

## The wind of change

### New whistleblowing rules in the financial services sector

A quiet revolution has been taking place in whistleblowing law but also in public perceptions of this issue. Slowly but surely, attitudes regarding those who report alleged wrong-doing by their employer have been shifting. This change in attitude is reflected similarly in terminology used to describe whistleblowing, with the phrase “speaking-out” increasingly replacing “whistleblowing” in policies.

To a large extent, the financial services industry has been at the forefront of these changes, setting the bar for good practice. Whilst it is fair to say that this was initiated against a backdrop of financial scandal and public demand for reform, the regulators have shown that they are increasingly prepared to be proactive. This is demonstrated in the rules concerning whistleblowing from the FCA and PRA, incorporated into their respective formal “instrument” documents.

These new rules represent the culmination of lengthy debate and consultation following proposals for reform of the banking sector, published by the Parliamentary Commission on Banking Standards in its paper, “Changing Banking for Good”, in 2013. Sector focus continues to be on putting in place mechanisms which facilitate the raising of concerns and are more widely accessible and overseen by a Senior Manager as a “whistleblowers’ champion”, who is charged with responsibility for their effectiveness.

#### New Rules for the Financial Services Sector

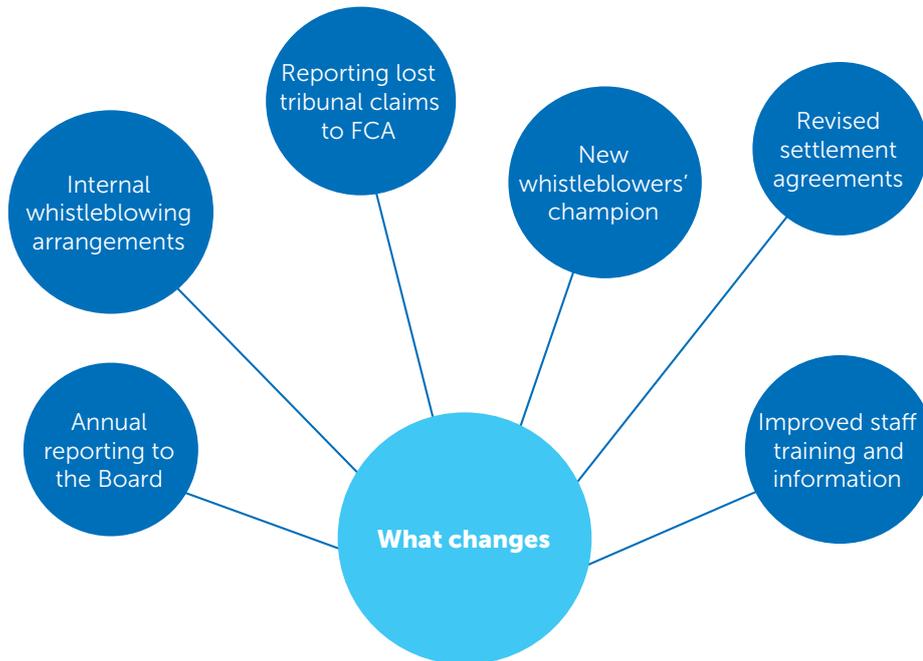
##### Objectives:

A consultation exercise by FCA and PRA in 2015 (the Consultation) identified a “well-run” financial institution as one which seeks to “foster a culture that welcomes discussion and challenge”, with workers feeling comfortable engaging in open dialogue. The Consultation referred to evidence to the Parliamentary Commission on Banking Standards which demonstrated that encouraging whistleblowers to raise the alarm can be a powerful tool for identifying wrongdoing in banks. This is equally relevant in the insurance industry. Those firms which do encourage whistleblowers are deemed more likely to expose alleged misconduct, dishonesty or illegal activity at an early stage, thereby enabling more efficient risk-management. The FCA and PRA also identified in the Consultation that the protection of individuals who raise their concerns about wrongdoing is a fundamental aspect of encouraging others to do so.

Building on previous statements of good practice in the banking and insurance sector, these changes introduced a number of additional steps. Interestingly, however, the regulators steered clear of placing a positive duty on employees to blow the whistle if they become aware of any wrongdoing and resisted the suggestion of putting in place financial incentives to encourage whistleblowing as is the case in the US.

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Affected firms are required to take a number of steps as regards their whistleblowing mechanisms, providing employee training and informing third parties of whistleblowing activity, in addition to embedding a culture of engagement in overarching principles of “speaking out”.

### More robust whistleblowing mechanisms

The Public Interest Disclosure Act 1998 (PIDA) already applies a broader definition to the meaning of “worker” than other employment legislation, for example, extending whistleblowing protection to agency workers and those undertaking work-experience work. That legislation remains in place but the FCA and PRA requirements exceed the extended PIDA provision in terms of their scope and the types of worker to which they apply. This reflects the FCA and PRA views that effective whistleblowing mechanisms must reach a far wider section of workers, including contractors, former employees and non-executive directors. The nature of “reportable concerns” is also wider, incorporating those under PIDA (such as a criminal offence or failure to comply with any legal obligation) but also any breach of an organization’s policies and procedures and behaviour which could harm its reputation or financial well-being. Crucially, the FCA also states that if a whistleblower suffers a detriment, this could call into question the fitness and propriety of the firm and relevant members of staff.

Against this background of wider application and interpretation, key aspects of the new rules include:

#### 1. Whistleblowers’ champion

Most significant amongst the changes is the obligation to appoint a Senior Manager as whistleblowers’ champion,

a step which, on its own, should elevate the subject to Boardroom level for institutions where it is not so already. This person must have a level of authority and independence within the firm, along with access to appropriate resource and information to allow them to fulfil their responsibilities.

#### 2. Wider scope of policies

Coupled with the increased onus on management to monitor and support whistleblowing, firms must put in place internal whistleblowing arrangements ensuring that many types of concerns from many types of person can be handled. This requirement broadens considerably the scope of existing whistleblowing arrangements. One of the challenges many firms face is transforming internal policies, which are frequently drafted in somewhat corporate and legalistic language, into something more employee-friendly and welcoming to those wishing to make their concerns known. An important aspect of a more “user-friendly” approach will be providing feedback to whistleblowers (where they identify themselves). Employers must tread carefully in this respect to balance the degree of reassurance it can offer a whistleblower that it is acting upon his or her concerns against duties of confidentiality, data protection obligations or even protection of potential criminal evidence.

For the avoidance of doubt, nothing under the rules prevents firms from taking disciplinary or other action against those who make false or malicious disclosures.

#### 3. Revised settlement agreement wording

As a further enhancement of worker protection, settlement agreements by which workers might compromise employment claims need to be adapted

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to state expressly that they do not prohibit the making of protected disclosures. Any such agreement must not include provisions which purport to require the worker to reveal any previous or potential disclosures.

### 4. Updated handbook/policy documents

Employment contracts or policies may not operate to dissuade disclosures to the FCA and PRA. The instruments make it clear that, whether through an employee handbook or otherwise, firms must advise their staff of their ability to contact the FCA or PRA directly with reportable concerns, without first contacting their employer. By providing express provision for disclosure to an external body in this way, the rules ensure that employees retain legal protection afforded by PIDA notwithstanding disclosure to a third party (which would ordinarily be subject to additional pre-conditions). As a result, in addition to the protection from disadvantage or harassment contained in the new rules, employees will also suffer no legal disadvantage in approaching the FCA or PRA directly.

### Staff information training:

Across the sector there has been considerable focus upon the interests of customers in recent years, demanding integrity, honesty and fairness. These principles are given even greater prominence by "Conduct Rules", which apply for most staff (although many firms are choosing to apply the same rules for all staff, including those not strictly covered by the Conduct Rules). Now, within the FCA and PRA requirements and aligned with their more robust whistleblowing arrangements there is provision for improved access to training about whistleblowing and sharing of information. Organizations will be required to tell UK-based employees about the FCA and PRA whistleblowing services and to require that their appointed representatives and tied agents also do so.

UK-based employees, their managers (wherever they are based) and any employees responsible for an organization's internal whistleblowing procedures, must be provided with information regarding the ability to report concerns and also the means of doing so. For managers and those responsible for operating internal arrangements, training will necessarily involve issues such as how to deal with complaints and preserving confidentiality but also how to recognise a reportable concern.

### Disclosing whistleblowing activity

The rules provide a boost to reporting obligations by requiring organizations to report promptly to the FCA any whistleblowing complaints upheld against them before an employment tribunal.

Firms which do not already do so will need to maintain records of reportable concerns and the outcome. More importantly still, they will need to present a report on whistleblowing to the Board on at least an annual basis, identifying the operation and effectiveness of the firm's systems and controls.

## To whom the rules apply?

The rules apply to: -

- UK deposit takers with assets of £250m or greater (including banks, building societies and 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

The FCA has said that it will consider whether similar requirements should be applied more widely to other organizations it regulates, such as stockbrokers, mortgage brokers, insurance brokers, investment firms and consumer credit firms. Until then, the text of the rules will act as non-binding guidance for such firms.

The FCA has also consulted on applying these rules to UK branches of overseas banks and will publish its final rules in a policy statement.

## What employers should be doing now

Think about...

- if not already identified, who will be your whistleblowers' champion? Have you agreed his or her duties and amended any statement of responsibilities or job specification accordingly?
- how and by whom the changes and increased obligations will be communicated to the Board
- adapting existing handbooks or other whistleblowing policies which do not meet the new requirements
- reviewing settlement agreement wording to incorporate the new clarifying wording
- how you will communicate the changes to your staff but also any appropriate third parties
- the extent of additional reporting obligations to the applicable governing body and/or the PRA or FCA and who will take responsibility

# Some frequently asked questions

1

## Why is whistleblowing such a concern?

The FCA has received a marked increase in whistleblowing disclosures in recent years, up from 276 in 2009 to 1376 in 2014, as workers' awareness and confidence has grown. The aim of the rules is to build upon this upward trend so that firms (and, where applicable, regulators) are alerted to potential problems earlier. This will be assisted further by greater responsibility and accountability upon Senior Managers, with incidences of whistleblowing on regulatory issues being likely to increase from this group also, as they look to ensure they discharge their personal responsibilities.

To accommodate the latest changes and anticipated rises in whistleblowing disclosures, policies and practices amongst firms will need to evolve and adapt, recognising also that, along with the many advantages of greater openness and information-sharing, there may be a risk that some workers could seek to use disclosures to the regulators ('prescribed persons' under PIDA) as a negotiating tactic.

2

## What protection should my firm afford a whistleblower?

PIDA protects any worker who discloses wrong-doing with a public interest element from detriment and victimisation. Courts have tended to apply a fairly broad interpretation to what may be in the "public interest" but this will depend on the particular circumstances. Firms should already ensure that they have provisions in place to prevent such workers from being dismissed, demoted or otherwise penalised where they disclose concerns which they:

- reasonably believe constitute a criminal offence, breach of obligation or other protected disclosure identified by PIDA; and
- reasonably believe to be in the public interest

Furthermore, firms should already have protections in place to prevent harassment and bullying of whistleblowers by colleagues since, as employer, they are potentially liable if they fail to take all reasonable, preventative steps.

FCA guidance encourages firms to adopt appropriate internal procedures to actively encourage workers with concerns to come forwards. The whistleblowing rules outlined above are a significant step towards standardising practice and will go beyond encouraging sector employers to have an effective policy, to requiring them to do so.

3

## Do workers have a duty to blow the whistle?

Senior Manager Conduct Rule 4 provides that a Senior Manager 'must disclose appropriately' 'must disclose appropriately any information of which the FCA or PRA would reasonably expect notice'. In September 2015 the FCA fined the former finance director of a collapsed investment firm £350,000 in connection with his failure to report a series of financial irregularities to the regulator. Firms themselves have an equivalent obligation under Principle 11 of the FCA's Principles for Business. It is not only senior personnel who are subject to such notification requirements. More junior employees also are subject to the Conduct Regulations and obliged to be "open and co-operative with the FCA, PRA and other regulators".

4

## Who should be the whistleblowers' champion?

The whistleblowers' champion is expected to oversee internal whistleblowing arrangements; prepare an annual report to the Board (which is not made public); and report to the FCA where an employment tribunal case is won by a whistleblower against the firm. The PRA and FCA expect this individual to be a non-executive director who is subject to the Senior Managers' Regime or Senior Insurance Managers' Regime. Most often this role will be filled by the Chair of the Audit Committee, as one of the more independent roles within firms although some respondents to the Consultation thought that the Board should have collective responsibility for overseeing whistleblowing as stipulated in the UK Governance Code - a proposal that was rejected. Assuming the role is filled by a non-executive, their statements of responsibility will need to be amended to reflect these new duties.

5

## Is my firm obliged to investigate all allegations?

Firms owe a duty to investigate all allegations. The particular nature of the investigation will vary depending on the allegations. Irrespective of the length or type of investigation, the firm should give feedback to the whistleblower (this will not include details of any disciplinary action, which will remain confidential to the individual concerned). The feedback should be provided promptly following conclusion of the investigation and any inquiry.

6

## To whom must a firm notify an allegation and when?

Firms must consider what internal notifications should take place and the appropriate mechanisms for such notifications, including reporting to appropriate governance committees. It must also be borne in mind, however, that notification may also be required to one or more external regulators in accordance with regulatory requirements to be open and honest and provide notification of matters which the regulator may reasonably require. Firms will need to consider the timing of any notifications carefully.

7

## What if my firm is not caught by the new rules?

The rules apply to the types of firm outlined above. However, for firms falling outside these categories, the rules will have the status of non-binding guidance and so compliance is voluntary. FCA and PRA guidance continues to encourage all firms, both large and small, to adopt appropriate internal procedures and good practice. In any event the FCA and PRA will consider whether to apply the rules more widely to all firms regulated by the Financial Services and Markets Act 2000.

8

## Will a firm be able to prevent disclosure as part of a settlement agreement?

No. Under the rules, settlement agreements must include a section which clarifies that nothing in the agreement prevents an employee or ex-employee from making a protected disclosure. New settlement agreements should include text explaining workers' legal rights. There will be a prohibition on warranties in settlement agreements where the effect of the warranty is to prevent the employee from making a whistleblowing disclosure. It is left to firms' discretion whether to include similar text in employment contracts.

FCA = Financial Conduct Authority      PRA = Prudential Regulation Authority

## For further information or advice, please contact:



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