Financial Conduct Authority

Whistleblowing in deposit-takers, PRA-designated investment firms and insurers

October 2015

Policy Statement

PS15/24

Contents

In this Policy Statement we report on the main issues arising from Consultation Paper CP15/4 *Whistleblowing in deposit-takers, PRA-designated investment firms and insurers* and publish the final rules.

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You can download this Policy Statement from our website: www.fca.org.uk. Or contact our order line for paper copies: 0845 608 2372.

Abbreviations used in this document

CP	Consultation Paper
ERA	Employment Rights Act 1996
FCA	Financial Conduct Authority
NED	Non-executive director
PCBS	Parliamentary Commission on Banking Standards
PIDA	Public Interest Disclosure Act 1998. In Northern Ireland, the Public Interest Disclosure (Northern Ireland) Order 1998.
PRA	Prudential Regulation Authority
PS	Policy Statement

1. Overview

Introduction

1.1 Individuals working for financial institutions may be reluctant to speak out about bad practice for fear of suffering personally as a consequence. Mechanisms within firms to encourage people to voice concerns – by, for example, offering confidentiality to those speaking up – can provide comfort to whistleblowers. This document sets out a package of rules designed to build-on and formalise examples of good practice already found in the financial services industry. These rules aim to encourage a culture in which individuals raise concerns and challenge poor practice and behaviour.

1.2 The rules in this policy statement complement our recent initiatives to reform senior management arrangements and remuneration in the financial services industry.

Who does this affect?

1.3 Our new rules affect:

- UK deposit-takers with assets of £250m or greater, including:
  - banks
  - building societies
  - credit unions
- PRA-designated investment firms, and
- insurance and reinsurance firms within the scope of Solvency II and to the Society of Lloyd's and managing agents.

1.4 These are collectively referred to as 'relevant firms' throughout this document.

1.5 For all other firms we regulate, the text of the rules will act as non-binding guidance.

Is this of interest to consumers?

1.6 Whistleblowing is a topic of wide public concern, although the detail of this policy statement is unlikely to be of direct interest to consumers.

Context

1.7 In 2013, the Parliamentary Commission on Banking Standards (PCBS) recommended that banks put in place mechanisms to allow their employees to raise concerns internally (i.e., to 'blow the whistle') and that they appoint a senior person to take responsibility for the effectiveness of these arrangements.[1] In February 2015, we consulted on a package of rules for deposit-takers, PRA-designated investment firms and insurers to formalise their whistleblowing procedures.[2]

Summary of feedback and our response

1.8 We received 50 responses to our consultation and are grateful to everyone who took the time to participate. Of these, 21 responses came from firms we regulate and 15 were from trade and professional bodies. The remainder were from law firms, private individuals, charities, a trade union, an academic and bodies representing whistleblowers. Respondents tended to welcome the intention of our proposals, although we also received comments on aspects of the detail. The following chapter discusses the responses. Annex 1 lists the names of non-confidential respondents, while Appendix 1 sets out final rules.

Whistleblowers' champion

1.9 The majority of respondents favoured the introduction of a whistleblowers' champion, but a sizeable minority thought the job was unnecessary, arguing that existing oversight arrangements were sufficient. Many respondents expressed concern we had assigned tasks to the whistleblowers' champion that were not appropriate for a non-executive director to fulfil. Our final rules will adjust the scope of the whistleblowers' champion's role to ensure it is suitable for a non-executive. Many respondents recommended greater flexibility for how the whistleblowers' champion role is allocated in financial groups. We agree this is desirable. The use of the Group Entity Senior Manager function allows groups sufficient flexibility in how to allocate the role.

Settlement agreements

1.10 Respondents tended to agree that new settlement agreements should make clear that the agreements do not prevent protected disclosures from being made. The final rules will contain a requirement for agreements to contain explanatory text, as well as prohibiting other poor practices that respondents drew to our attention. These prohibitions will include, for example, asking signatories to settlement agreements to state that they know of no information that could form the basis of a protected disclosure or that they have not made a protected disclosure.

1 http://www.parliament.uk/business/committees/committees-a-z/joint-select/professional-standards-in-the-banking-industry/news/changing-banking-for-good-report/

2 https://www.fca.org.uk/news/cp15-04-whistleblowing-in-deposit-takers-pra-designated-investment-firms-and-insurers

Scope

1.11 We received broad support for applying the requirements to deposit-takers, PRA-designated investment firms and Solvency II insurers.

1.12 Since our consultation was published, the scope of the Senior Managers Regime and Senior Insurance Managers Regime have been finalised: deposit-takers (i.e., banks, building societies and credit unions) with assets below £250m will not be required to assign a senior manager responsibility for overseeing the firm's whistleblowing arrangements (i.e., the role of 'whistleblowers' champion'). As a consequence, we will also not require **deposit takers with assets below £250m** to apply the whistleblowing requirements.

1.13 Many respondents identified challenges that **UK branches of overseas banks** would face in implementing these rules. We did not propose to apply rules to these branches as part of this process, but will explore this further in a future consultation.

1.14 Many aspects of our proposals received broad support and will be implemented unaltered from our consultation. As a consequence, we will require a relevant firm to:

- put internal whistleblowing arrangement in place that are able to handle **all types of disclosure from all types of person**
- tell UK-based employees about the **FCA and PRA whistleblowing services**
- require its **appointed representatives and tied agents** to tell their UK-based employees about the FCA whistleblowing service
- inform the FCA if it loses an **employment tribunal** case with a whistleblower
- present a **report on whistleblowing** is to its board at least annually

1.15 We will place no regulatory **duty** on a firm's staff to blow the whistle.

1.16 We judge that our final policy does not differ sufficiently from the position we consulted on to require a new **cost-benefit analysis**.

Next steps

What do you need to do next?

1.17 Relevant firms have until 7 September 2016 to comply with these requirements. The requirement to assign responsibilities to a whistleblowers' champion will take effect on the same date as the rest of the Senior Managers Regime, 7 March 2016. Between 7 March 2016 and 7 September 2016, the whistleblowers' champion will be responsible for overseeing the steps the firm takes to prepare for the new regime.

What will we do?

1.18 The FCA will consult soon on application of these rules to **UK branches of overseas banks**. Once the rules introduced by this document have been in effect long enough to assess their effectiveness, we will consider whether similar requirements should be applied more widely to **other firms we regulate**, such as stockbrokers, mortgage brokers, insurance brokers, investment firms and consumer credit firms.

2. Responses to our consultation

2.1 This chapter summarises the feedback to our February 2015 consultation. It sets out respondents' views on each of the questions we asked in February.

Question 1

Do you agree that the requirements should apply to these firms [deposit-takers, PRA-designated investment firms and Solvency II insurers]? What are the benefits and challenges of extending the requirements to a) branches of overseas banks, and b) other sectors regulated solely by the FCA such as non-PRA-designated investment firms?

2.2 We received **40 responses** to this question. Of these, 26 were supportive of the proposed scope of the new rules. Those who disagreed have suggested the rules should not be applied to firms such as small banks and credit unions. Some asked how the revised £250m balance sheet threshold for small credit unions affected our proposals.

2.3 Twenty-one respondents commented on the application of the requirements to the **UK branches of overseas banks** – 13 favoured applying whistleblowing requirements to branches. The remainder either disagreed or discussed challenges they perceived to exist. These concerns included:

- conflict with the home country's laws and regulations (such as those related to data protection)
- employment contracts being under overseas law
- the lack of board oversight, and
- branches' tendency to be small, and so less able to credibly protect a whistleblower's identity.

Some respondents suggested less-onerous requirements should be applied to branches or that our rules should be regarded as good practice guidance for them.

2.4 Of the 16 respondents who gave an opinion on the desirability of applying the requirements more widely to **all firms regulated by the FCA**, 14 were in favour, while 2 were against. Several suggested this would need to be done in a proportionate manner, given many of the firms would be small. One said sole traders should be exempted.

Our response

Since our consultation was published, the scope of the Senior Managers Regime and Senior Insurance Managers Regime has been finalised: **deposit-takers** (i.e. banks, building societies and credit unions) with assets below £250m will not be required to assign a senior manager responsibility for overseeing the firm's whistleblowing arrangements (i.e. the role of 'whistleblowers' champion'). We will also not require firms below these thresholds to apply the wider whistleblowing requirements.

Although we sought views, we did not formally consult on requiring **UK branches of overseas banks** to implement the whistleblowing measures. We will explore application to branches in a future consultation. In time, we may also discuss application to **other firms we regulate** (such as stockbrokers, insurance brokers, consumer credit firms, and investment firms) although we will first monitor the effectiveness of these new rules for deposit-takers, PRA-designated investment firms and insurers. Note that the requirements in this policy statement will be non-binding guidance for FCA-regulated firms not caught by these new rules.

Question 2

Do you agree that all UK-based employees of relevant firms should be informed about the whistleblowing services run by the PRA and the FCA?

2.5 There were **39 responses** to this question. None disagreed with the proposal that all UK-based employees should be told about the PRA and FCA whistleblowing services. Many suggested that employees should be encouraged to raise concerns internally before approaching the regulators, although one respondent wanted the regulators to clear up the widespread misunderstanding that whistleblowers must report to their employer first. One respondent sought clarity whether non-employees (e.g., suppliers) should be told about the regulators' whistleblowing services, while another wanted to know whether this was a one-off or ongoing exercise. Others suggested employees should be educated about the limits of legal protections under the Public Interest Disclosure Act (PIDA) and sources of independent advice.

Our response

We will require UK-based employees of relevant firms to be informed about the FCA and PRA whistleblowing services. While firms will often encourage employees to use internal whistleblowing services prior to contacting the regulator, we think it is important staff are made aware that they are entitled by law to approach regulators if they choose to and can do this at any stage, whether or not they have raised the concern internally first. There is no requirement to promote the FCA or PRA whistleblowing services to other parties, although firms may choose to do so.

Question 3

Do you agree that firms' whistleblowing arrangements should cover all types of disclosure, not just those related to regulatory matters or protected disclosures under the Public Interest Disclosure Act (PIDA)?

2.6 A total of **35 respondents** answered this question. Of these, 30 were supportive of our proposals. Several suggested that a broad definition had the virtue of being easy to understand and predictable and that, while PIDA provided the basis for workers to receive legal redress, the regulators could take a broader view. Others felt our approach was too wide; they suggested whistleblowing arrangements should handle only disclosures that would be protected under PIDA and that doing otherwise risked encouraging whistleblowing that did not benefit from legal protection. There was also the issue of serious concerns being drowned out by more trivial matters.

2.7 Many respondents were concerned that, by allowing disclosures on all types of topic, we risked channelling concerns that were better handled elsewhere towards the firm's whistleblowing service; these respondents were concerned that our proposals would undermine other escalation arrangements in firms related to, for example, grievances or customer complaints. Several respondents asked for clarity on how disclosures that were false, malicious, vexatious, frivolous, or misdirected should be handled and recorded. Others asked whether all whistleblowing disclosures needed to be investigated.

Our response

We will require relevant firms' whistleblowing arrangements to be able to handle all types of whistleblowing disclosure. We judge that the benefits of doing so outweigh the risks. We agree that not all types of issue or concern raised in an organisation (e.g., grievances, customer complaints, everyday differences of opinion) need to be channelled through the whistleblowing service: there will be other escalation routes and processes that should more properly handle those situations and we do not intend our proposals to interfere with this. Whistleblowing lines will often provide a neutral source of information to callers about alternative routes open to them. That being said, if mainstream escalation routes have been exhausted or ineffective, the whistleblowing arrangements will remain as a last resort.

We require internal whistleblowing arrangements to ensure the 'effective assessment and escalation' of concerns. It is accepted that not all disclosures will result in investigative action, although we would expect due consideration to be given to each case and for this to be recorded.

Nothing in our proposals prevents a firm from taking appropriate action against an employee if it can be demonstrated that person knowingly made a false disclosure with malicious intent.

Question 4

Do you agree firms' whistleblowing arrangements should be available to all individuals, and that protections should apply to all individuals making disclosures, not just employees or those who benefit from protections under PIDA?

2.8 There were **32 responses** to this question. Three respondents said only individuals who benefit from PIDA protections should be able to use firms' whistleblowing arrangements; another said it should be limited to current and former employees, volunteers and non-executive directors. However, the majority favoured protections being offered to a broad range of people, although several were uncomfortable with the idea of receiving disclosures from the employees of competitors or suppliers.

2.9 Many respondents noted that, while the firm can offer confidentiality to all whistleblowers, it cannot, in practice, offer other protections to people outside the firm. For example, respondents said it was not possible for the firm to protect against victimisation by third parties. Several respondents sought clarification on whether the regulators expect whistleblowing arrangements to be promoted to people outside the firm. One respondent suggested that the ability to make anonymous disclosures should not be extended to those raising breaches of company policy, where staff often have a mandatory contractual obligation to speak up.

Our response

We will require relevant firms' whistleblowing arrangements to be able to take disclosures from any person. To be clear, we do not expect the arrangements to be promoted to anyone other than the firm's UK-based employees. We agree that firms can offer fewer protections to whistleblowers who are not employees if they are victimised by people outside the firm, although measures such as keeping disclosures confidential will help.

We think firms should always be prepared to receive anonymous disclosures, if this is what the whistleblower wants, although firms may choose to discuss with whistleblowers the advantages of disclosing their identity. If a disclosure amounts to performance of a contractual obligation then it is arguably in the whistleblower's own interest for their identity to be recorded.

Question 5

Do you agree that settlement agreements and employment contracts reached by a firm with a UK worker must contain a passage clarifying that nothing in that agreement prevents the worker from making a protected disclosure? Should firms be required to impose the same requirement on agencies that provide them with staff?

2.10 We received **40 responses** to this question; of these, 9 disagreed that legal agreements should contain text clarifying a worker's rights under UK law related to whistleblowing. Some suggested such text was unnecessary because it restated the existing legal position and workers entering settlement agreements receive independent legal advice anyway. Others thought it unduly burdensome because it would require contract templates to be redrafted, or might mislead workers to make disclosures that were not protected by the law. Several were concerned the requirement might have retrospective effect and require existing employment contracts to be redrafted, which is not the intention of the proposals.

2.11 The remaining 31 were supportive of adding text about protected disclosures to settlement agreements, with some commenting that clauses were already in use. However, not all of these respondents thought employment contracts should include the text, or sought clarification whether staff handbooks would be considered as appropriate homes for the policy instead. Six respondents commented on the suggested text, as prepared by the FCA. Some felt it was too legalistic and would be hard for workers to understand, while others were concerned it only discussed disclosures made to the FCA and PRA, and not to other prescribed bodies.

2.12 Several respondents said regulators should take further steps. Suggested measures included banning 'gagging clauses' and requiring all settlement agreements, or all settlement agreements reached following the initiation of an employment tribunal, to be submitted to the regulators. Two respondents voiced concern that workers entering into an settlement agreement were being asked to give warranties that they have not made a protected disclosure and knew no information that could form the basis of a protected disclosure: making a disclosure would then place them at risk of being sued for breach of warranty. It was suggested the regulators should outlaw this practice.

2.13 Seventeen respondents offered views on whether recruitment agencies should also be required to use text about protected disclosures in their contracts: seven were in favour and ten were against, saying it would be difficult in practice.

Our response

We will require relevant firms to include text explaining workers' legal rights in any new settlement agreements. In addition, we will prohibit relevant firms from asking signatories to any agreement to:

- state that they know of no information that could form the basis of a protected disclosure
- state whether they have made a protected disclosure

Relevant firms must not use measures intended to prevent workers from making protected disclosures.

We have provided sample text in guidance that firms may choose to use, although use of alternative wording which has the same meaning is equally acceptable.

Firms have discretion about whether to a) include such text in employment contracts and b) whether to request that the employment agencies it uses include such text in settlement agreements entered into with workers.

Question 6

Do you agree with the FCA's proposed treatment of whistleblowing arrangements for staff of appointed representatives and agents?

2.14 Our consultation proposed that principal firms should require their **appointed representatives and tied agents** to inform their staff about the FCA whistleblowing service. It did not,

however, propose to require that principal firms' internal whistleblowing arrangements be promoted to appointed representatives and tied agents. It also proposed a flexible approach to how representatives and agents approached their own whistleblowing arrangements. Principal firms were encouraged to invite representatives and agents to consider adopting appropriate internal procedures themselves, but no detail was prescribed.

2.15 Nearly all the **24 responses** that mentioned this topic were supportive of the proposals. One commented that it was important for appointed representatives and agents to be brought into scope in some way, otherwise intelligence from whistleblowers would be lost. Different views were expressed as to whether the principal firm's whistleblowing arrangements should be promoted to staff of appointed representatives and tied agents.

Our response

The rules we proposed related to appointed representatives and tied agents will remain unchanged.

Question 7

Do you agree with these proposals for the role of whistleblowers' champion?

2.16 There were **44 responses** to this question. Of these, 28 favoured the introduction of a whistleblowers' champion; 5 were opposed. The remainder offered comments. Of those that disagreed, many stated that the board should have collective responsibility for overseeing whistleblowing as stipulated in the UK's Corporate Governance Code. It was argued that assigning responsibility for oversight to an individual would be at odds with UK corporate governance norms and risked reducing how much attention other senior managers paid to the issue. Others suggested the champion would be too remote to offer reassurance to whistleblowers.

2.17 Many respondents felt we assigned specific tasks to the champion (e.g., preparing an annual report, reporting tribunal judgements) that were unsuitable for a non-executive director (NED) in an oversight role. Many felt the notion that a NED should play any kind of 'hands-on' role to be inappropriate. Several respondents said the role should not be performed by a NED, or not by a NED who is also subject to the senior management regime, given the heavy workload on these individuals and the executive nature of some aspects of the role. On the other hand, two respondents said the role should be given to the Chairman of the board.

2.18 Several respondents said that the title 'whistleblowers' champion' was not suitable, because the oversight role would involve ensuring arrangements were effective, but not acting as an advocate for whistleblowers. The term 'whistleblowing champion' was suggested as an alternative. Several respondents suggested that, in large firms, the proposal that the champion should be open to direct approaches from whistleblowers was unrealistic and may lead to conflicts of interest.

Our response

We will require relevant firms to appoint a whistleblowers' champion. They need not use this specific title within the firm. The champion will be a non-

executive director who is subject to the Senior Managers Regime or the Senior Insurance Managers Regime. We have amended the proposals we consulted on to:

- ensure that the role of whistleblowers' champion is entirely non-executive in nature.

- remove guidance that explicitly states the champion is expected be open to direct approaches. We now give guidance that the whistleblowers' champion need not have a day-to-day operational role handling disclosures from whistleblowers. That having been said, if a whistleblower does choose to contact them directly, the whistleblowers' champion will need to consider an appropriate course of action.

Question 8

Do you agree that the whistleblowers' champion should prepare an annual report to the firm's senior governance committee, which is available to regulators on request, but not made public?

2.19 There were **37 responses** to this proposal. Most were in favour of an annual report being prepared, suggesting it would encourage ongoing improvement to a firm's arrangements. Four respondents were against the idea, on grounds it might compromise whistleblowers' confidentiality or would add little value compared to existing reporting arrangements. Most respondents agreed the report should not be a public document or a regulatory return, although four respondents favoured some form of public disclosure. Eight respondents expressed doubts about our suggestions for the content of the report, particularly information about whistleblowers; it was feared that gathering such data would discourage people with concerns from coming forward.

2.20 Several respondents were concerned about the challenge of minimising conflicts of interest when preparing the report. Internal audit, for example, might not be well placed to prepare the report if they also ran aspects of the whistleblowing service. Several respondents thought the whistleblowers' champion should not prepare the report, because this is an executive task not suitable for a non-executive director, and the report may comment, directly or indirectly, on the Champion's performance.

Our response

We will require relevant firms to prepare an annual report for the board, which is available to the FCA or the PRA on request, but not made public. The whistleblowers' champion does not need to prepare the report, but should oversee its preparation as part of his or her oversight role. Our final rules and guidance will be silent on the report's content, to provide firms with the freedom to tailor it as appropriate.

Question 9

Do you agree with our proposed treatment of the role of the whistleblowers' champion in financial groups?

2.21 We proposed that a firm's whistleblowers' champion could be on the board of a parent company that was itself regulated by the FCA and was also subject to the rules. We received **25 responses** to this question. Sixteen were in favour. The remainder suggested amendments to the proposals or requested clarification. Several said firms should have wide discretion as to how to allocate the responsibility. Some respondents asked how the whistleblowers' champion role should be performed in a ring-fenced group. Others requested that a non-executive director of an unregulated parent company should be able to perform the role.

2.22 Several international banks with headquarters outside the UK were concerned that our proposal would interfere with the operation of their existing cross-group whistleblowing arrangements that they believed to be effective; they suggested it should be acceptable for the champion to be located overseas.

Our response

We agree that financial groups should have flexibility about how to allocate the prescribed responsibility of the whistleblowers' champion. A relevant firm must assign the role of champion to a senior manager. The Senior Managers Regime and Senior Insurance Managers Regime include a Group Entity Senior Manager function (SMF7 and SIMF7): a firm that is part of a group may use SMF7 or SIMF7 as a means of appointing a person from elsewhere in the group to perform the champion role. We would not object to a ring-fenced group using SMF7 as a means of appointing one whistleblowers' champion for multiple ring-fenced entities.

However they are appointed, we expect the whistleblowers' champion to be a non-executive director (NED), although we do not expect a firm without NEDs as part of its governance arrangements to create this position specifically to perform the whistleblowers' champion role.

We will not now include specific guidance about groups in the section of the rules about the whistleblowers' champion. We do not object to the champion being based overseas, although the firm will need to be satisfied that he or she can nonetheless perform the role effectively.

Question 10

Do you agree the FCA should require firms to inform it of cases where an employment tribunal finds in favour of a whistleblower?

2.23 In total, **36 respondents** answered this question. Most respondents were in favour, although some questioned the scope: one thought only cases where whistleblowing related to regulatory matters should be reported. Several others suggested firms should also report settlements with whistleblowers because, otherwise, our proposals could push firms to settle early. On the other hand, several respondents noted that tribunal judgements were public information and there was already a mechanism in place by which claimants could ask tribunals to inform a regulator

when their claim was commenced. Some respondents wanted it made clear that it was only after a tribunal supported an employee's claims to have been victimised as a result of blowing the whistle that the case should be reported to the FCA. Another felt the FCA should be told of all tribunal claims involving a whistleblower, regardless of who won. Others were concerned that filing these reports was not an appropriate task for the whistleblowers' champion, because this role would be held by a non-executive director.

Our response

We will require a relevant firm to inform us of cases where an employment tribunal finds in favour of a whistleblower when the finding related to a claim that the whistleblower was victimised. This will not be a task for the whistleblowers' champion, although it will be something for which he or she has oversight as part of the role.

A firm can inform the FCA by writing to whistle@fca.org.uk.

Question 11

Do you agree that the FCA and the PRA should not place a requirement on employees to speak up when they see wrongdoing?

2.24 There were **40 responses** to this question. Several respondents felt that the imposition of a regulatory duty could support a culture of openness and alleviate the dilemma potential whistleblowers face when deciding whether or not to speak up. However, 36 respondents agreed that employees should not be given a regulatory duty to speak up, because this risked putting a whistleblower who feared reprisals in a very difficult position.

Our response

We will impose no regulatory duty on staff to blow the whistle.

Question 12

Do you have any other comments on the proposals in this consultation paper?

2.25 Eleven respondents offered views on **where a whistleblowing function might best sit in a firm**, citing the conflicts of interest that arise in different types of structure. Several expressed doubts whether staff would be confident that Human Resource departments would keep whistleblowing segregated from disciplinary or grievance processes (with, for example, separate record keeping). Others defended HR departments' ability to manage these potential conflicts. One respondent was concerned that any role played by internal audit in operating a firm's whistleblowing arrangements could prevent credible audit work on the effectiveness of the firm's whistleblowing arrangements.

2.26 Eight respondents expressed concerns about our proposal that firms should track whistleblowers to **monitor for mistreatment**. Several suggested an 'open-ended' requirement of this kind

would be difficult to fulfil, particularly given the breadth of potential detriment. Many suggested some whistleblowers would not want be tracked in this way, and efforts to do so might expose a whistleblower's identity. It was suggested a workable approach would be for whistleblowing functions to contact a sample of whistleblowers or invite whistleblowers to self-report cases of detriment.

2.27 Several respondents suggested new **wider roles for the regulators**. One said the regulators should set up a financial hardship fund for whistleblowers. Another suggested that regulators should be given new powers to require firms to compensate whistleblowers who have been victimised. One respondent advocated the FCA acting as arbitrator in employment disputes and taking on cases from the employment tribunal service when they involved regulated firms. One respondent suggested that a new whistleblowing ombudsman, established on similar lines to the Financial Ombudsman Service, should be established to adjudicate in cases where whistleblowers were unhappy with their treatment. Finally, the issue of whether regulators should pay rewards to whistleblowers was raised.

2.28 We also received a number of other **comments and queries**:

- several respondents felt the term 'whistleblowing' had **negative connotations**, and phrases such as 'speaking up' or 'alternative reporting' were preferable
- it was suggested that UK law (e.g., the Public Interest Disclosure Act) and whistleblowing provisions in recent **EU regulations and directives** made the regulators' proposals unnecessary
- several respondents said financial regulators and firms could learn **from best practice in other industries**, with the Civil Aviation Authority's 'Mandatory Occurrence Reporting Scheme' given as an example
- some respondents asked how much **time** we planned to give firms to implement the recommendations.

Our response

Where should whistleblowing sit in an organisation? Relevant firms will need to consider these issues when designing their arrangements, but we will have no specific guidance on this point in our final rules.

Tracking detriment: We agree it would be unfortunate if genuine efforts to detect mistreatment were misinterpreted by whistleblowers as something sinister. We agree that, in practice, there may be challenges taking active steps to detect mistreatment over time. We have removed specific reference from the rules to monitoring for victimisation.

Language: relevant firms need not use the term 'whistleblowing' if they prefer alternative language.

EU directives: The whistleblowing provisions in recent EU directives affecting financial services firms do not take direct effect. European countries need to take implementing measures. The rules in this policy statement will act to put these requirements into effect for the firms covered by the rules.

Timelines: relevant firms will have until 7 September 2016 to implement the measures set out in this policy statement. The exception to this is appointing a whistleblowers' champion: this job will become active alongside the rest of the Senior Managers Regime on 7 March 2016.

Question 13

Do you have any comments on the FCA's cost benefit analysis?

There were **seven responses** to this question. Five thought we underestimated costs. One thought we overestimated costs. One thought our estimates looked reasonable. A large bank provided helpful and detailed cost breakdowns for their whistleblowing function. A credit union said it would not be unusual for a credit union to have no whistleblowing reports in a year.

Our response

We are grateful for these contributions.

Annex 1: List of non-confidential respondents

ACE Credit Union Services and UK Credit Unions Limited

Association for Financial Markets in Europe

Association of British Credit Unions Limited

Association of British Insurers

Association of Financial Mutuals

Barclays Bank plc

Berwin Leighton Paisner LLP

British Bankers' Association

BSI Group

Building Societies Association

Chartered Institute for Securities and Investment

Chartered Institute of Internal Auditors

Chartered Institute of Personnel and Development

Chartered Insurance Institute

Christian Galvin

Deutsche Bank AG

Dr Wim Vandekerckhove, University of Greenwich

Employment Lawyers Association

Financial Services Consumer Panel

HSBC Holdings plc

Institute and Faculty of Actuaries

Integrated Financial Arrangements plc

Irish League of Credit Unions

Liverpool Victoria Friendly Society Limited

Lloyd's Market Association

Lloyds Banking Group

Lynne Edwards

Methodist Chapel Aid Limited

Nationwide Building Society

Newington Credit Union Limited

Nigel Wilkins

Public Concern at Work

Royal & Sun Alliance Insurance plc

Simmons & Simmons LLP

Society of Lloyd's

The Pheonix Group

The Royal Bank of Scotland plc

Unite

Virgin Money Holdings (UK) plc

Whistleblowers UK

Yorkshire Building Society

Appendix 1: Made rules (legal instrument)

ACCOUNTABILITY AND WHISTLEBLOWING INSTRUMENT 2015

Powers exercised

A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 ("the Act"):

(1) section 59 (Approval for particular arrangements);
(2) section 64A (Rules of conduct);
(3) section 137A (The FCA's general rules);
(4) section 137T (General supplementary powers);
(5) section 138C (Evidential provisions);
(6) section 139A (Power of the FCA to give guidance); and
(7) section 395 (The FCA's and PRA's procedures).

B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

C. This instrument comes into force on as follows:

(1) Part 1 of Annex A (Glossary) and Part 1 of Annex B (SYSC) come into force on 7 March 2016;
(2) Part 2 of Annex A (Glossary), Part 2 of Annex B (SYSC) and Annex C (IFPRU) come into force on 7 September 2016.

Amendments to the Handbook

D. The modules of the FCA's Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2) below:

(1)	(2)
Glossary of definitions	Annex A
Senior Management Arrangements, Systems and Controls sourcebook (SYSC)	Annex B
Prudential sourcebook for Investment Firms (IFPRU)	Annex C

Citation

E. This instrument may be cited as the Accountability and Whistleblowing Instrument 2015.

By order of the Board
24 September 2015

Annex A

Amendments to the Glossary of definitions

In this Annex, underlining indicates new text, unless otherwise stated.

Part 1: Comes into force on 7 March 2016

Insert the following new definitions in the appropriate alphabetical position. The text is not underlined.

protected disclosure

(a) a "qualifying disclosure" as defined in section 43B of the Employment Rights Act 1996 (and summarised in (b) below) made by a *worker* in accordance with sections 43C to 43H of the Employment Rights Act 1996;

(b) a qualifying disclosure is, in summary, a disclosure, made in the public interest, of information which, in the reasonable belief of the *worker* making the disclosure, tends to show that one or more of the following (a "failure") has been, is being, or is likely to be, committed:

(i) a criminal offence; or

(ii) a failure to comply with any legal obligation; or

(iii) a miscarriage of justice; or

(iv) the putting of the health and safety of an individual in danger; or

(v) damage to the environment; or

(vi) deliberate concealment relating to any of (i) to (v);

it is immaterial whether the failure occurred, occurs or would occur in the *United Kingdom* or elsewhere, and whether the law applying to it is that of the *United Kingdom* or of any other country or territory.

reportable concern

a concern held by any *person* in relation to the activities of a *firm*, including:

(a) anything that would be the subject-matter of a *protected disclosure*, including breaches of *rules*;

(b) a breach of the *firm's* policies and procedures; and

(c) behaviour that harms or is likely to harm the reputation or financial well-being of the *firm*.

settlement

(in *SYSC* 18) (Whistleblowing) an agreement between the *firm* and a

agreement	*worker* which sets out the terms and conditions agreed by these parties for the purposes of settling a potential employment tribunal claim, other court proceedings or employment disputes.
whistleblower	any *person* that has disclosed, or intends to disclose, a *reportable concern*: (a) to a *firm*; or (b) to the *FCA* or the *PRA*; or (c) in accordance with Part 4A (Protected Disclosures) of the Employment Rights Act 1996. A person is not necessarily a *whistleblower* if they use a channel other than the internal arrangements set out in *SYSC* 18.3.
whistleblowers' champion	(a) (in *SYSC* 4.5) an individual appointed by a *firm* under *SYSC* 4.5.25R(1) with the allocated responsibilities in *SYSC* 18.4.4R; (b) (in *SYSC* 18) (Whistleblowing) an individual appointed by a *firm* under either *SYSC* 4.5.25R(1) or *SYSC* 18.4.2R, as applicable, with the allocated responsibilities in *SYSC* 18.4.4R.
worker	a "worker" defined in section 230(3), and as extended under section 43K, of the Employment Rights Act 1996.

Part 2: Comes into force on 7 September 2016

Insert the following new definition in the appropriate alphabetical position. The text is not underlined.

small deposit taker	(in *SYSC* 18) (Whistleblowing) a *firm* whose *Part 4A permission* includes *accepting deposits* and which has total gross assets of £250 million or less, determined on the basis of the annual average amount of gross assets calculated across a rolling period of five years or, if it has been in existence for less than five years, across the period during which it has existed (in each case, calculated with reference to the *firm's* annual accounting reference date).

Amend the following as shown.

firm	…
	(8) (in *SYSC* 18 with the exception of the guidance in *SYSC* 18.3.9G): (a) a *relevant authorised person* 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.

Annex B

Amendments to the Senior Management Arrangements, Systems and Controls sourcebook (SYSC)

In this Annex, underlining indicates new text and striking through indicates deleted text, unless otherwise stated

Part 1: Comes into force on 7 March 2016

4 General organisational requirements

…

4.7 Senior management responsibilities for relevant authorised persons: allocation of responsibilities

…

4.7.7 R Table: FCA – prescribed senior management responsibilities

FCA-prescribed service management responsibility	Explanation	Equivalent PRA-prescribed senior management responsibility
…		
(4) …	~~(A)~~ (1) … ~~(B)~~ (2) … ~~(C)~~ (3) …	
(4A) Acting as the *firm's whistleblowers' champion*	The *whistleblowers' champion's* allocated responsibilities are set out in *SYSC* 18.4.4R	
…		

After SYSC 18.2 insert the following new section. The text is not underlined. (SYSC 18.3 is inserted by Part 2 of this instrument.)

18.4 The whistleblowers' champion

18.4.1 G (1) A *relevant authorised person* is required under *SYSC* 4.5.25R(1) 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 G The role of a *whistleblowers' champion*, before the introduction of his responsibilities under those provisions of *SYSC* 18 which are to come into force on 2 October 2016, includes oversight of the *firm's* transition to its new arrangements for whistleblowing.

Part 2: Comes into force on 7 September 2016

18 ~~Guidance on Public Interest Disclosure Act:~~ Whistleblowing

18.1 Application and Purpose

Application

18.1.1 G ~~This chapter is relevant to every *firm* to the extent that the Public Interest Disclosure Act 1998 ("PIDA") applies to it.~~ [deleted]

18.1.1A R This chapter applies to:

(1) a *firm*;

(2) in relation to the guidance in *SYSC* 18.3.9G to every *firm*.

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) a *relevant authorised person* 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) ~~to remind *firms* of the provisions of PIDA~~ 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); ~~and~~

(b) ~~to encourage *firms* to consider adopting and communicating to workers appropriate internal procedures for handling workers' concerns as part of an effective risk management system~~ 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*;

(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) ~~In this chapter "worker" includes, but is not limited to, an individual who has entered into a contract of employment.~~ [deleted]

18.1.3 G ~~The *guidance* in this chapter concerns the effect of PIDA in the context of the relationship between *firms* and the *FCA*. It is not comprehensive guidance on PIDA itself.~~ [deleted]

Delete SYSC 18.2 (Practical measures) in its entirety. The deleted text is not shown.

After SYSC 18.2 (deleted) insert the following new sections. The text is not underlined.

18.3 Internal arrangements

Arrangements to be appropriate and effective

18.3.1 R (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 w*herever the *manager* is based; and

(iii) *employees* responsible for operating the *firms*' internal arrangements.

18.3.2 G (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 G (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 G 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

(e) 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 (1) A *firm* 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. A *firm* must make clear that:

(a) reporting to the *PRA* or to the *FCA* is not conditional on a report first being made using the *firm's* internal arrangements;

(b) it is possible to report using the *firm'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 the *firm* in the first instance.

(2) The communication in (1) must be included in the *firm's* employee handbook or other equivalent *document*

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.

…

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.*

Annex C

Amendments to the Prudential sourcebook for Investment Firms (IFPRU)

In this Annex, underlining indicates new text and striking through indicates deleted text.

2 Supervisory processes and governance

…

2.4 Reporting of breaches

…

2.4.2 G *SYSC* 18 (~~Guidance on Public Interest Disclosure Act:~~ Whistleblowing) contains ~~further *guidance* on the effect of the Public Interest Disclosure Act 1998 in the context of the relationship between *firms* and the *FCA*~~ requirements on *relevant authorised persons* and certain *insurers* (see *SYSC* 18.1.1AR) in relation to the adoption and communication of appropriate internal procedures for handling *reportable concerns* as part of an effective risk management system. *SYSC* 18.1.1CG provides that *firms* not otherwise subject to *SYSC* 18 may nonetheless wish to adopt the provisions in that chapter as best practice.

Financial Conduct Authority

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