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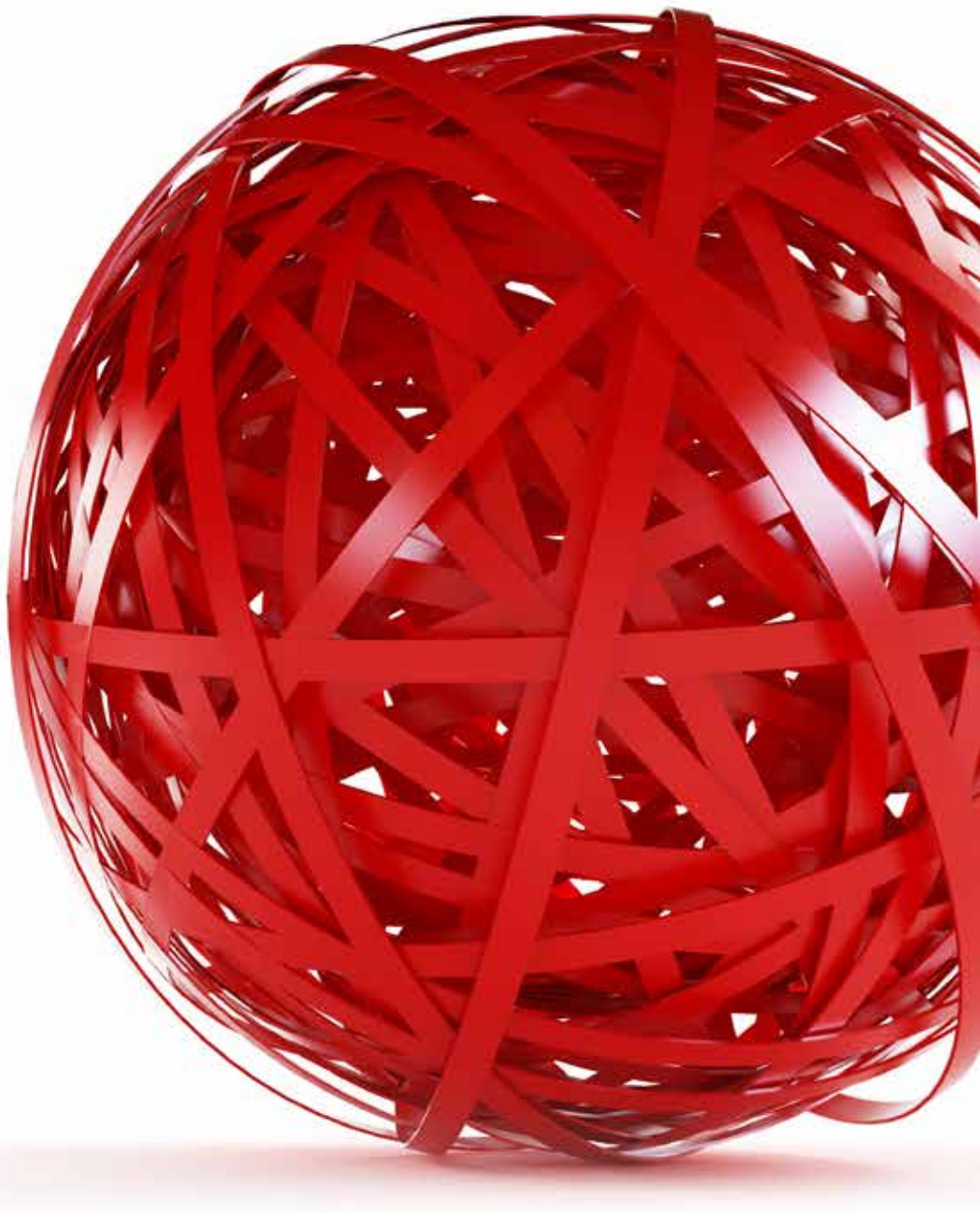


Whistleblowing in financial services – final rules

December 2015

Cultural change

The final rules have now been published, so work can begin. There is less than a year until the implementation date (7 September 2016), although the Whistleblowers' Champion must be in post and active when the Senior Manager Regime comes into force on 7 March 2016.

The new regime is much more than a peripheral tinkering with the whistleblowing rules. Fundamental revisions have been designed to impose cultural change so that individuals feel encouraged to raise concerns, and feel safe once a disclosure is made. To bring this about, the rules intertwine with the Senior Manager and Certification Regime at numerous levels, making them an important and integral part of the regulatory framework. Giving the Whistleblowers' Champion the status of Senior Manager, and linking the fitness and propriety of the firm and individuals to whistleblowing retaliation, are cases in point.

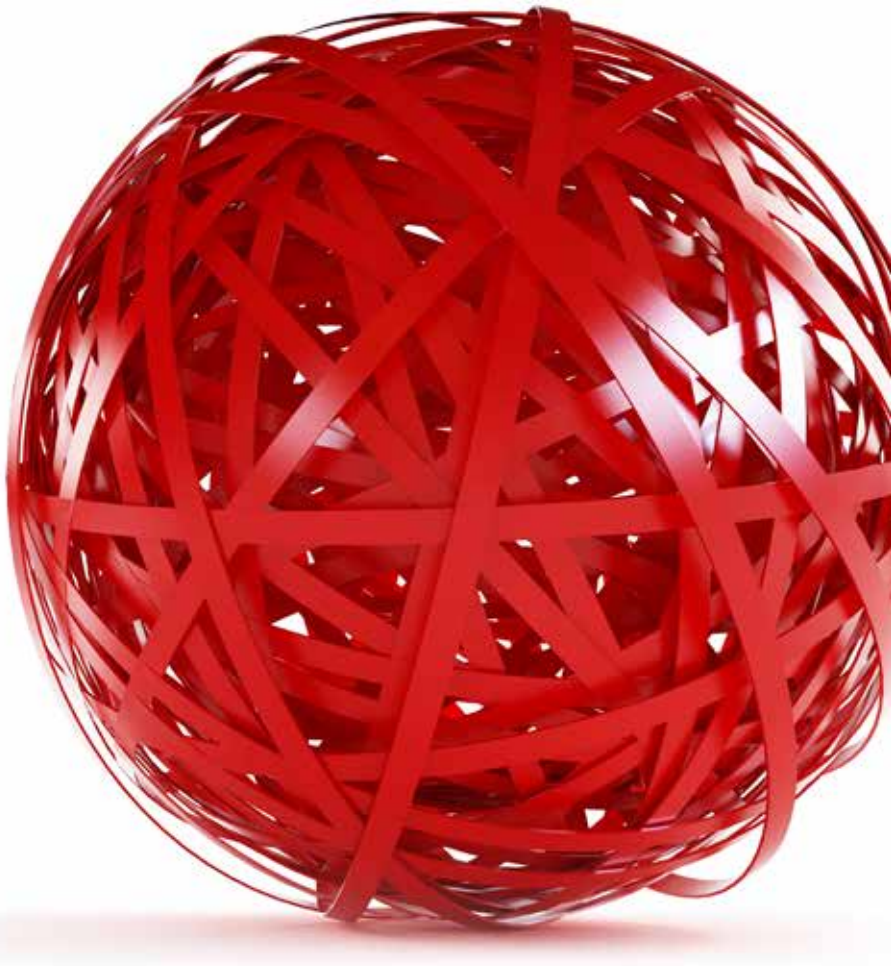
Why have the regulators taken this approach? It is clear from the whistleblowing package that the culture of a firm is a prime focus of the regulators. Mistreatment of a whistleblower would be a matter of regulatory concern regardless of whether the disclosure related to a breach of a specific FCA or PRA rule because it might be evidence of a culture that is harmful to those choosing to speak out. The FCA's analysis in 2014 of the data from their whistleblowing cases over recent years revealed that most disclosures related to the culture of the organisation, whereas fitness and propriety, and crime/money laundering concerns, came in second and fourth respectively.

There is much to be done in preparation, in terms of rewriting and reworking documentation, policies, procedures, training and development, but this is not where the challenges lie. A shift in culture to one where a whistleblower is welcomed with open arms and viewed as an asset will not happen overnight. Linking the implementation, maintenance and effectiveness of whistleblowing policies and procedures under the new regime to regulatory compliance will go a long way to speeding up the process of change.

Boardroom issue

The responsibility for overseeing the effectiveness of a firm's whistleblowing arrangements and transitioning into the new regime lies with the Whistleblowers' Champion, who will be a non-executive director Senior Manager. However, consistent with the nature of their non-executive role, the Whistleblowers' Champion does not need to play a "hands-on" operational role in respect of whistleblowing arrangements day-to-day, and does not need to be available for direct approach by whistleblowers.

Given the regulatory responsibilities and obligations that attach to the role of Senior Manager under the new Senior Manager Regime (even with the abandonment of the presumption of responsibility) and the responsibility of the Whistleblowers' Champion to ensure that a report on whistleblowing is made to the board at least once a year (which the board will then have to consider and decide whether any resulting action should be taken), whistleblowing will now be elevated to an issue that must be taken seriously in the boardroom. Particular attention will be paid to whether there is any retaliation against those who do speak out.



Which firms are covered by these rules?

The new rules will apply to:

For the moment the rules will not apply to UK branches of overseas banks but the regulators may bring them within scope in the future subject to proposed further consultation.

Wider category of reportable concerns

Employment practitioners are familiar with what amounts to a protected disclosure under the Public Interest Disclosure Act ("PIDA"). However, the new regulatory whistleblowing regime significantly expands the scope of disclosures to include what are being termed "reportable concerns".

Firms must ensure adequate protections are afforded to anybody blowing the whistle irrespective of the subject matter.

"Reportable concerns" under the regime include not only PIDA and regulatory disclosures, but also any kind of misconduct, from breach of the firm's policies and procedures to behaviour that harms the reputation or financial well-being of the firm.

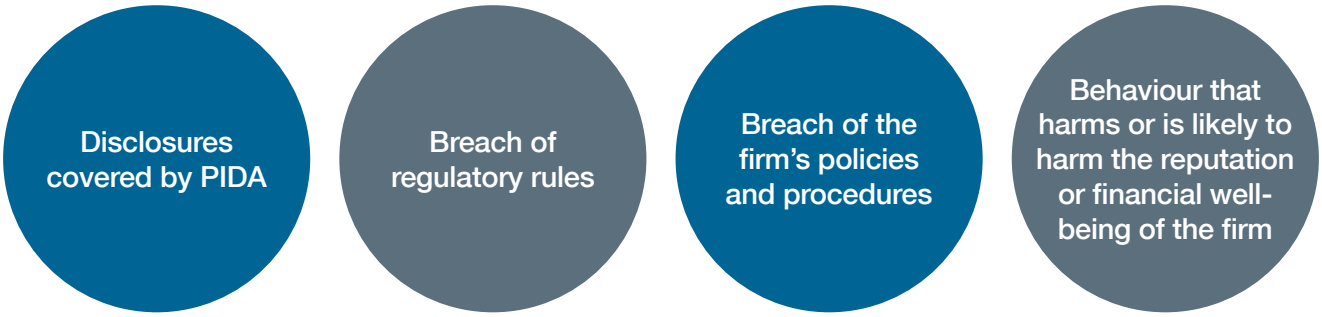
In practice, therefore, under the new regulatory whistleblowing regime the statutory requirement for the disclosure to be in the "public interest" under PIDA becomes irrelevant. Complaints about bullying or harassment or breaches of the annual holiday rules in a staff handbook could all be "reportable concerns" for the purposes of the new regime.

The regulators were not perturbed by consultation responses that argued that this expansive scope would encourage a mixed bag of disclosures better dealt with elsewhere, that it would undermine other escalation arrangements such as grievances, or that it might encourage false or vexatious reports. In the regulators' view, the benefits of whistleblowing arrangements that can handle all types of disclosures outweigh the risks of misuse, which can be managed by effective assessment, filtering and escalation of reportable concerns, to weed out misdirected or inappropriate concerns.

The new rules do acknowledge the inevitable commercial and regulatory difficulties that are likely to arise in practice by imposing such a wide ambit of reportable concerns on firms, expressly providing that a firm may wish to clarify in its written procedures more appropriate channels which can and should be used for the raising of issues such as employees' grievances, customer complaints and everyday differences of opinion. But ultimately, the whistleblowing arrangements will remain as a last resort for individuals who have otherwise exhausted any more suitable alternative routes.

Employers will need to ensure that there are clear signposts for employees indicating the appropriate method for raising grievance-type concerns, reinforced by line manager training to make them aware that a grievance may turn into a "reportable concern" if not dealt with effectively.

What are Reportable Concerns ?



Who is a whistleblower?

Anybody and "nobody" can be a whistleblower.

ANYBODY

The term "whistleblower" is an individual who has disclosed, or intends to disclose, a reportable concern to the firm, or the FCA or the PRA or in accordance with PIDA. A firm's whistleblowing arrangements should therefore be able to take disclosures from any person. This wide definition does not affect the current category of worker protected by PIDA and who therefore can bring a whistleblowing-related claim to the employment tribunal which remains appropriately narrower in focus. However, it does mean that the wider category of potential whistleblowers fall within the scope of the new regulatory whistleblowing regime and, as such, should be protected from detriment and retaliation for blowing the whistle pursuant to effective whistleblowing arrangements overseen by the Whistleblowers' Champion.

NOBODY

How can a whistleblower be "nobody"? In short, whistleblowing polices and arrangements must be able to handle disclosures by those who want to speak out but have requested confidentiality or have chosen not to reveal their identity. This does not necessarily mean that there will be a huge increase in the number of anonymous reports as many financial services firms already have whistleblowing hotlines under which anonymous reports can be made. In terms of protecting confidentiality, if those dealing with the disclosure focus on the wrongdoing rather than the whistleblower, the task becomes more manageable.

Linking detrimental treatment of the whistleblower to fitness and propriety (see below under New link with fitness and propriety) will encourage those operating whistleblowing procedures or dealing with the whistleblower to be mindful of the personal consequences of exposing the individual to retaliation, and an effective way of doing this is to protect his or her identity. The flip side is that anonymous whistleblowers cannot claim they were subjected to detrimental treatment if their identity was unknown.

Whistleblowing arrangements must:

– Allow reportable concerns

– Protect identity and confidentiality if requested

– Allow a range of communication methods for making a disclosure

– Include effective assessment and escalation processes

– Include measures to prevent retaliation

– Provide feedback to whistleblower, where feasible

– Prepare and maintain records of reportable concerns and outcomes

– Include written procedures on compliance

– Report annually to the board

– Report to FCA on successful whistleblowing tribunal cases involving detriment or unfair dismissal

– Include training

New link with fitness and propriety

The consequences of subjecting a whistleblower to a detriment are significant for both the firm and anyone requiring fitness and propriety certification. This is because the rules make a link between detrimental treatment of a whistleblower and the fitness and propriety of the firm and/or member of staff. Evidence of such could be relevant to the firm's suitability status or the certification of the employee.

This can be a high-risk area for managers as it is common for robust management to be interpreted as retaliation by the whistleblower. The new requirement to protect the whistleblower's identity and confidentiality, if requested, will go some way to mitigating this risk (see above, under Who is a whistleblower?) but for all other cases, managers and those administering the whistleblowing arrangements will need to be trained to ensure that there is no link between the making of a reportable concern and detrimental treatment. Discretionary decisions around remuneration, promotion etc will need to be carefully documented to show that decisions were made on an objectively justified basis.

Freedom to speak up directly to the regulators

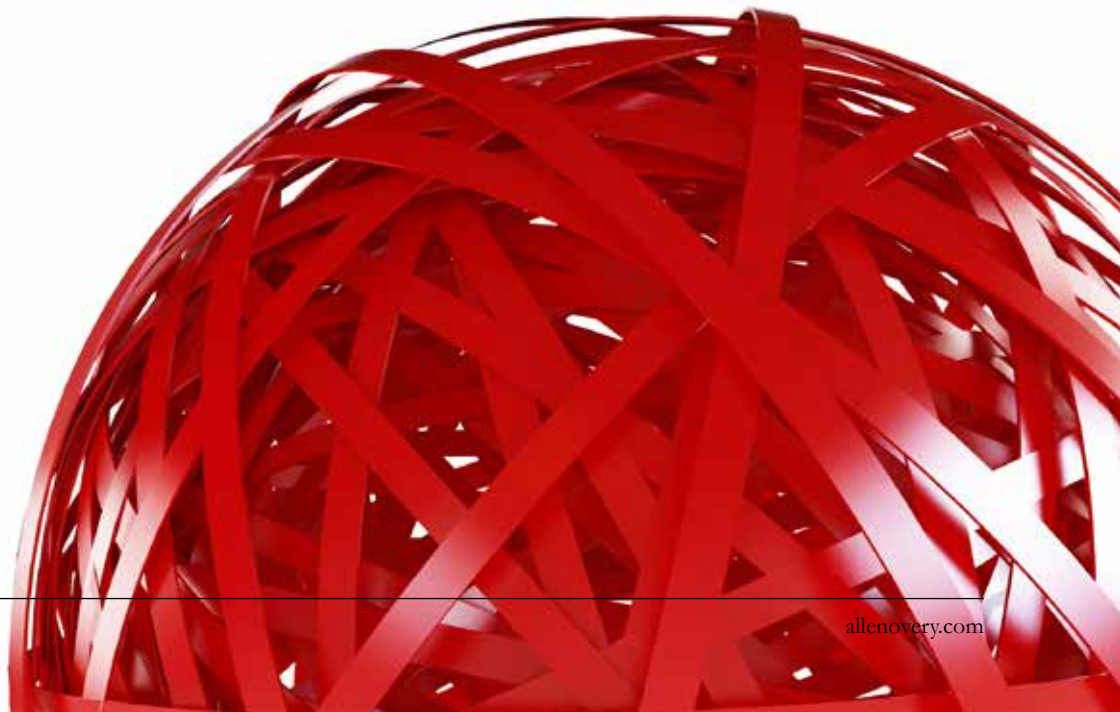
Under PIDA, those making a disclosure only receive protection if they do so using the correct procedure, for example, by reporting their concern directly to the employer in the first instance rather than going straight to the press. Individuals have always been able to go directly to the relevant regulators should they wish but this is not something that is promoted expressly in whistleblowing policies, as most employers would prefer to encourage internal disclosures first.

However, to encourage cultural change within firms, the regulators will now require firms to make whistleblowers aware that they are legally entitled to approach regulators directly if they choose to do so, whether or not the individual has first raised the concern internally. It will be up to the individual to decide which is the most appropriate route for raising the concern in the circumstances. Disclosures to the regulators can be made consecutively or simultaneously with internal disclosures.

In future, firms will have some work to do to convey the message to potential whistleblowers that internal disclosures are the preferred choice. Anonymous helplines and/or protection of identity for internal disclosures, if managed well, are a signpost to those worried about malpractice that the focus is not on who is disclosing but on what is being disclosed. Mandatory training (see below, under Training) can reinforce this message.

Non-gagging clauses

To make it crystal clear that individuals are not prevented from whistleblowing, particularly for departing employees, settlement agreements will need to include text to that effect. Warranties requiring individuals to disclose if they have a made a protected disclosure, or if they know of any information that could form the basis of a disclosure, are prohibited. Note that these provisions apply to PIDA disclosures and not the wider category of reportable concerns.



Reports

The days when data about whistleblowing disclosures did not need to be carefully analysed and proactively addressed by firms are on the way out. The whole process, from the day a reportable concern is made through to its management and outcome, needs to be documented and recorded by firms under the new regime. Systematic processes and effective controls will need to be in place to track the "journey" of a reportable concern. Although the new regime is designed to bring about cultural change, there can be little doubt that a fair amount of box ticking, checking and re-checking will need to be done to bring all the elements together so that, at any point, the Whistleblowers' Champion can call upon data to demonstrate the current state of play, progress and trends within a firm as to the management of its whistleblowing procedures and treatment of those who speak up.

RECORDS

Firms will now have to keep records of reportable concerns, how they are treated and their outcome. This makes it crucial that the level of knowledge of everyone in the firm, be it by written policy, training or leadership, is second to none when it comes to whistleblowing.

ANNUAL REPORTS

During the consultation process, there was debate about whether the Whistleblowers' Champion should prepare an annual report on whistleblowing. The regulators have decided that a report should be prepared for the board of each firm, although this does not have to be done by the Whistleblowers' Champion, nor does it need to be made public. The contents of the report will be a matter for each firm but will cover the operation and effectiveness of whistleblowing arrangements. Whistleblowers cannot be identified.

The content of these reports will be a key consideration for firms. They will inevitably be disclosable and a key piece of evidence in any employment tribunal proceedings, and will have the potential to be very helpful, or indeed very damaging, to a firm's defence in any whistleblowing-related litigation.

EMPLOYMENT TRIBUNAL REPORTS

The FCA requires a prompt report about contested whistleblowing claims where the claimant was successful in relation to detriment or unfair dismissal as a result of making a protected disclosure. "Prompt" is not defined but "within 14 days" seems realistic and manageable. We envisage that the threat of these reports will be used tactically by opportunistic claimants in the hope of securing enhanced settlement terms.

Training

Appropriate training on whistleblowing is required for:

The training requirements on whistleblowing are not insignificant because they cover all UK-based employees, and the training must be tailored to suit the audience (potential whistleblowers, managers and HR). Once the new infrastructure is in place, firms will need to consider:

– Content appropriate to the audience (the rules give minimum standards)

– The most appropriate method of training, eg online, face-to-face, or a combination of both

– Should training be part of the induction process for new joiners, and part of management training for new managers?

– Frequency

– Compliance records.

What are the rules?

The table below sets out in summary form the new whistleblowing regime as set out in the FCA Handbook.

G Guidance is not binding

R A Rule is a provision with which firms are required to comply

Whistleblowing arrangements	Status	Reference	Details
Internal arrangements	R	18.3.1	A firm must establish, implement and maintain effective arrangements for the disclosure of reportable concerns. These arrangements must at least: – Effectively handle disclosures where the whistleblower has requested confidentiality or has chosen not to reveal their identity – Allow for disclosures to be made through a range of communication methods – Ensure the effective assessment and escalation of reportable concerns including to the FCA and PRA – Include all reasonable measures to prevent victimisation of a whistleblower – Provide feedback to the whistleblower where this is feasible and appropriate – Prepare and maintain records of reportable concerns and the firm's treatment of these reports including the outcomes – Include appropriate training to its UK-based employees, managers of UK-based employees and employees operating the firm's internal arrangements Prepare reports: – Annually to the firm's governing body on the operation and effectiveness of whistleblowing arrangements, maintaining confidentiality – Prompt reports to the FCA about each unsuccessful claim at the employment tribunal involving detrimental treatment or unfair dismissal due to whistleblowing

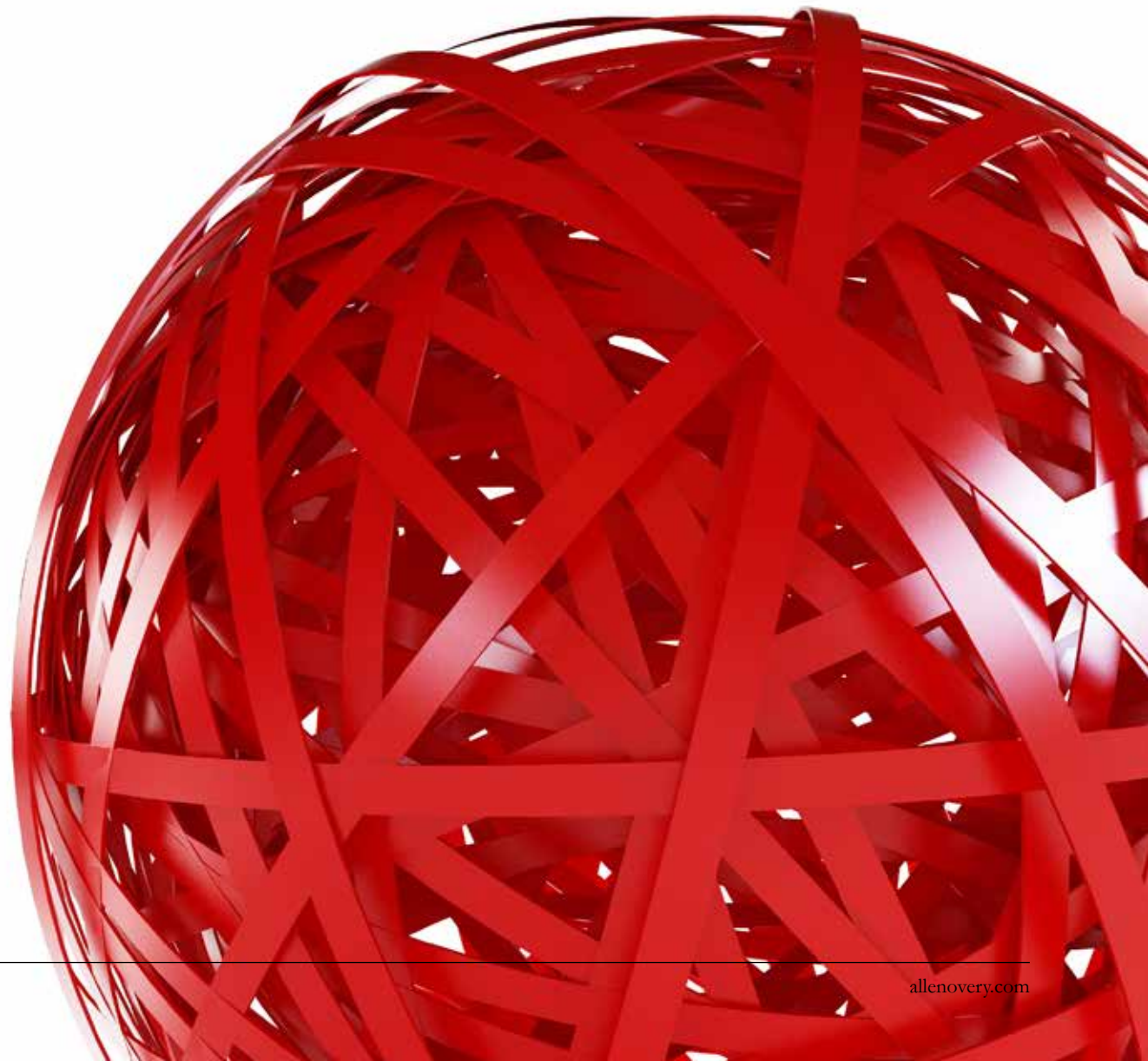
Whistleblowing arrangements	Status	Reference	Details
Whistleblowers' Champion	G	18.4.1(1)	Allocate FCA senior management responsibility for acting as Whistleblowers' Champion
	G	18.4.1(4)	Appoint a non-executive director to this Senior Manager role
	R	18.4.4	Allocate responsibility of ensuring and overseeing the integrity, independence and effectiveness of arrangements to the Whistleblowers' Champion
	G	18.4.5(1)	The Whistleblowers' Champion should have a level of authority and independence within the firm and access to resources (including independent legal advice and training) and information sufficient to carry out the responsibilities of the role
	G	18.4.5(2)	Need not have a day-to-day operational role handling disclosures
	G	18.4.6	Role includes oversight of the firm's transition to its new arrangements for whistleblowing

Whistleblowing arrangements	Status	Reference	Details
Reporting of concerns by employees to regulators	R	18.3.6	A firm must communicate to its UK-based employees (in its handbook or similar written material) that they may disclose reportable concerns directly to the regulators, and methods for doing so. It must make clear that: – Using the firm's internal arrangements and reporting to the regulators may be done simultaneously or consecutively – It is not necessary to make an internal disclosure in the first instance

Whistleblowing arrangements	Status	Reference	Details
Link to fitness and propriety	G	18.3.9	– The FCA would regard as a senior matter any evidence that a firm had acted to the detriment of a worker – Evidence of detrimental treatment of a whistleblower may be relevant to the firm's/individual's fitness and propriety and could affect the firm's suitability standing or an employee's certification status

Whistleblowing arrangements	Status	Reference	Details
Settlement agreements with employees	R	18.5.1	Include new wording in settlement agreements which makes it clear that nothing in these agreements prevents an individual from making a protected disclosure
	R	18.5.3	Firms must not request that workers enter into warranties which require them to disclose that they have made a protected disclosure or that they know of no information which could form the basis of a protected disclosure

Whistleblowing arrangements	Status	Reference	Details
Training for all UK-based employees	G	18.3.4(1)	Training should include: – A statement that the firm takes the making of reportable concerns seriously and the methods for doing so – Examples of events that might prompt a disclosure of a reportable concern – Examples of actions the firm might take after receiving a reportable concern, including measures to protect confidentiality – Information about external sources of support, such as Public Concern at Work
Training for all managers of UK-based employees	G	18.3.4(2)	All managers should be trained on: – how to recognise a disclosure of a reportable concern – how to protect confidentiality and provide feedback – steps to ensure fair treatment of any person accused of wrongdoing – sources of internal and external advice and support
Training for employees operating the firm's whistleblowing arrangements (eg HR)	G	18.3.4(3)	Training on how to: – protect a whistleblower's confidentiality – assess and grade the significance of information provided by the whistleblower – assist the whistleblowers' champion when asked to do so



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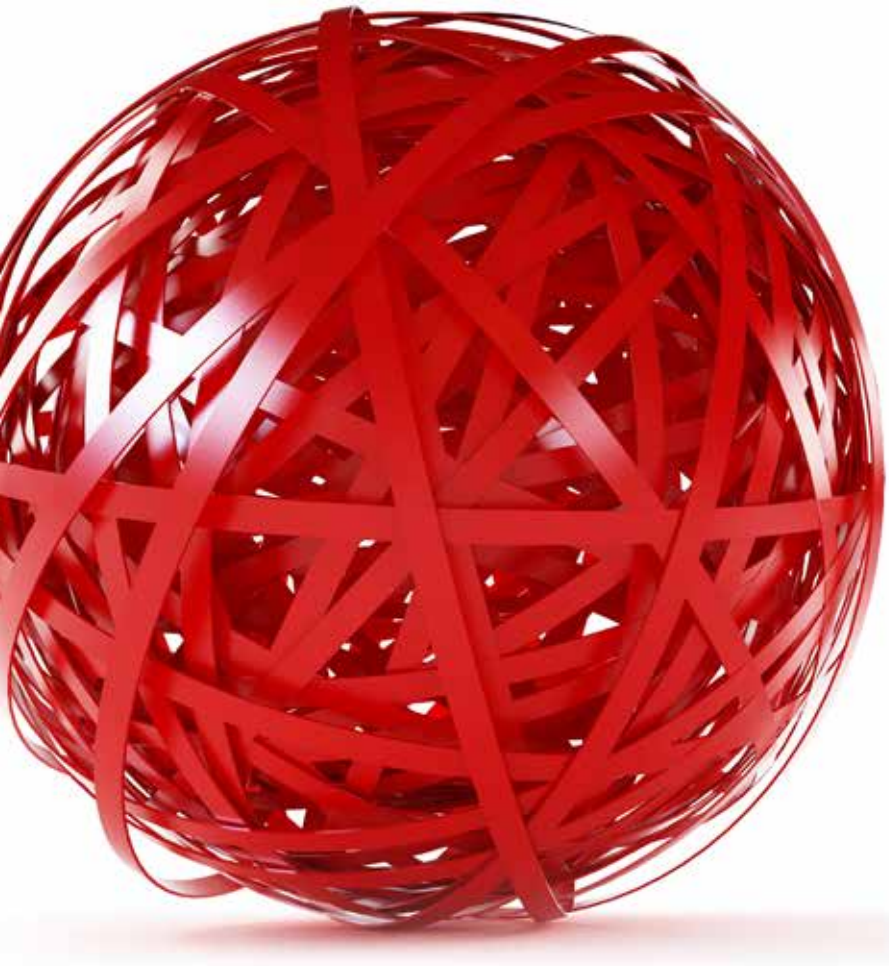

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