

Senior arrangements, Systems and Controls

Chapter 18

Whistleblowing

18.1 Application and purpose

Application

- 18.1.1** **G** [deleted]
- 18.1.1A** **R** This chapter applies to:
- (1) a *firm*;
 - (2) in relation to the *guidance* in **SYSC 18.3.9G**, every *firm*;
 - (3) in relation to **SYSC 18.3.6R** and **SYSC 18.3.10R**, *EEA SMCR banking firms* and *third-country SMCR banking firms* only in relation to a *branch* maintained by them in the *United Kingdom*; and
 - (4) in relation to **SYSC 18.6.1R** to **SYSC 18.6.3G** (Whistleblowing obligations under MiFID):
 - (a) a *UK MiFID investment firm*, except a *collective portfolio management firm*; and
 - (b) a *third country investment firm*; and
 - (5) in relation to **SYSC 18.6.4G** to **SYSC 18.6.5G** (Whistleblowing obligations under other EU legislation), a *person* within the scope of the identified *EU* sectoral and cross-sectoral legislation.
- 18.1.1AA** **G** *Firms* are reminded that for the purpose of **SYSC 18** (except for **SYSC 18.3.9G**) "*firm*" has the specific meaning set out in paragraph (8) of that definition in the *Glossary*, namely:
- (a) "(8) (in **SYSC 18**, with the exception of the *guidance* in **SYSC 18.3.9G**):
 - (a) a *UK SMCR banking firm* except a *small deposit taker*; and
 - (b) a firm as referred to in Chapter 1.1 of the PRA Rulebook: Solvency II Firms: Whistleblowing Instrument 2015."
- 18.1.1B** **R** In this chapter, a reference to a provision of the Employment Rights Act 1996 includes a reference to the corresponding provision of the Employment Rights (Northern Ireland) Order 1996.

18.1.1C **G** A firm not referred to in ■ SYSC 18.1.1AR may adopt the *rules and guidance* in this chapter as best practice. If so, it may tailor its approach in a manner that reflects its size, structure and headcount.

Purpose

- 18.1.2 **G**
- (1) The purposes of this chapter are to:
 - (a) set out the requirements on *firms* in relation to the adoption, and communication to *UK-based employees*, of appropriate internal procedures for handling *reportable concerns* made by *whistleblowers* as part of an effective risk management system (■ SYSC 18.3);
 - (b) set out the role of the *whistleblowers' champion* (■ SYSC 18.4);
 - (c) require *firms* to ensure that *settlement agreements* expressly state that *workers* may make *protected disclosures* (■ SYSC 18.5) and do not include warranties related to *protected disclosures*;
 - (ca) implement the whistleblowing obligation under article 73(2) of *MiFID*, which requires *MiFID investment firms* (except *collective portfolio management firms*) to have in place appropriate procedures for their employees to report potential or actual infringements of *MiFID* and *MiFIR* (■ SYSC 18.6);
 - (cb) outline other *EU-derived* whistleblowing obligations similar to those in article 73(2) of *MiFID*, some of which may also be applicable to *MiFID investment firms* (■ SYSC 18.6);
 - (d) outline best practice for *firms* which are not required to apply the measures set out in this chapter but which wish to do so; and
 - (e) outline the link between effective whistleblowing measures and fitness and propriety.

(2) [deleted]

18.1.3 **G** [deleted]

18.3 Internal arrangements

Arrangements to be appropriate and effective

18.3.1

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- (1) A *firm* must establish, implement and maintain appropriate and effective arrangements for the disclosure of *reportable concerns* by *whistleblowers*.
- (2) The arrangements in (1) must at least:
 - (a) be able effectively to handle disclosures of *reportable concerns* including:
 - (i) where the *whistleblower* has requested confidentiality or has chosen not to reveal their identity; and
 - (ii) allowing for disclosures to be made through a range of communication methods;
 - (b) ensure the effective assessment and escalation of *reportable concerns* by *whistleblowers* where appropriate, including to the *FCA* or *PRA*;
 - (c) include reasonable measures to ensure that if a *reportable concern* is made by a *whistleblower* no *person* under the control of the *firm* engages in victimisation of that *whistleblower*;
 - (d) provide feedback to a *whistleblower* about a *reportable concern* made to the *firm* by that *whistleblower*, where this is feasible and appropriate;
 - (e) include the preparation and maintenance of:
 - (i) appropriate records of *reportable concerns* made by *whistleblowers* and the *firm's* treatment of these reports including the outcome; and
 - (ii) up-to-date written procedures that are readily available to the *firm's* UK-based *employees* outlining the *firm's* processes for complying with this chapter;
 - (f) include the preparation of the following reports:
 - (i) a report made at least annually to the *firm's* governing body on the operation and effectiveness of its systems and controls in relation to whistleblowing (see ■ SYSC 18.3.1R); this report must maintain the confidentiality of individual *whistleblowers*; and
 - (ii) prompt reports to the *FCA* about each case the *firm* contested but lost before an employment tribunal where the claimant successfully based all or part of their claim on either detriment suffered as a result of making a protected

disclosure in breach of section 47B of the Employment Rights Act 1996 or being unfairly dismissed under section 103A of the Employment Rights Act 1996;

- (g) include appropriate training for:
 - (i) UK-based employees;
 - (ii) managers of UK-based employees wherever the manager is based; and
 - (iii) employees responsible for operating the firms' internal arrangements.

18.3.2

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- (1) When establishing internal arrangements in line with SYSC 18.3.1R a firm may:
 - (a) draw upon relevant resources prepared by whistleblowing charities or other recognised standards setting organisations; and
 - (b) consult with its UK-based employees or those representing these employees.
- (2) In considering if a firm has complied with SYSC 18.3.1R the FCA will take into account whether the firm has applied the measures in (1).
- (3) A firm may wish to clarify in its written procedures for the purposes of SYSC 18.3.1R(2)(e)(ii), that:
 - (a) there may be other appropriate routes for some issues, such as employee grievances or consumer complaints, but internal arrangements as set out in SYSC 18.3.1R(2) can be used to blow the whistle after alternative routes have been exhausted, in relation to the effectiveness or efficiency of the routes; and
 - (b) nothing prevents firms taking action against those who have made false and malicious disclosures.

18.3.3

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- (1) A firm may wish to operate its arrangements under SYSC 18.3.1R internally, within its group or through a third party.
- (2) Firms will have to consider how to manage any conflicts of interest.
- (3) If the firm uses another member of its group or a third party to operate its arrangements under SYSC 18.3.1R it will continue to be responsible for complying with that rule.

Training and development

18.3.4

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A firm's training and development in line with SYSC 18.3.1R(2)(g) should include:

- (1) for all UK-based employees:
 - (a) a statement that the firm takes the making of reportable concerns seriously;
 - (b) a reference to the ability to report reportable concerns to the firm and the methods for doing so;

- (c) examples of events that might prompt the making of a *reportable concern*;
 - (d) examples of action that might be taken by the *firm* after receiving a *reportable concern* by a *whistleblower*, including measures to protect the *whistleblower's* confidentiality; and information about sources of external support such as whistleblowing charities;
- (2) for all managers of *UK-based employees* wherever the *manager* is based:
- (a) how to recognise when there has been a disclosure of a *reportable concern* by a *whistleblower*;
 - (b) how to protect *whistleblowers* and ensure their confidentiality is preserved;
 - (c) how to provide feedback to a *whistleblower*, where appropriate;
 - (d) steps to ensure fair treatment of any *person* accused of wrongdoing by a *whistleblower*; and
 - (e) sources of internal and external advice and support on the matters referred to in (a) to (d);
- (3) all *employees* of the *firm*, wherever they are based, responsible for operating the *firm's* arrangements under ■ SYSC 18.3.1R, how to:
- (a) protect a *whistleblower's* confidentiality;
 - (b) assess and grade the significance of information provided by *whistleblowers*; and
 - (c) assist the *whistleblowers' champion* (see ■ SYSC 18.4) when asked to do so.

18.3.5 **G** Where a *firm* operates its arrangements under ■ SYSC 18.3.1R through another member of its *group* or a third party it should consider providing the training referred to in ■ SYSC 18.3.4G(3) to the *persons* operating the arrangements by the *group* member or third party.

Reporting of concerns by employees to regulators

18.3.6 **R** This rule applies to an *EEA SMCR banking firm* and a *third-country SMCR banking firm*.

- (1) A *person* subject to this rule ('P') must, in the manner described in (2), communicate to its *UK-based employees* that they may disclose *reportable concerns* to the *PRA* or the *FCA* and the methods for doing so. P must make clear that:
- (a) reporting to the *PRA* or to the *FCA* is not conditional on a report first being made using P's internal arrangements;
 - (b) it is possible to report using P's internal arrangements and also to the *PRA* or *FCA*; these routes may be used simultaneously or consecutively; and
 - (c) it is not necessary for a disclosure to be made to P in the first instance.
- (2) The communication in (1) must be included in the *firm's* employee handbook or other equivalent *document*.

18.3.6A **G** For the purposes of **SYSC 18.3.6R(1)** the possibility for *P's employees* to disclose *reportable concerns* to the *PRA* or to the *FCA* does not override any obligation of *P* or its *employees* to report breaches to *P's Home State regulator* of matters reserved by an *EU instrument* to that regulator.

18.3.7 **R** *Firms* must ensure that their *appointed representatives* or, where applicable, their *tied agents*, inform any of their *UK-based employees* who are *workers* that, as *workers*, they may make *protected disclosures* to the *FCA*.

Appointed representatives and tied agents

18.3.8 **G** *Firms* are encouraged to invite their *appointed representatives* or, where applicable, their *tied agents* to consider adopting appropriate internal procedures which will encourage *workers* with concerns to blow the whistle internally about matters which are relevant to the functions of the *FCA* or *PRA*.

Link to fitness and propriety

18.3.9 **G** The *FCA* would regard as a serious matter any evidence that a *firm* had acted to the detriment of a *whistleblower*. Such evidence could call into question the fitness and propriety of the *firm* or relevant members of its staff, and could therefore, if relevant, affect the *firm's* continuing satisfaction of *threshold condition 5 (Suitability)* or, for an *approved person* or a *certification employee*, their status as such.

Additional rules for UK branches

18.3.10 **R**

- (1) This *rule* applies where an *EEA SMCR banking firm* or a *third-country SMCR banking firm* has:
 - (a) a *branch* in the *United Kingdom*; and
 - (b) a *group* entity which is a *UK SMCR banking firm*.
- (2) An *EEA SMCR banking firm* and a *third-country SMCR banking firm* must, in the manner described in (3), communicate to the *UK-based employees* of its *UK branch*:
 - (a) the whistleblowing arrangements of the *group* entity that is a *UK SMCR banking firm*; and
 - (b) indicate that these arrangements may be used by *employees* of its *UK branch*.
- (3) The communication in (2) must be included in the *branch's* employee handbook or other equivalent *document*.

18.4 The whistleblowers' champion

- 18.4.1** **G** (1) A UK SMCR banking firm is required under ■ SYSC 24.2.1R to allocate the FCA-prescribed senior management responsibility for acting as the firm's whistleblowers' champion.
- (2) ■ SYSC 18.4.2R requires the appointment by an insurer of a director or senior manager as its whistleblowers' champion.
- (3) This section sets out the role of the whistleblowers' champion.
- (4) The FCA expects that a firm will appoint a non-executive director as its whistleblowers' champion. A firm that does not have a non-executive director would not be expected to appoint one just for this purpose.
- 18.4.2** **R** An insurer must appoint a director or senior manager as its whistleblowers' champion.
- 18.4.3** **R** A firm must assign the responsibilities set out in ■ SYSC 18.4.4R to its whistleblowers' champion.
- 18.4.4** **R** A firm must allocate to the whistleblowers' champion the responsibility for ensuring and overseeing the integrity, independence and effectiveness of the firm's policies and procedures on whistleblowing (see ■ SYSC 18.3 (Internal Arrangements)) including those policies and procedures intended to protect whistleblowers from being victimised because they have disclosed reportable concerns.
- 18.4.5** **G** The whistleblowers' champion:
- (1) should have a level of authority and independence within the firm and access to resources (including access to independent legal advice and training) and information sufficient to enable him to carry out that responsibility;
- (2) need not have a day-to-day operational role handling disclosures from whistleblowers; and
- (3) may be based anywhere provided he can perform his function effectively.

18.4.6

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The role of a *whistleblowers' champion*, before the introduction of his or her responsibilities under those provisions of ■ SYSC 18 which are to come into force on 7 September 2016, includes oversight of the *firm's* transition to its new arrangements for whistleblowing.

18.5 Settlement agreements with workers

- 18.5.1** **R** A *firm* must include a term in any *settlement agreement* with a *worker* that makes clear that nothing in such an agreement prevents a *worker* from making a *protected disclosure*.
- 18.5.2** **E**
- (1) *Firms* may use the following wording, or alternative wording which has substantively the same meaning, in any *settlement agreement*:
“For the avoidance of doubt, nothing precludes [name of worker] from making a “protected disclosure” within the meaning of Part 4A (Protected Disclosures) of the Employment Rights Act 1996. This includes protected disclosures made about matters previously disclosed to another recipient.”
 - (2) Compliance with (1) may be relied on as tending to establish compliance with ■ SYSC 18.5.1R.
- 18.5.3** **R**
- (1) *Firms* must not request that *workers* enter into warranties which require them to disclose to the *firm* that:
 - (a) they have made a *protected disclosure*; or
 - (b) they know of no information which could form the basis of a *protected disclosure*.
 - (2) *Firms* must not use measures intended to prevent *workers* from making *protected disclosures*.

18.6 Whistleblowing obligations under MiFID and other EU legislation

Whistleblowing obligations under MiFID

- 18.6.1** **R** (1) A UK MiFID investment firm (except a collective portfolio management investment firm) must have appropriate procedures in place for its employees to report a potential or actual breach of:
- (a) any rule implementing MiFID; or
 - (b) a requirement imposed by MiFIR or any EU regulation adopted under MiFID or MiFIR.
- (2) The procedures in (1) must enable employees to report internally through a specific, independent and autonomous channel.
- (3) The channel referred to in (2) may be provided through arrangements made by social partners, subject to the Public Interest Disclosure Act 1998 and the Employment Rights Act 1996 to the extent that they apply.

[Note: article 73(2) of MiFID]

- 18.6.2** **R** ■ SYSC 18.6.1R applies to a third country investment firm as if it were a UK MiFID investment firm (unless it is a collective portfolio management investment firm) when the following conditions are met:
- (1) it carries on MiFID or equivalent third country business; and
 - (2) it carries on the business in (1) from an establishment in the United Kingdom.

- 18.6.3** **G** When considering what procedures may be appropriate for the purposes of ■ SYSC 18.6.1R(1), a UK MiFID investment firm or a third country investment firm may wish to consider the arrangements in ■ SYSC 18.3.1R(2).

Whistleblowing obligations under other EU legislation

- 18.6.4** **G** In addition to obligations under MiFID, similar whistleblowing obligations apply to miscellaneous persons subject to regulation by the FCA under the following non-exhaustive list of EU legislation:
- (1) article 32(3) of the Market Abuse Regulation, as implemented in section 131AA of the Act;

- (2) article 71(3) of the *CRD* (see ■ IFPRU 2.4.1R in respect of *IFPRU investment firms*);
- (3) article 99d(5) of the *UCITS Directive* (see ■ SYSC 4.1.1ER in respect of *UK UCITS management companies*, and ■ COLL 6.6B.30R in respect of *depositories*); and
- (4) article 24(3) of the *securities financing transactions regulation*.

18.6.5

G Depending on the nature of its business, in addition to ■ SYSC 18.6.1R, a *MiFID investment firm* may, for example, be subject to one or more of the requirements in ■ SYSC 18.6.4G.