

Conduct Rules Scenarios

The 'Superstar' Bully

Scenario

Greg Johnson is head of equities trading at Toploader Asset Management Ltd. Greg is not a Senior Manager, but has been classified as a "Material Risk Taker".

The Human Resources department of Toploader has received a number of complaints from members of Greg's team about Greg's behaviour. Initial informal investigations would suggest that there is substance to the various claims.

Greg's seems to have promoted a culture of intimidation and bullying, with a focus on nothing other than long hours and "the bottom line". Greg maintains that this is simply part of the process of "toughening up" the team, many of whom he regards as "snowflakes".

A formal investigation into the matter is initiated, but Greg leaves before the investigation and any related disciplinary hearing can be completed.

What conduct rules may have been breached?

- None (probably)

Points to consider

General

In order to be considered in-scope for the purposes of the Conduct Rules, the conduct in question must relate to the regulated or unregulated "financial activities" of the firm.

Under COCON 3.1.3G, a person will only be in breach of a Conduct Rule where they are personally culpable. In other words, the person's conduct must have been:

1. Deliberate, or
2. Below the standard of conduct that would be reasonable in all of the circumstances.

Pursuant to COCON 3.1.2G, in assessing whether a breach of the Conduct Rules has

occurred, the FCA will have regard to the context in which a course of conduct was undertaken, including:

1. The precise circumstances of the individual case,
2. The characteristics of the particular function performed by the individual in question, and
3. The behaviour expected of that function.

The FCA will also take into account whether the conduct in question (a) relates to activities that are subject to other provisions of the FCA Handbook, or (b) is consistent with the requirements and standards of the regulatory system (as far as it applies to the firm).

Pursuant to COCON 3.1.5G and 3.1.6G, in determining whether a breach of the Senior Manager Conduct Rules has occurred, the FCA will take into account:

1. Whether the Senior Manager exercised reasonable care when considering the information available to them,
2. Whether the Senior Manager reached a reasonable conclusion upon which to act,
3. The nature, scale and complexity of the firm's business (the smaller and less complex the business, the less detailed and extensive the systems of control in place need to be – and vice versa),
4. The role and responsibility of the Senior Manager as determined by reference to his/her Statement of Responsibilities, and
5. The knowledge which the Senior Manager had, or should have had, of regulatory concerns (if any) relating to their role and responsibilities.

In terms of the territorial application of the Conduct Rules, in general the Conduct Rules only apply to 'UK activity'. More specifically, the Conduct Rules apply to:

1. Conduct performed from an establishment maintained in the UK by a firm which is subject to the SM&CR, or
2. Conduct which involves dealing with a UK-based client of a UK firm which is subject to the SM&CR from an establishment overseas.

However, the Conduct Rules apply to the conduct of the following individuals wherever it is performed:

1. A Senior Manager, or
2. An employee of an SM&CR firm who performs the function of a Senior Manager, or
3. A non-executive director, or
4. A Certification Employee who performs Certification Function (6) ("Material Risk Taker").

Ultimately, the firm will have to notify the FCA of any breach of the Conduct Rules. Normally, breaches of the Conduct Rules by non-Senior Managers must be notified to the

FCA annually in October using Form H (also known as “REP008 – Notification of Disciplinary Action”). However, the following types of breaches must be reported to the FCA “immediately”:

1. Any “significant” breach of a Conduct Rule (SUP 15.1.7G(1) and SUP 15.3.11R(1)(a)), or
2. Any matter that could have a significant adverse effect on the firm’s reputation (SUP 15.3.1R(3)), or
3. The occurrence of any fraud with respect to any member of staff (SUP 15.2.17R).

The FCA must be notified of any breach of the Conduct Rules by a Senior Manager within 7 days, pursuant to SUP 10C Annex 2G.

Greg

Whilst it is possible that Greg’s behaviour could be regarded as involving a lack of “integrity” as required by **Individual Conduct Rule 1**, the Conduct Rules only relate to the regulated and unregulated financial activities of the firm. As such, Greg’s actions are not subject to the Conduct Rules and, accordingly, cannot result in a breach of the Conduct Rules.

However, there are clearly issues with Greg’s behaviour that need to be addressed. This may well result in disciplinary action against Greg and a finding that he is not fit and proper to perform his role due to the fact that he lacks integrity (despite the fact that he is a ‘superstar’ from a financial point of view).

In passing, the fact that Greg has left before the investigation into his behaviour has been completed would make no difference – even if his conduct had been of a type that had constituted a breach of the Conduct Rules. The FCA would still have to be notified. If necessary, Toploader Asset Management Ltd would have updated any information previously submitted to the FCA (e.g. after the investigation had been completed).