Financial Services Consumer Panel
AN INDEPENDENT VOICE FOR CONSUMERS OF FINANCIAL SERVICES

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Dear Elizabeth

This is the Financial Services Consumer Panel's response to the Financial Conduct Authority's and the Prudential Regulation Authority's joint consultation paper on whistleblowing in deposit-taking firms, PRA-designated investment firms, and relevant insurers.

The consultation paper's stated aim is to move towards a more consistent approach, and ensure that all employees are encouraged to blow the whistle where they suspect misconduct, with the confidence that their concerns will be considered, and that there will be no personal repercussions. The Consumer Panel broadly supports the thrust of the proposals, we however see weaknesses in the current plans and offer suggestions to improve and strengthen them.

Scope of the proposals

The Panel is concerned about the exclusion of small Credit Unions. Credit Unions are not always well run, particularly the smaller ones, and their failure or governance problems can have a disproportionate impact on their customers and local communities.

We are also concerned that the proposed regime will not immediately apply to UK branches of overseas banks. Exclusion of UK branches risks diluting the stated aims of the regime, with some parts of the market operating under a different framework and leaving room for poor culture to linger or creep in.

The proposals

In our April 2013 response to the FCA's Transparency DP (DP 13/1)[1], we said

"The FCA should ensure all regulated firms have an effective whistleblowing policy in place, one not diluted by a culture of bullying or intimidation or limited (in the case of former employees) by the wording of compromise agreements. Supervisory and enforcement action should be taken against non-compliant firms."

The proposals are therefore welcome. However, we are concerned that the arrangements will be left to firms' discretion. This leaves too much room for manoeuvre. We believe

[1] Please see annex 1:

that some standardisation of procedures, coupled with efficient oversight by way of periodic supervision are needed to ensure the regime works effectively.

The PCBS recommended attribution of the role of 'whistleblowing champion' to a non-executive director, preferably the Chairman. The FCA/PRA proposes to assign the role to a non-executive director who is a "senior manager under the Senior Managers Regime and Senior Insurance Managers Regime'. This person will be responsible for:

- overseeing the effectiveness of the firm's whistleblowing policy (including ensuring that a whistle-blower does not suffer detrimental treatment);
- preparing an annual report to the board regarding the operation of the policy (the contents of that report are left to the discretion of the firm); and
- reporting to the FCA where, in a case before an employment tribunal contested by the firm, the tribunal finds in favour of a whistleblower.

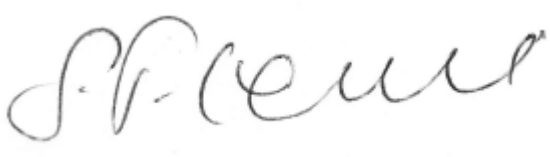
It is the Panel's view that this responsibility should lie with the Chairman, with tough sanctions (e.g. no bonus, personal fine) should evidence emerge that a whistleblower has been mistreated or disadvantaged. The firm could be obliged by the FCA/PRA to give financial redress in such cases, without the need for the individual to invoke the protections under the 1998 Public Interest Disclosure Act. This could be done through the introduction of a specific rule, for example. We consider the disincentives to whistleblowing so high that the potential whistleblower has to have great confidence that their financial position and reputation will be protected.

We believe there should be a whistleblowing duty, in line with the PCBS recommendation. This would put responsibility on employees not only to act, but also to consider the consequences of their inaction. This is important in a sector where the culture led to the financial crisis, market rigging, and widespread consumer detriment.

The regulators also rejected the Consumer Panel's suggestion that whistleblowers could be given a financial reward based on the scale of revealed crime. In our response on transparency, we cited two pieces of academic work that attempted to ascertain the drivers of whistleblowing behaviour[2]. These suggested that fears of reprisal and of ineffectual remedial response are key reasons that inhibit potential whistleblowers. It is our view that the FCA/PRA should have researched whistleblowing behaviour more rigorously before rejecting rewards.

We believe that a strong whistleblowing regime has the potential to bolster compliance, provide intelligence, and avert malpractices that lead to consumer detriment. The regime needs to be robust. We hope the FCA and PRA will consider our comments, offered with the aim of strengthening these proposals.

Yours sincerely,



Sue Lewis

[2] Smith, R. (2010),), "The Role of Whistle-Blowing in Governing Well: Evidence from the Australian Public Sector", The American Review of Public Administration, 40(6), 704-721)

Annex 1

Consumer Panel's response to DP13/1 on Transparency, 26 April 2013: Extract

Whistleblowing

The purpose of a Whistleblowing Policy is to encourage employees to disclose any malpractice or misconduct of which they become aware, and importantly to provide protection for employees who report allegations of such malpractice or misconduct. An effective whistleblowing regime therefore has the potential to bolster compliance and provide intelligence, particularly in industries where detriment could have a significant impact on the lives of citizens e.g. financial services.

Under the Public Interest Disclosure Act 1998 employees in the financial services sector can bypass the general obligation on them to report to their employers (in the first instance), and go directly to the FCA. We believe that this places an extra duty on the FCA to ensure that it inspires confidence pre and post disclosure. Therefore, the Panel supports the FCA's proposals to improve its policy in this area, and specifically to give more details to the Whistleblower about the action that has been taken, or were under consideration, after they have contacted the FCA. Relevant and timely feedback is an essential part of the process, as well as a concerted effort to raise employees' awareness about their legal protections under PIDA.

We agree that the FCA should publish data about the number of whistleblowing incidents, including any action or indeed inaction taken as a result of information received. It is equally important that the FCA is rock-solid in protecting the identity of whistleblowers, and provides adequate information at the very beginning of the process on the policies it has in place to protect whistleblowers' identities, should they wish to be anonymous.

The DP provides no analysis of the incentives that drive – or inhibit - whistleblowing. The regulator receives 3,000 to 4,000 whistleblowing tip offs a year but finds it possible to act on only a small proportion - about 12%. Without further analysis, it is not clear whether the high proportion of in-actionable intelligence is a mark of weakness in the regulatory system. It may be. The FCA's approach to whistleblowing relies on "moral incentive"[3] but an honest individual's willingness to report malpractice may be compromised by a number of considerations: erroneous belief that a practice is ethical if commonplace; perceived disloyalty to friends; fear that a reported malpractice will not be effectively corrected; fear of career-destroying reprisal.[4]

The Panel has two recommendations:

- The FCA should ensure all regulated firms have an effective whistleblowing policy in place, one not diluted by a culture of bullying or intimidation or limited (in the

3 Evidence by Mr Wheatley taken by the Parliamentary Commission on Banking Standards, 27th February 2013.

4 Even if the provisions of the 1998 Act succeed in protecting the whistleblower from immediate reprisals by the accused firm, the individual's career may be undermined by resulting industry-wide reluctance to hire. (see, for example, Smith, R. (2010), "The Role of Whistle-Blowing in Governing Well: Evidence from the Australian Public Sector", The American Review of Public Administration, 40(6), 704-721).

case of former employees) by the wording of compromise agreements. Supervisory and enforcement action should be taken against non-compliant firms.

- The FCA should carefully examine the case for the introduction of monetary rewards for whistleblowers, subject to effective screening to weed out fallacious allegations. Where relevant, the reward could be linked to the proceeds of revealed financial crime or fines obtained as a result of prosecution, thus emulating American practice.

The FCA could usefully learn from the practice of competition regulators. For instance, the Office of Fair Trading incentivises whistleblowing by offering rewards of up to £100,000 to companies and individuals reporting cartel activity that leads to fines or criminal prosecution.

Moreover, the first company or individual to blow the whistle on a cartel may be eligible for immunity from prosecution. We believe these two incentives could be adopted and adapted for financial services. Monetary incentives can be linked to any fines eventually obtained as a result of an FSA action (e.g.10% to 20% of the fine obtained).

We would like the FCA seriously to consider and consult on these two specific incentives, especially in light of its new responsibility to promote effective competition. Finally, the advent of the new FCA provides a good opportunity for the FCA to re-launch its whistleblowing reporting telephone number and its policy.