

Non-Financial Misconduct



Presented by Peter Haines
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Contents

- The FCA's latest stated position
- The pitfalls for firms
- Handling and reporting of conduct breaches

What Do You Think?

Poll 1:

Do you believe that the FCA is offering sufficient guidance as to what constitutes non-financial misconduct and how firms should be dealing with it?

- Yes?
- No?

Conduct Rules

- Conduct Rules – All Employees

Rule 1 You must act with **integrity**.

Rule 2 You must act with **due skill, care and diligence**.

Rule 3 You must be **open and cooperative** with the FCA, the PRA and other regulators.

Rule 4 You must pay due regard to the **interests of customers** and treat them fairly.

Rule 5 You must observe proper standards of **market conduct**.

Non-Financial Misconduct and the Conduct Rules

*“From our perspective, misconduct is misconduct, whether it is **financial or non-financial...**”*

- Megan Butler, Director of Investment, Wholesale and Specialist Supervision, FCA, May 2018

In a letter to a Parliamentary Select Committee, Butler stated:

*“There have been instances where either we, or a firm we supervise, have found an individual **not to be fit and proper** on the basis of their non-financial misconduct, with the consequence that there were unable to take up, or else continue in, their role”*

“Sexual harassment and other forms of non-financial misconduct can amount to a breach of [the FCA’s] Conduct Rules”



FCA's Pronouncements

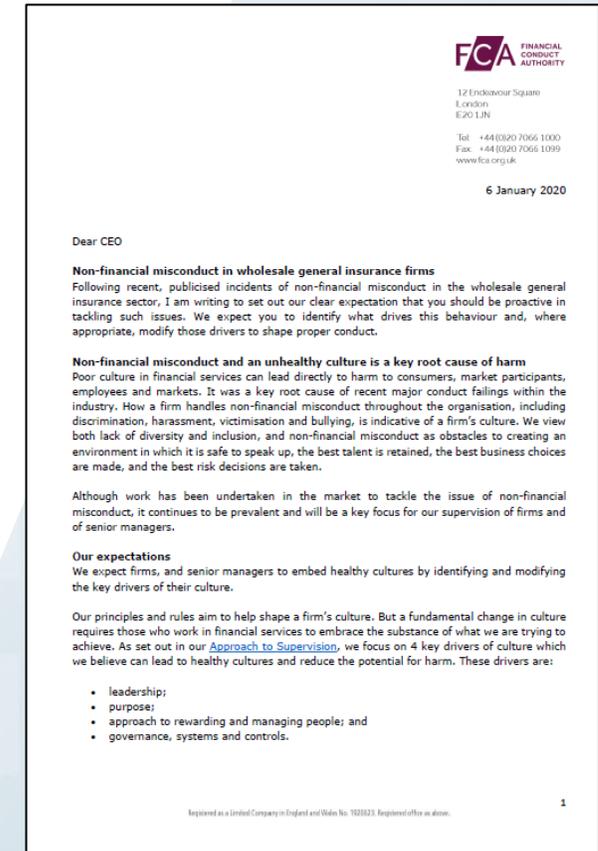
- *“An emerging theme in the last year or so has been non-financial misconduct, such as serious personal misbehaviour, bullying, sexual discrimination or sexual misconduct in the workplace. This type of serious misbehaviour is toxic to a working environment and can lead to bad outcomes for customers, staff, stakeholders and the firm. In our view, tolerance of this sort of misconduct would be a clear example of a driver of unhealthy culture.”*
- Nausicaa Delfas, Executive Director, International at the FCA - June 2019

Non-Financial Misconduct and the Conduct Rules

“As part of our approval of senior managers, an assessment of fitness and propriety will be completed. This looks at factors including competence and capability, honesty, integrity and reputation, and we will consider any known relevant issues of non-financial misconduct.

*In particular, a senior manager’s **failure to take reasonable steps to address non-financial misconduct** could lead us to determine that they are **not fit and proper**. We expect firms and the Boards of firms to take this into account when considering the suitability and performance of (potential) senior managers and other senior leaders.”*

FCA ‘Dear CEO Letter’, January 2020



Non-Financial Misconduct - Examples

The Telegraph News Politics Sport Business Money

Home > Business

Banker sacked for 'stealing' £5 bike

chain

A Citi suspends senior bond trader over alleged theft from canteen

Paras Shah was one of the highest-profile traders in Europe's junk bond market

Robert Smith

Citigroup
the US i

The Telegraph News World Cup Business Sport Opinion Ukraine Money Life

Alex Economy Companies Markets Tech

Top banker quits after telling female colleague he needed 'love and affection'

Citigroup dealmaker Jan Skarbek was suspended after allegedly making the comments on a staff getaway

Concerning Conduct

KPMG head of Lower Gulf to resign.

- Nader Haffer, the chair and chief executive of KPMG's Lower Gulf business centred in Dubai that employs around 1,300 people, announced he is resigning from the firm. Mr Haffer had been accused of creating a "culture of fear" as well as nepotism and cronyism.

Senior Deloitte partner retires after drunken rant.

- The head of Deloitte's executive compensation practice in the UK will retire in December. The retirement comes after an internal probe into events on 14 June when around 30 employees attended a social event at Royal Ascot. It was alleged that the partner was heavily inebriated and launched into a sexist, racist and bullying rant.

Concerning Conduct

Epstein victim is suing his lenders.

- A victim of paedophile Jeffrey Epstein is suing two banks for aiding his sex trafficking. The accusations allege that one of the banks “knowingly benefited and received things of value for assisting and supporting ... Epstein’s sex trafficking organisation”.

UK financial sector told to address the “class ceiling”.

- The City of London Corporation said accents and parentage still dictated progression in the UK financial sector with just 36% of senior leaders from the working class and lower socio-economic backgrounds. The corporation called for an increase to at least 50% by 2030.

Concerning Conduct

DE Shaw former money manager awarded \$52m by Finra.

- The US Financial Industry Regulation Authority (Finra) awarded a former money manager at DE Shaw \$52m for defamation. Dan Michalow had been earning around \$40m a year when he was fired for gross violations of DE Shaw's standards and values. The violations included jokingly referring to a prospective female assistant he wanted to hire in a sexist manner. However, a Finra arbitration panel found that his behaviour did not amount to misconduct.

UK's Financial Reporting Council bears down on auditor exam cheating.

- The UK's accounting regulator, the Financial Reporting Council, wrote to the seven largest audit firms asking for explanations as to how they prevent staff cheating in professional exams. The letters followed the EY fine from the US SEC of \$100m for cheating in ethics exams, and fines for similar issues at PwC's Canadian business and KPMG.

Concerning Conduct

PwC sued by auditor for injury after drinking game.

- An auditor submitted a personal injury claim against his employer, professional services firm PwC, alleging a failure in its duty of care. He had been encouraged to attend a “pub golf” event that involved visiting 9 bars and needing to drink in each in as few mouthfuls as possible. He attended the event and was later found lying in the street after a fall. He suffered what he describes as “moderate-severe brain injury” and is claiming provisional damages of more than £200,000.

Swiss Re loses at tribunal over sexual discrimination.

- Swiss Re lost an employment tribunal case in London against a female employee who was made redundant in April 2021 and alleged sexual discrimination. The tribunal upheld unfair dismissal and complaints of sexual discrimination, sex-related harassment, and maternity-related discrimination.

Concerning Conduct

Former Goldman Sachs MD reveals all in book.

- Jamie Fiore Higgins worked at Goldman Sachs in New York for 17 years and rose to managing director before quitting in 2016. She has published a book titled “Bully Market” about her experiences that include some shocking instances of sexual discrimination. These include being dragged back into the office early after a miscarriage because a manager said his wife had miscarried and was “fine after a few days”, facing taunts of “Mooo” when she used the bank’s lactation room and being told she would not be made an MD if she was pumping milk instead of working.

Conduct Rules – Breach Reporting

Need to notify FCA of conduct breaches:

- Formal written warning
- Suspension or dismissal
- Reduction in remuneration

SMFs:

- Within 7 business days

Conduct rules staff:

- Annually

Reports to the FCA

Institutional fund managers and wholesale banks:

- 194 in 2020-21
- Most were Covid-related, but...
- 33 related to bullying
- 23 to racism

Enforcement investigations into non-financial misconduct:

- 2019: 1
- 2020: 5
- 2021: 0

FCA Bans Fare Dodger for Life

- Jonathan Paul Burrows admitted to avoiding the £21.50 fare from Stonegate in East Sussex for a prolonged period – dodging up to £42,550 overall.



FCA Action

FCA bans three individuals from working in the financial services industry for non-financial misconduct

Press Releases | First published: 05/11/2020 | Last updated: 05/11/2020

The Financial Conduct Authority (FCA) has prohibited Russell David Jameson, Mark Horsey, and Frank Cochran from working in the financial services industry following findings that they are not fit and proper. Each of them had been convicted of serious non-financial indictable offences while working in the financial services industry.

Indecent images, voyeurism and sexual assault

The Pitfalls for Firms

- How should firms deal with non-financial misconduct?
 - How serious should any offences be to warrant a conduct rules breach?
 - Old friends in a bar...
 - Racist e-mails...
-
- What should the governance procedures be?
 - Where is the reporting threshold?
 - Has there been a “dumbing down” of the disciplinary process?
 - What about regulatory references? Is the industry complying?

Poll 2

You work in Compliance and have received a query from one of the managers overseeing the firm's graduate programme. He attended your recent training on NFM and wonders whether there are any compliance issues relating to the skiing trip that is being planned for those who successfully complete the graduate programme. The firm hasn't run the trip for a few years but you're aware that previous trips have been the subject of rather colourful gossip about the 'after-hours' behaviour of some of the attendees.

How would you respond to the manager?

- a) Tell him that in light of the FCA's approach to NFM any type of trip outside the office would be high risk and hence inadvisable.
- b) Suggest that he organises a day trip in the UK instead so that no overnight stays are involved.
- c) Recommend that if the trip goes ahead the attendees should be required to sign a code of conduct which sets out acceptable and unacceptable forms of behaviour.
- d) Something else

Light at the End of the Tunnel?

- DP21/2: Diversity and inclusion in the financial sector – working together to drive change
- DP21/2 suggested that the regulators might look to include non-financial misconduct into fitness and propriety assessments for firms and individuals.
- They also stated that:
- Guidance might be useful for firms as to how to define non-financial misconduct
- Guidance might include factors such as sexual harassment, bullying and discrimination on the basis of someone's protected characteristics

VERY IMPORTANTLY:

- Guidance might demonstrate how non-financial misconduct (and tolerance of such conduct) could result in a conduct rules breach.

Light at the End of the Tunnel?

- The FCA is clearly watching events at the Solicitors Regulation Authority
- Following Ryan Beckwith v SRA ([2020
- <https://www.sra.org.uk/solicitors/guidance/sexual-misconduct/>
- The SRA published its guide to understanding sexual misconduct in September 2022

Beckwith case concluded:

- Integrity is associated with compliance with the ethical standards of the profession.
- Professionals should be held to a higher standard than others (note Forsyth)
- The regulatory obligation to act with integrity "does not require professional people to be paragons of virtue"

Conclusion

- FCA is receiving a substantial number of breach reports
- FCA has not given clear guidance up until now
- Firms are fumbling in the dark as to how to handle NFM

- Look at the governance – at least if you have followed your internal procedures, that should help
- Make senior management aware that they could be judged in terms of tolerance and culture
- Await guidance from the FCA in 2023...

Thank you for attending

Any Questions?

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