

## NON-FINANCIAL MISCONDUCT: FIVE THINGS WE ARE THINKING ABOUT



**CRISIS MANAGEMENT**  
Part of the Horizon Scanning series

Non-financial misconduct (NFM) is an increasingly hot topic in the financial sector. The Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) are currently consulting on measures to strengthen their regulation of NFM. What does this mean for firms and their employees in this sector?



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### 1. TO WHAT EXTENT IS CONDUCT OUTSIDE WORK CAPTURED?

- NFM generally refers to conduct which speaks to an employee's moral integrity and reputation, reaching beyond incidents of financial misconduct such as fraud. It can include sexual misconduct, bullying, harassment or discrimination, other forms of violence or criminal offences (including driving offences). Its incidence can raise questions about the health of a firm's culture in addition to the employee's fitness for their role.
- NFM can arise between members of staff, including in settings outside of the office such as staff social events and during client entertainment, or outside of work in employees' private lives.
- That said, where misconduct has no or little nexus to an employee's regulated work, it will need to be sufficiently serious for the regulatory regime to be successfully engaged. The extent to which both regulators and employers are able to reach into employees' private lives is a developing area.

### 2. WHEN SHOULD WE INVOLVE THE REGULATOR?

- Firms will need to balance their obligations to the regulator with their duties to affected individuals.
- Firms may need to inform the regulator of allegations of NFM, even before they are investigated or any disciplinary action is taken. A formal disclosure must also be made where disciplinary action is taken.
- It is unlikely the alleged perpetrator will have any involvement in this process, which invariably 'ups the ante' given that formal disclosure can have serious consequences for their future employment in this sector.

### 3. WHAT IMPACT COULD NFM HAVE ON REMUNERATION?

- Firms could consider implementing malus and clawback provisions in bonus and other incentive plans which explicitly allow them to withhold or reclaim remuneration where there has been serious NFM.

- Senior management remuneration could also be linked to targets to improve DEI and tackle NFM, although this would need to be carefully tailored to the firm's specific policies. Any targets would also need to be capable of objective measurement to avoid allegations of "bluewashing".

#### 4. HOW SHOULD WE APPROACH HISTORIC NFM?

- When hiring new staff historic NFM may emerge through regulatory references, and any offers of employment should be made subject to satisfactory references.
- Allegations of historic NFM against existing staff may emerge through internal or external speak-up processes, investigations or media reports. These should be investigated promptly.
- Investigation will present challenges; for example, will it be possible to speak to all the individuals involved? Is it appropriate (or necessary) to speak to individuals who have left employment? What effect will the passage of time have on their recollections? Could there be any other contemporaneous records of what happened? Is there a reason why the allegations have only come to light now? Is there a need to work with the police or other authorities?
- When making a finding as to whether historic NFM has taken place, an employer must not act on the basis of mere suspicion, nor necessarily act on the finding of any criminal proceedings. The employer must have a genuine belief that the employee is guilty, based on reasonable grounds, after having carried out as much investigation into the matter as was reasonable in all the circumstances.

#### 5. HOW SHOULD NFM BE DEALT WITH IN A REGULATORY REFERENCE?

- Firms should approach with sensitivity and caution any determination to include details of NFM in a regulatory reference, recognising the ramifications of including details on the individual concerned. Providing details of NFM

could have very serious implications for the individual, making it difficult for them to find employment in the financial services sector, and could result in claims against the firm (e.g. for negligent misstatement).

- References to NFM should not be included out of an abundance of caution, particularly through a narrow focus on regulatory compliance. Firms must adopt a proportionate and fair approach to any reference, including a regulatory reference, and should approach regulatory compliance having regard to the need to ensure a fair and proportionate outcome for the ex-employee.
- Firms should consider whether the NFM is of sufficient severity that disclosure is proportionate given its relevance to any future fitness and propriety assessment. Firms should also consider the inherent severity of the NFM, and how strong the evidential basis is to substantiate the NFM.
- The employee should be given the opportunity to make representations before any NFM is included in a regulatory reference. Whilst firms are not required to accept those representations, they must be properly considered and any resulting disclosure should be balanced and proportionate.

#### CONTACT US TO FIND OUT MORE

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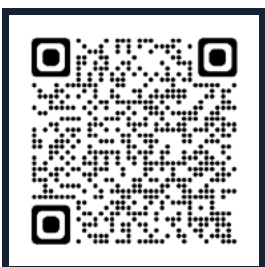
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