

## Lloyd's of London Plans to Modernise its Misconduct Framework

08 October 2024

On 12 September 2024, Lloyd's of London ("**Lloyd's**") launched a consultation on proposed changes to its framework for dealing with misconduct at managing agents and syndicates, including financial and non-financial misconduct. Intended to, in Lloyd's words, "*modernise its approach*", the changes seek to address and bring clarity around Lloyd's approach to dealing with misconduct, including when and how Lloyd's will intervene. The plans will also more closely align Lloyd's approach with that of the Financial Conduct Authority ("**FCA**") and the Prudential Regulation Authority ("**PRA**"). Published weeks before UK employers will be under a new legal obligation to take reasonable steps to prevent sexual harassment, the consultation further underlines Lloyd's ongoing focus on non-financial misconduct as it pursues its stated desire to transform the culture at both Lloyd's and in the Lloyd's market.

### Key Takeaways

- Lloyd's proposals, set out in a consultation paper available [here](#), follow recent criticism of its processes and decision-making around misconduct. A number of the suggestions seem designed to address practical and procedural issues that Lloyd's has faced as it has sought, in recent years, to hold firms and individuals to account for perceived misconduct, though the consultation paper indicates that change is not intended to increase the number of cases handled under its framework. Rather, Lloyd's has acknowledged that its current framework for dealing with misconduct at managing agents and syndicates can be unclear and lead to uncertainty. The proposals are intended to address that.
- A new, non-exhaustive list of poor behaviors and conduct is proposed to be introduced within the ruleset to clarify what constitutes 'misconduct' and the circumstances in which Lloyd's will intervene. The list includes examples of non-financial misconduct and makes clear that Lloyd's remit extends to conduct outside

of a professional context in certain circumstances (such as social events where other Lloyd's market participants are present). These suggested changes would codify the messaging communicated by Lloyd's through previous Market Bulletins and are broadly consistent with proposals from the FCA (see [here](#)).

- Procedural reform will see a new Lloyd's committee (comprised of senior individuals from within the Legal, Market Oversight and Culture teams) review and triage reports of misconduct to determine whether issues should be dealt with by the Market Oversight team or referred to the Enforcement division. Lloyd's General Counsel, Claire Schrader, and Chief of Markets, Patrick Tiernan, are to be made jointly accountable for decision-making and are expected to be more closely involved in reviewing alleged misconduct and determining Lloyd's response, though the consultation preserves the existing governance and committee approval which is required before formal enforcement action can be commenced.
- Overall, the paper clarifies expectations around conduct in a manner that should be familiar to Lloyd's market participants and provides some greater transparency as to the internal procedures that Lloyd's will deploy, which may be useful. However, there remain many aspects of Lloyd's Market Oversight and Enforcement processes which are not addressed within the paper and where uncertainty likely remains for market participants. Unlike the FCA or PRA regimes where detailed guidance supplements the regulators' discretion to take supervisory or enforcement action, firms or individuals who find themselves subject to Market Oversight or Enforcement continue to have limited transparency as to how those processes will run in practice.
- Additionally, as the consultation focuses only on the regime applicable to managing agents and syndicates, the framework applicable to coverholders, brokers and Delegated Claims Administrators (DCAs) theoretically remains unchanged. While those firms should take note of the consultation (in particular, the revised definition of 'misconduct' and Lloyd's expectations for internal HR processes and regulatory engagement), the circumstances in which Lloyd's would deploy its limited 'toolkit' and proactively review and determine the suitability of such a Lloyd's market participant following an allegation of misconduct remains unclear, as does the process and governance oversight that would apply should such review be launched.

## Why are the changes needed?

Lloyd's has acknowledged that its current framework for dealing with misconduct at managing agents and syndicates (the "**In Scope Firms**") can be unclear, cut across firms' own intervention processes and lead to uncertainty as to potential outcomes. It

also recognises the scope to improve the timeliness and consistency of its decision-making. The proposed changes to Lloyd's framework seek to clarify Lloyd's expectations of In Scope Firms and how Lloyd's will deal with misconduct at these firms.

Additionally, in recent years, in step with other regulators such as the FCA, Lloyd's has placed an increasing focus on addressing non-financial misconduct in the marketplace. While various Market Bulletins and other publications have sought to communicate Lloyd's expectations to market participants, the consultation paper suggests that the current regulatory framework requires updating to align with this less formal guidance. There is also a hint that the current formulation has been hampering Lloyd's ability to take action in relation to non-financial misconduct.

Lloyd's reference in the consultation paper to the current rules requiring "*interpretation by Enforcement Tribunals*" may refer to an Enforcement Tribunal's decision in June 2023 to dismiss the majority of bullying and misconduct charges brought by Lloyd's against Richard Tomlin. This dismissal followed the acceptance of misconduct and settlement of enforcement action by his former employer, Atrium Underwriting Limited ("**Atrium**"). In its judgment, the Enforcement Tribunal is reported to have criticised Lloyd's processes and decision-making insofar as it concerned Tomlin.

With Lloyd's current framework first introduced almost twenty years ago in 2005, there is certainly scope for clarification as to the types of poor and unacceptable conduct that may lead to intervention and enforcement action – particularly for instances of non-financial misconduct. An increase in enforcement activity (although still very limited compared to the FCA and PRA) also leaves scope for 'lessons learned'. It seems the proposed changes seek to address both these things.

## What exactly is proposed?

Currently, there is no single regulatory framework which applies to all Lloyd's market participants, including for dealing with misconduct. Importantly, the proposed framework set out in the consultation paper applies only to those firms and individuals who are subject to the enforcement jurisdiction of Lloyd's – principally, managing agents and syndicates (i.e., In Scope Firms) – and the significance of this is discussed further below.

Lloyd's proposals would see the introduction of a 'Lloyd's Market Conduct and Behaviours Framework' based around a single overarching objective: "*to advance and*

*protect the interests, reputation and culture of the Lloyd's market and its people through the promotion of good conduct and the timely intervention into and remediation of conduct that fails to meet Lloyd's expectations."*

The framework would then implement a number of more specific changes and principles, including notably:

- 1. Misconduct:** Introducing a new, non-exhaustive list of poor behaviors and conduct amounting to 'misconduct' under Lloyd's Enforcement Byelaw which may lead to Lloyd's intervention. This includes non-financial misconduct such as harassment, discrimination and conducting Lloyd's business under the influence, or in possession, of illegal drugs. It also extends to conducting Lloyd's business under the influence of alcohol where it leads to unprofessional behaviour or behaviour that risks bringing the Lloyd's name into disrepute.
- 2. Conduct outside the workplace:** Making clear that misconduct within Lloyd's remit includes not only conduct in the workplace, but also conduct outside of a professional context so long as there is "*a material connection to the Lloyd's market.*" What is appropriate in terms of regulatory jurisdiction remains topical, with the FCA still to publish final rules following its consultation in 2023 (available [here](#)) which (among other things) proposed to clarify the relevance of non-financial misconduct and 'out of office' conduct in the context of the FCA's Conduct Rules. Lloyd's intends to align itself to the FCA's position as reflected in its recent non-financial misconduct data gathering exercise, where it indicated that it was interested in incidents that take "*place at the office, working from home, working offsite, and social situations related to work*" (see [here](#)). Whilst this would not include private events organised by employees among themselves with no other connection to work, there is likely to remain some uncertainty as to exactly where, in practice, Lloyd's remit ends.
- 3. Firms' response to misconduct:** Setting out Lloyd's expectations regarding how In Scope Firms deal with misconduct. The consultation paper reinforces the expectation that most misconduct issues (particularly those involving individuals) will be dealt with by firms rather than Lloyd's, but recognises the importance of robust internal procedures. This includes ensuring that firms have effective internal 'speak up' procedures, follow robust investigation processes (including engaging external advisors to investigate issues deemed to be sufficiently serious), and have HR procedures and disciplinary processes that align with and support Lloyd's Culture Principle (one of 'The Principles for doing business at Lloyd's'). Lloyd's has made clear that a failure to, in its view, deal

sufficiently robustly with misconduct may lead to Lloyd's intervening to conduct its own investigation or a downgrading a managing agent's Culture Principle Rating or a syndicate's overall rating.

- 4. Reporting:** The changes proposed by the consultation paper include encouraging firms to report matters of potential concern to Lloyd's "*at an early stage*" via a "*pre-investigation*" process. Lloyd's Enforcement Byelaw already requires In Scope Firms to report where they have a reasonable belief as to suspected misconduct (including to Lloyd's "*as soon as practicable*") and Atrium was censured for failing to properly report. It is currently unclear how the proposed "*pre-investigation*" process fits in with, or differs from, the current reporting obligations, and firms will need to be mindful of employment and data protection issues which could arise in an early reporting scenario. Lloyd's has stated that it "*is not seeking to be a proxy HR function for firms*" and not every matter will need to be reported to Lloyd's (such as matters relating purely to non-compliance with internal procedures). However, given the focus on reporting and the non-exhaustive list of 'misconduct' outlined above, in practice, it seems likely that reporting to Lloyd's will increase. Indeed, Lloyd's has made clear that a failure to report in the appropriate circumstances could itself amount to misconduct and "*encourages anyone who is in any doubt to discuss the matter with Lloyd's.*"
- 5. Market Oversight and Enforcement:** Providing clarity around, and improving, Lloyd's decision making regarding when and how it may intervene. Lloyd's currently operates two distinct processes to deal with misconduct at In Scope Firms - namely Market Oversight and Enforcement. Interventions by the Market Oversight team typically result in a quicker, and potentially less adversarial, resolution of an issue by addressing culture, governance, risk management or control issues through various potential mechanisms such as a mandated remediation plan, adjustments to a firm's Culture Principle Rating or a skilled person review. Enforcement, on the other hand, is a formal process that may lead to, for example, suspension or expulsion from the market, fines and public censure. Under the proposed revised framework, Lloyd's intends to operate a single, holistic process that will see joint accountability delegated to Lloyd's General Counsel and Chief of Markets, and a new committee apply "*filtering*" and "*triage*" criteria to determine whether Market Oversight and/or Enforcement may be appropriate depending on the seriousness and systemic nature of the issue. It remains Lloyd's expectation that the majority of cases where Lloyd's intervention is merited will be addressed by the Market Oversight team.

6. **Early Account Scheme:** Introducing, as part of Lloyd’s Enforcement process, an ‘Early Account Scheme’. This scheme, which appears to draw inspiration from the Early Account Scheme introduced by the PRA earlier this year, will allow firms to themselves investigate alleged misconduct, within parameters pre-agreed with Lloyd’s, and where appropriate, take disciplinary action or remedial measures. Alongside allowing a firm to benefit from a more efficient investigative process, Lloyd’s also expects utilisation of this scheme to lead Lloyd’s to impose a lower sanction than it otherwise might. It is, effectively, a tool to incentivise firms to proactively and voluntarily address misconduct by offering the ‘carrot’ of quicker and less severe outcomes. The scheme will only be available at Lloyd’s discretion and Lloyd’s has made clear it will not be appropriate in every case.
  
7. **Whistleblowers, victims and vulnerable witnesses:** Introducing changes to support whistleblowers and those affected by misconduct (i.e., victims), particularly of non-financial misconduct. For example, under the proposals, *“acting improperly towards a witness or whistleblower”* is specifically included as an example of ‘misconduct’ that could give rise to enforcement action – for example, against those mistreating a witness or whistleblower. More broadly, Lloyd’s has stated its intention to, in appropriate cases, provide dedicated support to whistleblowers and victims via either a designated individual at Lloyd’s (who is independent from any investigation team or Enforcement process) or a third party. The proposed changes will also, for example, allow vulnerable witnesses and victims to give evidence anonymously or via an independent lawyer at any Enforcement Tribunal. The proposals are however silent on key points, such as how Lloyd’s will ensure whistleblowers, victims and vulnerable witnesses are properly supported throughout an investigation process (i.e., before any enforcement decision or tribunal procedure), and the skills and experience that Lloyd’s will require those interacting with, or providing support to, vulnerable individuals to exhibit.
  
8. **Sensitive information about individuals:** Proposing changes that will enable Lloyd’s to redact information in enforcement decisions to protect an individual’s identity or information about them. Such power could be used to redact the identity of, and information about, whistleblowers, victims and witnesses in enforcement decisions where it may be damaging to those individuals. However, another underlying driver for this proposal is likely to be the Enforcement Tribunal’s criticism of Lloyd’s for effectively identifying Richard Tomlin in its Market Bulletin Y5369 (available [here](#)) that communicated the Lloyd’s Enforcement Board’s decision in respect of his employer, Atrium.

In launching its consultation, Lloyd's has stated that it will not seek to become more directly interventionist and deal with more matters. Rather, Lloyd's view is that the proposed framework will lead to better alignment with In Scope Firms' own internal HR and disciplinary processes, supporting firms' ability to investigate their own employees and to address issues themselves. Only time will tell whether that holds true, or whether Lloyd's intends to increasingly take action against firms for issues of misconduct and, particularly, non-financial misconduct.

## What is not covered by the proposals?

Whilst the proposals by Lloyd's aim to bring clarity around Lloyd's approach to dealing with misconduct at managing agents and syndicates, the proposals are silent on a number of notable items.

- 1. Out of Scope Firms:** The changes proposed by Lloyd's apply only to its framework for dealing with misconduct at managing agents and syndicates (i.e., In Scope Firms). The consultation does not address those firms and individuals who fall outside Lloyd's enforcement jurisdiction, such as coverholders, Lloyd's brokers and DCAs ("**Out of Scope Firms**"). For Out of Scope Firms, Lloyd's will likely have regard to the new framework when deciding what constitutes misconduct and whether misconduct is sufficiently serious for it to intervene. However, the process that Lloyd's will follow in making those decisions, as well as in determining *how* to intervene, remains unclear and ill-defined. This gives rise to additional risks and considerations for Out of Scope Firms to navigate. Notably, since Lloyd's regulatory 'toolkit' is more limited for Out of Scope Firms (with no power to fine or issue public censure), Lloyd's must assess misconduct through the lens of a firm's continued suitability to operate in the market. The current regulatory framework is not transparent as to how such a review would be carried out, and provides no detail regarding the governance and decision-making that Lloyd's will employ; there are also no prescribed means for an Out of Scope Firm to challenge an intervention by Lloyd's (as would be available, via the Enforcement Tribunal, for a managing agent or syndicate). Overall, this may be said to place Out of Scope Firms in a less clear and more precarious position when it comes to misconduct interventions by the regulator and the consultation paper does nothing to address this position.
- 2. Third Parties:** Given the backdrop to this consultation and Lloyd's focus on vulnerable individuals (including powers to redact sensitive information from publicised materials), it is curious that certain other issues concerning third

parties have not been addressed. For example, as noted above, whilst the proposals include some proposals around support to whistleblowers, victims and vulnerable witnesses, they do not fully address how such individuals will be supported during any Lloyd's investigation. In addition, there is no proposal to provide rights to third parties (commonly individuals) in circumstances where Lloyd's findings in relation to another party (commonly a firm) are prejudicial to that third party – so-called 'third party rights.' This can be contrasted with the FCA, for example, who provide third parties against whom prejudicial information is included in a warning notice or decision notice with the right to make representations in response and prior to publication.

- 3. Enforcement process:** Whilst a key driver for the consultation is said to be a need for clarity, Lloyd's proposals do not codify what firms can expect if enforcement action is taken by Lloyd's and, ultimately, if an adverse finding is made. Unlike the FCA and PRA, who have published detailed guidance for firms and make clear their intended practice (e.g., in connection with annotated warning notices) there is no (published) detailed playbook that would support a firm in navigating this procedure. Even if Lloyd's "*modernised*" framework were to be implemented, there would remain significant potential uncertainty about the operation of any procedure conducted thereunder.

## What do affected firms need to do?

Those wishing to respond to the consultation should do so by the deadline of 16 December 2024. Otherwise, firms should monitor the results of the consultation and Lloyd's implementation of the framework. In the meantime, firms should review their policies and procedures to ensure that they encompass the key aspects of the proposed framework, including around the definition of misconduct, internal and external reporting, and investigation and disciplinary processes.

## Key contacts

Please contact us if you would like further information about any of the matters raised in this client bulletin or support in preparing a consultation response.

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## Suggested Reading

- 11 June 2024 Kirkland Alert AIFMD II Q&A for Fund Sponsors
- 05 February 2024 Kirkland Alert [MOBILE DOWNLOAD] Revised HSR Act Thresholds, Filing Fees and Civil Penalty Amounts Announced
- 11 January 2024 Kirkland Alert 2024 Healthcare Private Equity Outlook and Considerations

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