



BANK OF ENGLAND
PRUDENTIAL REGULATION
AUTHORITY

Consultation Paper | CP35/16

Whistleblowing in UK branches

September 2016

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Responses are requested by Monday 9 January 2017.

Please address any comments or enquiries to:

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Contents

1	Overview	5
2	Proposed whistleblowing rules for UK branches	7
3	The PRA's statutory obligations	10
	Appendices	13

1 Overview

1.1 This Prudential Regulation Authority (PRA) consultation paper (CP) proposes amendments to PRA rules to require UK branches of non-EEA deposit-takers and both EEA and non-EEA insurers, including reinsurers, to inform workers about the PRA's and the Financial Conduct Authority's (FCA) ('the regulators') whistleblowing services, and how to use them. This CP also proposes requirements for non-EEA banking groups with both UK branches and subsidiaries. The proposals in this CP do not apply to UK branches of EEA deposit-takers.

1.2 The Parliamentary Commission on Banking Standards (PCBS) recommended that banks put in place mechanisms to allow their employees to raise concerns of risk and wrongdoing internally ('whistleblowing') in its final report in June 2013.¹ The PCBS also recommended that banks assign responsibility for overseeing the effectiveness of these arrangements to a senior person.

1.3 In October 2015, the PRA introduced new rules requiring internal whistleblowing arrangements to be introduced by deposit-takers, PRA-designated investment firms and Solvency II insurers.² This CP proposes extending the rule requiring firms to inform their workers about the regulators' whistleblowing services to UK branches of overseas firms. It also contains a proposal that UK subsidiaries of non-EEA banks (which will have established their own internal whistleblowing channels in response to last October's rules) should make these available to workers at UK branches that are part of the wider group. The FCA has published a consultation with similar proposals.³ The PRA has worked with the FCA in creating these proposals and will continue to cooperate in drawing up the final rules and policy statement.

1.4 The policy contained in this CP has been designed in the context of the current UK and EU regulatory framework. The PRA will keep the policy under review to assess whether any changes would be required due to changes in the UK regulatory framework, including those arising once any new arrangements with the European Union take effect.

Summary of proposals

1.5 The policy proposals included in this CP require:

- UK branches of non-EEA banks and of both EEA and non-EEA insurers to inform their workers about the regulators' whistleblowing services; and
- any non-EEA banking group with both a UK branch and UK subsidiary which is subject to the regulators' whistleblowing rules, to inform the staff of the branch of the subsidiary's whistleblowing arrangements. This proposal does not apply to insurers.

Implementation

1.6 The rules published in 2015 came into force in September 2016. The PRA expects the final rules consulted on in this CP will come into force in September 2017.

1 Parliamentary Commission on Banking Standards Fifth Report - Changing Banking for Good, June 2013 www.publications.parliament.uk/pa/jt201314/jtselect/jtpcb/27/27ii02.htm.

2 PS24/15 Whistleblowing in UK deposit-takers, PRA-designated investment firms and insurers, October 2015 www.bankofengland.co.uk/pra/Pages/publications/ps/2015/ps2415.aspx.

3 Available at www.fca.org.uk/firms/senior-managers-certification-regime.

Responses and next steps

1.7 This consultation closes on Monday 9 January 2017. The PRA invites feedback on the proposals set out in this consultation. Please address any comments or enquiries to CP35_16@bankofengland.co.uk.

2 Proposals

2.1 Individuals working for financial institutions may be reluctant to speak out about bad practice for fear of suffering detrimental treatment as a consequence. Mechanisms within firms to encourage people to voice concerns, for example by offering confidentiality to those speaking up, can provide comfort to whistleblowers.

2.2 The rules introduced in October 2015 were designed to formalise the good practice already found across the financial services industry. They aimed to encourage a culture in which individuals can raise concerns and challenge poor practice and behaviour. The PRA proposes amendments to the Internal Governance of Third Country Branches Part of the PRA Rulebook to help develop a similar culture for staff at UK branches of overseas firms. The proposed rules are set out in the sections below.

The regulators' whistleblowing services

2.3 The PRA propose that UK branches of non-EEA deposit-takers and both EEA and non-EEA insurers inform their workers of the regulators' whistleblowing services, including how to contact the regulators and what constitutes a protected disclosure under the Public Interest Disclosure Act 1998 (PIDA). The regulators run dedicated whistleblowing services that workers can use to report concerns that they have about their firm, with the legal protections offered by PIDA. More information about the whistleblowing services is available on the regulators' respective websites.¹

2.4 Under the Capital Requirements Directive (CRD) competent authorities are required to put in place rules to facilitate whistleblowing in their authorised firms.² This means that whistleblowing is a home state issue and so the PRA is not able to impose whistleblowing requirements on branches of EEA deposit-takers. Solvency II does not contain similar provisions so the PRA can apply rules on whistleblowing to UK branches of EEA insurers, as well as to non-EEA insurers.

UK bank branches in the same group as UK subsidiaries of deposit-takers

2.5 A number of banking groups, from a range of countries, have both UK subsidiaries and UK branches. UK subsidiaries are subject to the PRA's whistleblowing rules. Their internal whistleblowing arrangements are required to be able to handle disclosures from any person on any topic, and to be able to protect the identity of all those making disclosures. This would apply equally to those making disclosures from a UK-based branch within the same group.

2.6 The PRA propose that where a non-EEA banking group has both a UK branch and UK subsidiary that is subject to the PRA's whistleblowing rules, the staff of the branch should be informed of the subsidiary's whistleblowing arrangements. This will give workers at UK branches of firms with a UK subsidiary an additional route through which to raise relevant concerns. This is a channel that will not be available for staff at UK branches of banks without a UK subsidiary.

2.7 The PRA does not expect the UK subsidiaries of non-EEA banks to contact all workers individually at UK branches within the same group. The subsidiary should send the details to

1 The whistleblowing page on the Bank of England website is available at www.bankofengland.co.uk/pr/Pages/contactpra/whistleblowing.aspx, and on the FCA website is available at www.fca.org.uk/firms/whistleblowing.

2 Article 71 (3) CRD <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0036>.

the most relevant member of staff at the branch, such as the branch manager or head of HR, who can distribute them among workers at the branch.

Alignment of requirements for branches with UK domestic whistleblowing rules

2.8 In February 2015, the PRA consulted on the benefits and challenges of applying whistleblowing requirements to branches of overseas banks in CP6/15 'Whistleblowing in UK deposit-takers, PRA designated investment firms and insurers'.¹ CP6/15 first proposed new whistleblowing rules.

2.9 There were twenty one responses to that question. Of these, thirteen respondents favoured applying whistleblowing requirements to branches, and the remainder either disagreed or discussed challenges they perceived to exist. The following concerns were raised:

- some respondents suggested branches are often relatively small operations and so are less able to credibly protect a whistleblower's identity;
- others were concerned that operating a whistleblowing service in the United Kingdom could lead the branch or its employees into conflict with their home country's laws or regulations, such as those related to data protection or banking secrecy. For example, a foreign national working in the United Kingdom could be left with a dilemma if blowing the whistle in the United Kingdom meant they were committing an offence under the laws of their home country;
- it was suggested by some respondents that employment contracts of some people working for the UK branch of an overseas bank could be governed by overseas law, and hence that person may not benefit from the protections British law gives whistleblowers; and
- several respondents said UK branches of overseas banks will have different governance arrangements to banks incorporated in the United Kingdom. There will be no non-executive directors to take the role of 'whistleblowers' champion' which the regulators have created for UK banks. There might be no other person within the governance of the branch sufficiently independent to perform this role credibly.

2.10 Having considered these views, the PRA does not propose for all the requirements related to whistleblowing published in PS24/15 to be applied to UK branches of EEA or non-EEA firms.

2.11 UK branches will not be required to establish their own internal whistleblowing channels. This is because differences in the laws of the UK jurisdictions and a firm's home country could mean whistleblowers are unprotected and could potentially be put at risk by raising concerns. When making rules on whistleblowing the PRA has always considered the protection of potential whistleblowers to be the predominant concern. As such, the PRA considers that requirements should not be put in place which might result in detrimental treatment for whistleblowers.

2.12 There are potentially legal issues with making rules regarding employment contracts for workers at UK branches of EEA or non-EEA firms. As raised in the responses to the previous consultation, some workers may be employed by contracts governed by laws other than the

¹ www.bankofengland.co.uk/pr/Pages/publications/cp/2015/cp615.aspx.

laws of the UK jurisdictions and it may be uncertain as to whether workers have legal protection when raising their concerns. Again, the PRA does not want to make any rules that could put whistleblowers at any risk, and therefore will not be applying any requirements around employment contracts or settlement agreements to UK branches.

2.13 Finally, under the Senior Managers and Certification Regime a senior manager of all but the smallest UK deposit-takers is allocated a prescribed responsibility relating to the firm's whistleblowing policies. All but the smallest UK insurers must allocate a prescribed responsibility relating to the firm's whistleblowing policies to a non-executive director who has been approved by the regulator(s) either for a Senior Insurance Management (Oversight) Function or for an FCA governing function. This individual was referred to in Supervisory Statement SS39/15 'Whistleblowing in UK deposit-takers, PRA-designated investment firms and insurers'¹ as the 'whistleblowers' champion'. The prescribed responsibility does not apply to UK branches and the PRA will not be requiring UK branches to create an equivalent position.

1 October 2015 www.bankofengland.co.uk/pr/Pages/publications/ss/2015/ss3915.aspx.

3 The PRA's statutory obligations

3.1 Before making any rules, the Financial Services and Markets Act 2000 (FSMA)¹ requires the PRA to publish a draft of the proposed rules accompanied by:

- a cost benefit analysis;
- a statement as to whether the impact of the proposed rules will be significantly different to mutuals than to other persons;²
- an explanation of the PRA's reasons for believing that making the proposed rules is compatible with the PRA's duty to act in a way that advances its general objective,³ insurance objective⁴ (if applicable), and secondary competition objective;⁵ and
- an explanation of the PRA's reasons for believing that making the proposed rules are compatible with its duty to have regard to the regulatory principles.⁶

3.2 The PRA is also required by the Equalities Act 2010⁷ to have due regard to the need to eliminate discrimination and to promote equality of opportunity in carrying out its policies, services and functions.

Cost benefit analysis

3.3 As noted in CP6/15 effective whistleblowing arrangements can help firms and regulators identify wrongdoing. Early identification will in turn help firms and regulators rectify and mitigate wrongdoings, therefore reducing risk to firms and the wider financial system.

Informing workers of the regulators' whistleblowing services

3.4 There are a number of reasons why workers may not feel comfortable raising their concerns with managers. Informing employees of branches that they can blow the whistle to the regulators can help expose wrongdoing. The exposure of wrongdoing is beneficial for the firms. Whistleblowing would allow regulators to investigate and intervene at an early stage to mitigate the potential cost such wrongdoings could impose on the wider financial system.

3.5 The incremental cost for the firms is likely to be minimal as firms can inform employees in a number of ways, including by email, that they can blow the whistle to the regulators. If the heightened awareness leads to an increased number of individuals raising their concerns the regulators will incur some additional cost in dealing with these contacts. However, the PRA does not expect the additional cost in dealing with contacts themselves will be significant. There may be further costs associated with investigating some of these additional contacts. To the extent that the tip-offs merit further investigation, there will be benefits associated with uncovering wrongdoings, setting appropriate sanctions and creating potential deterrent effects.

1 Section 138J of FSMA.

2 Section 138K of FSMA.

3 Section 2B of FSMA.

4 Section 2C of FSMA.

5 Section 2H(1) of FSMA.

6 Sections 2H(2) and 3B of FSMA.

7 Section 149.

Branches publicising the internal whistleblowing services of UK subsidiaries in their group

3.6 Under the existing rules on whistleblowing, subsidiaries are required to have internal whistleblowing channels that are open to everybody to use. Under these proposals subsidiaries that are in the same group as UK branches must pass the contact details of their whistleblowing channels to the branch. The benefits of this will be to offer an additional route for certain branch employees to raise their concerns, with all of the benefits included above.

3.7 This will bring marginal cost increases for the subsidiary, as it will need to pass on these details to UK branches (although this could be done in an email for minimal cost) and in handling disclosures from branch employees. As mentioned, subsidiaries should already have the resources to handle disclosures from individuals outside the company.

Compatibility with the PRA's objectives

3.8 The PRA believes these proposals will advance its general objective, as the proposed rules would raise awareness of measures designed to allow whistleblowers to raise concerns and help regulators identify wrongdoing. Early identification will in turn help firms and regulators rectify and mitigate wrongdoings, therefore help reduce risks to firms and the wider financial system.

3.9 The PRA has assessed whether the proposal in this CP facilitates effective competition. By bringing requirements for branches more closely into line with subsidiaries the PRA is proposing to create a more level playing field on which firms can compete.

Regulatory principles

3.10 In developing the proposals in this CP, the PRA has had regard to the regulatory principles:

- (a) The PRA has adhered to the regulatory principles in setting out the rules proposed in this consultation. In particular the need to use the resources of each regulator in the most efficient and economic way.

The requirement for branches to inform their workers about the whistleblowing services provided by the regulators may increase awareness, and so increase the workload of the regulators in receiving and pursuing these disclosures. This could provide useful additional information that can be used by regulators to investigate and intervene in wrongdoing at an earlier stage mitigating potential costs to the financial system.

- (b) The principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction.

The costs of these requirements are likely to be minimal. The PRA is not putting in place the same requirements for branches as subsidiaries so the costs will be lower, although this decision was not made on cost grounds. The benefits of identifying risk or wrongdoing at an early stage can be far greater than the fines or losses that they can cause.

- (c) The desirability of sustainable growth in the economy of the United Kingdom in the medium or long term.

If the PRA can identify and rectify wrongdoing, as a result of staff being better informed on how to make disclosures, this will reduce the risks to the wider financial system.

- (d) The general principle that consumers should take responsibility for their decisions.

The PRA does not consider this to be relevant for this CP.

- (e) The responsibility of senior management of persons subject to requirements imposed by or under this Act, including those affecting consumers, in relation to compliance with those requirements;

Unlike the rules made last year these requirements do not relate to the Senior Managers and Certification Regimes.

- (f) The desirability where appropriate of each regulator exercising its functions in a way that recognises differences in the nature of, and objectives of, businesses carried on by different persons subject to requirements imposed by or under FSMA.

Firms may choose the way in which they inform their workers about the regulators' whistleblowing services. This could be done through a regular email, company intranet or a whistleblowing policy depending on the firm's preference. These proposals also recognise different corporate structures with the proposed changes to SS39/15 taking account of groups with both UK subsidiaries and branches.

- (g) The desirability in appropriate cases of each regulator publishing information relating to persons on whom requirements are imposed by or under this Act, or requiring such persons to publish information, as a means of contributing to the advancement by each regulator of its objectives.

It is important that firms and the regulators protect the identity of whistleblowers where this is requested. These requirements are not placed on individuals but on the branch itself.

- (h) The principle that the regulators should exercise their functions as transparently as possible.

The regulators have held discussions with trade associations and firms, government departments, whistleblowing charities, providers of third party whistleblowing services, trade unions and other relevant stakeholders prior to publishing this consultation, and will continue to engage.

Impact on mutuals

3.11 The PRA has a statutory requirement under section 138K(2) of FSMA to state whether the impact on mutual societies will be significantly different from the impact on other firms. However, the proposals in the CP will not apply to mutual societies.

Equality and diversity

3.12 The regulators have sought to ensure that the rules do not directly or indirectly discriminate against people with protected characteristics. The rules are high-level in nature and would not prompt firms to treat one section of their workforce more or less favourably than another.

Appendices

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- 1 **Draft Instrument: CRR FIRMS: NON-CRR FIRMS: THIRD COUNTRY BRANCHES (WHISTLEBLOWING) INSTRUMENT 2016**

 - 2 **Draft instrument: SOLVENCY II FIRMS: EEA AND THIRD COUNTRY BRANCHES (WHISTLEBLOWING) INSTRUMENT 2016**

**PRA RULEBOOK: CRR FIRMS: NON-CRR FIRMS: THIRD COUNTRY BRANCHES
(WHISTLEBLOWING) INSTRUMENT 2016**

Powers exercised

- A. The Prudential Regulation Authority (“PRA”) 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 137G (The PRA’s general rules); and
 - (2) section 137T (General supplementary powers).
- B. The rule-making powers referred to above are specified for the purpose of section 138G (2) (Rule-making instrument) of the Act.

Pre-conditions to making

- C. In accordance with section 138J of the Act (Consultation by the PRA), the PRA consulted the Financial Conduct Authority. After consulting, the PRA published a draft of proposed rules and had regard to representations made.

PRA Rulebook: CRR Firms; Non-CRR Firms: Third Country Branches (Whistleblowing) Instrument 2016

- D. The PRA makes the rules in the Annexes to this instrument.

Commencement

- E. This instrument comes into force on [].

Citation

- F. This instrument may be cited as the PRA Rulebook: CRR Firms: Non-CRR Firms: Third Country Branches (Whistleblowing) Instrument 2016.

By order of the Board of the Prudential Regulation Authority

[]

Annex A

Amendments to CRR Firms: General Organisational Requirements Part

In this Annex, new text is underlined.

....

2A WHISTLEBLOWING

...

2A.7

If

(a) the firm is a subsidiary of a third country firm; and

(b) the third country firm also carries on regulated activities from an establishment in the UK;

the firm must provide information to the third country firm in the UK on the channel in 2A.2 and make the channel available to workers in the third country firm's UK establishment.

Part

GENERAL ORGANISATIONAL REQUIREMENTS

Externally defined glossary terms:

Term	Definition source
<i>person</i>	<i>Sch 1 Interpretation Act 1978</i>
<i>regulated activity</i>	<i>s22 FSMA</i>
<i>subsidiary</i>	<i>s420(2) FSMA</i>

Annex B

Amendment to Non- CRR Firms: Internal Governance of Third Country Branches Part

In this Annex, new text is underlined.

1 APPLICATION AND DEFINITIONS

...

1.3 In this Part, the following definitions shall apply:

...

protected disclosure

means a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996 made by a worker in accordance with sections 43C to 43H of the Employment Rights Act 1996.

staff disclosure channel

means the arrangements described in CRR Firms: General Organisational Requirements 2A.1.

...

worker

has the meaning as defined by section 230(3) of the Employment Rights Act 1996 and as extended under section 43K of the Employment Rights Act 1996.

1.4 In this Part, 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.

...

2A WHISTLEBLOWING

2A.1 A firm must inform all workers:

- (1) that they may disclose directly to the PRA or to the FCA anything that would be the subject-matter of a protected disclosure;
- (2) of what would constitute a protected disclosure;
- (3) that the PRA or the FCA are prescribed persons under section 43F of the Employment Rights Act 1996 and the effect of making a protected disclosure to the PRA or to the FCA; and
- (4) of the means available to make a protected disclosure to the PRA or the FCA.

2A.2 If the firm

- (1) is a member of a group which includes a CRR firm; and

(2) the CRR firm is subject to Chapter 2A of CRR firms: General Organisations Requirements

the firm must inform all its workers in the UK of the CRR firm's staff disclosure channel and explain that the staff disclosure channel is available to them.

Part

INTERNAL GOVERNANCE OF THIRD COUNTRY BRANCHES

Externally defined glossary terms

Term	Definition source
<i>group</i>	<i>S 421 FSMA</i>
<i>person</i>	<i>Schedule 1 Interpretation Act 1978</i>
<i>rule</i>	<i>S417 FSMA</i>

**PRA RULEBOOK: SOLVENCY II FIRMS: EEA AND THIRD COUNTRY BRANCHES
(WHISTLEBLOWING) INSTRUMENT 2016**

Powers exercised

G. The Prudential Regulation Authority (“PRA”) makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):

- (3) section 137G (The PRA’s general rules); and
- (4) section 137T (General supplementary powers).

H. The rule-making powers referred to above are specified for the purpose of section 138G (2) (Rule-making instrument) of the Act.

Pre-conditions to making

I. In accordance with section 138J of the Act (Consultation by the PRA), the PRA consulted the Financial Conduct Authority. After consulting, the PRA published a draft of proposed rules and had regard to representations made.

PRA Rulebook: Solvency II Firms: EEA and Third Country Branches (Whistleblowing) Instrument 2016

J. The PRA makes the rules in the Annex to this instrument.

Commencement

K. This instrument comes into force on [].

Citation

L. This instrument may be cited as the PRA Rulebook: Solvency II Firms: EEA and Third Country Branches (Whistleblowing) Instrument 2016.

By order of the Board of the Prudential Regulation Authority

[]

Annex A

Amendments to Whistleblowing Part

In this Annex, new text is underlined.

1 APPLICATION AND DEFINITIONS

1.1 Unless otherwise stated, this Part applies to:

- (1) a *UK Solvency II firm*;
- (2) in accordance with Insurance General Application 3, the *Society*, as modified by 3 ~~and~~;
- (3) in accordance with Insurance General Application 3, *managing agents*, as modified by 3_i;
- (4) an *incoming EEA firm* and an *incoming Treaty firm* in respect of any *insurance business* carried on by a *UK branch*, in accordance with 4; and
- (5) a *third country branch undertaking*, in accordance with 4.

...

4 BRANCHES

4.1 2.1- 2.3 and 2.5 -2.6 do not apply.

4.2 2.4 applies only in relation to the *firm's workers* in the *UK*.