure implications for limited licence and limited activity firms as a consequence of changes to the General Guidance on Proportionality for IFPRU firms.*

The FCA has changed its wording to maintain the previous policy in the final version of the guidance for both IFPRU and dual-regulated limited license and limited activity firms. On proportionality, the FCA, in conjunction with the PRA, has taken a proportionate approach to applying the bonus cap in order to recognise the different incentives and consequences for risk-taking across all CRD-regulated firms. The FCA has set out objective criteria for firms to use when considering whether proportionality applies, which considers the size, internal organisation, nature, scope and complexity of their activities.

Going forward, firms need to take into account the EBA guidelines for the 2017 performance year onwards, as well as this recently released FCA guidance.

## Whistleblowing in UK branches of foreign banks

This [policy](#), which enters into effect on 7 September 2017, incorporates the FCA's final rules on whistleblowing requirements for UK branches of foreign banks. It does not apply to UK branches of overseas firms in other sectors.

The requirements are that UK branches of overseas banks tell their UK-based employees about the FCA and PRA whistleblowing services. Furthermore if a UK branch of an overseas bank has a sister or parent company that is subject to FCA whistleblowing rules, that branch must tell its staff that they are able to make use of that (sister or parent) company's whistleblowing arrangements.

UK branches of overseas banks will need to ensure that they are ready to implement the whistleblowing rules from September onwards.

The FCA is concerned that individuals working for financial institutions may be reluctant to speak out for fear of suffering personally as a result. The FCA hopes that introducing new mechanisms within firms to encourage people to voice concerns will reassure whistleblowers; facilitating an environment where this practice can continue to take place.

The FCA has also taken the opportunity to confirm that there are no plans to offer financial incentives to whistleblowers in the UK, as is the practice in the United States.

## Guidance on the duty of responsibility

Since the senior manager's 'duty of responsibility' came in to force on 10 May 2016, there has been significant speculation as to how the FCA would apply the duty in an enforcement context.

In this [policy](#) statement released 3 May 2017 the FCA has set out guidance in the Decision Procedure and Penalties Manual (DEPP) on how it will enforce the 'duty of responsibility'.

The FCA and the PRA can take enforcement action against senior managers if they are responsible for the management of any activities in their firm in relation to which their firm contravenes a regulatory requirement, and they do not take such steps as a person in their position could reasonably be expected to take to avoid the contravention occurring or continuing.

The changes to DEPP set out a checklist of factors that the FCA will take into account when assessing a senior manager's compliance with his duties. For example:

- whether the senior manager took reasonable steps to ensure that any delegation was appropriate and whether they took reasonable steps to oversee;
- whether they took reasonable steps to satisfy themselves that the firm had appropriate policies and procedures for reviewing each individual member of staff; and
- whether they took reasonable steps to ensure an orderly transition when they were replaced in the performance of their function by someone else.

Senior managers at UK banks, building societies, credit unions, PRA-designated investment firms, and incoming branches of overseas firms have been subject to the duty of responsibility since 10 May 2016. The duty of responsibility is likely to apply to senior managers at all financial firms when the senior managers' regime is extended in 2018.

Although aimed at enforcement, the guidance also acts as a useful ongoing checklist for senior managers in complying with their regulatory obligations.

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