Policy Statement | PS24/15

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

October 2015

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This policy statement contains the final rules to implement the proposals made in Consultation Paper 6/15.

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# 1 Overview

1.1 This Prudential Regulation Authority (PRA) policy statement (PS) provides feedback on the responses received on PRA Consultation Paper 6/15 '*Whistleblowing in UK deposit-takers, PRA-designated investment firms and insurers*'.[1] The consultation was published jointly with the Financial Conduct Authority (FCA) in February.

1.2 The PRA is required by the Financial Services and Markets Act 2000 (FSMA) to have regard to any representations made to the proposals in a consultation, and to publish an account in general terms, of those communications and its response to them. This PS sets out feedback to the responses received to PRA proposals.

1.3 This PS will be of interest to the relevant firms (deposit-takers with assets greater than £250 million, PRA-designated investment firms and insurers - meaning insurance and reinsurance firms within the scope of Solvency II - and to the Society of Lloyd's and managing agents), but also to individuals working in the financial services sector. It will also be of interest to a wider range of firms that may wish to comply voluntarily**.**

1.4 Most of the proposals in CP6/15 were broadly supported by respondents, and as such, the changes are relatively minor and mainly seek to offer clarifications as to the intent of the policy. The PRA will, therefore, take forward requirements that:

- firms establish internal whistleblowing channels and inform their staff about these arrangements;
- firms inform their staff about the whistleblowing services of the PRA and the FCA, as well as informing them of the legal protections offered under the Public Interest Disclosure Act 1998 (PIDA); and,
- wording in employment contracts and settlement agreements should not deter staff from whistleblowing.

1.5 The proposals that have changed due to consultation responses are in the following areas:

- Chapter 2: the scope of the rules;
- Chapter 3: internal whistleblowing procedures;
- Chapter 4: employment contracts and settlement agreements; and
- Chapter 5: the 'whistleblowers' champion'.

1.6 PRA Supervisory Statement SS39/15 'Whistleblowing in deposit-takers, PRA-designated investment firms and insurers' has also been published alongside this PS.[2]

[1] PRA CP6/15; www.bankofengland.co.uk/pra/Pages/publications/cp/2015/cp615.aspx.
[2] Available at www.bankofengland.co.uk/pra/Pages/publications/ss/2015/ss3915.aspx.

## 2 Scope

2.1 The whistleblowing proposals have been designed to work in conjunction with the Senior Managers Regime (SMR) and Senior Insurance Managers Regime (SIMR) to meet the recommendations of the Parliamentary Commission on Banking Standards (PCBS).

2.2 Policy Statement PS3/15[1], published in March, amended the scope of this section of the SMR to apply to all deposit-takers with assets greater than £250 million. As such the PRA proposes to alter the scope of these rules to maintain consistency with the SMR. Capital Requirements Directive (CRD) firms that do not have assets greater than £250 million will continue to operate under the previous rule in General Organisational Requirements 2.9. This will also address concerns, raised by a number of respondents, that small credit unions were given an exemption, but that other small firms were not.

2.3 For insurers, again the scope will be altered to maintain consistency with the SIMR, applying only to firms required to allocate the prescribed responsibility relating to whistleblowing to a Senior Manager. This means that only Solvency II firms will be required to comply with these rules.

## 3 Internal whistleblowing procedures

3.1 CP6/15 proposed that relevant firms should establish and maintain an independent channel through which reportable concerns could be disclosed directly to the firm. The PRA proposed that this channel would be open to anyone to use and should be able to handle all types of disclosure.

3.2 Several respondents welcomed the fact that the channel would be open to all issues, as potential whistleblowers may be deterred from coming forward if there were complicated criteria that their concerns had to meet. Others raised concerns that more important matters could be overlooked if whistleblowing channels are overwhelmed by trivial matters. It was suggested that disclosures should have to meet the criteria for a 'protected disclosure' set out in PIDA. Protected disclosures include information that a criminal act has, or is likely to be, committed, legal obligations are not being complied with, a miscarriage of justice has or will occur, health and safety is being endangered, the environment is being damaged or that information about these acts is being concealed.

3.3 Another concern raised by a number of respondents was that by opening the whistleblowing channel to all reportable concerns, individuals may contact the firm's whistleblowing function with issues that would be more appropriately handled by other areas, such as customer complaints or individual human resources grievances. This could undermine escalation structures in other functions within the firm and require the whistleblowing function to deal with issues they were not familiar with.

3.4 While the PRA appreciates the concerns firms may have about the range of issues that could be raised through internal whistleblowing channels, the potential benefits of receiving information that could prevent wrongdoing outweigh the disadvantages. It is not the case that all issues raised through the whistleblowing channel should be treated as cases of whistleblowing. A clarification has been made to avoid future misunderstandings.

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[1] *PRA Policy Statement 3/15* 'Strengthening individual accountability in banking and insurance – responses to CP14/14 and CP26/14, March 2015; www.bankofengland.co.uk/pra/Pages/publications/ps/2015/ps315.aspx.

3.5 The PCBS recommended that firms should apply a 'filter' to reports made through internal whistleblowing channels that could redirect some disclosures to areas that would be better placed to handle them. The PRA supports this approach and would only expect a firm's whistleblowing function to deal with genuine reportable concerns. As such, the supervisory statement has been amended to reflect this, by adding paragraph 2.3, which says that firms can filter out genuine whistleblowing reports and redirect reports that would be better dealt with by other areas of the organisation.

3.6 In respect to who should be able to contact a firm's whistleblowing channel some respondents felt that this should be limited. Suggestions for the limit of those who could access the channel included those covered by PIDA. There were also some concerns about receiving disclosures from employees of rival firms.

3.7 The PRA does not intend to introduce limits on those who can contact a firm's whistleblowing channel. Valuable information could come from a range of sources, so it would not be appropriate to limit unduly who could raise concerns. Firms can deal with vexatious disclosures appropriately.

3.8 A number of respondents requested clarification about the responsibility of firms to prevent victimisation of whistleblowers by individuals that are not employed by the firm. The supervisory statement is clear that a firm's responsibility is limited to preventing victimisation of whistleblowers by individuals under its control. Firms can also help prevent improper treatment of whistleblowers by those outside of their control by honouring whistleblowers' requests for confidentiality.

3.9 No concerns were raised about the proposal that firms should inform their workers that they may make protected disclosures to the PRA and the FCA (which are prescribed bodies under PIDA). Some respondents, however, indicated that they planned to inform employees that they should contact their firm's internal whistleblowing service before they can contact the PRA or FCA. It is important that employees are not discouraged from whistleblowing because they feel intimidated. Firms may encourage speaking up internally by creating a culture that welcomes criticism: they should not seek to force people to raise concerns through one channel only. The PRA has added a rule to prevent firms instructing their employees to raise concerns through their internal whistleblowing channel before contacting the PRA or FCA.

## 4 Employment contracts and settlement agreements

4.1 Workers have a right to make protected disclosures, which cannot be signed away as part of any contract. However, workers entering agreements with firms may be unaware of this and employment contracts or settlement agreements often contain intimidating language around confidentiality which may deter whistleblowers from coming forward. The initial proposal aimed to provide clarity to workers entering into these agreements.

4.2 The majority of responses favoured this approach, although some respondents questioned the need to explain existing law because workers can take legal advice before entering into these agreements. Others suggested further steps that could be taken such as banning 'gagging clauses' or requiring all settlement agreements to be submitted to the regulator. As the intention of the proposal was to clarify the existing rights of workers the PRA does not intend to add additional requirements in these areas.

4.3 An issue that was raised during the consultation related to the use of 'warranties' in which workers are asked to confirm that they have not made a protected disclosure and/or they do not know of any information that could lead to them making a protected disclosure. These warranties put an employee at risk of being sued for breach of warranty if they make a disclosure in the future. These practices could deter workers from making protected disclosures, as is their legal right, so the PRA has made rules to restrict these practices in settlement agreements, employment contracts and ancillary documents.

# 5 Whistleblowers' champion

5.1 Under the SMR and SIMR firms must allocate a prescribed responsibility relating to the firms' whistleblowing policies and procedures, and the protection of those using them to a Senior Manager who is a non-executive director. This person is referred to as the 'whistleblowers' champion'.

5.2 A number of respondents were concerned that allocating this responsibility to one individual would damage the collective responsibility of the firm's board as a whole. Concerns were raised that board members may not give whistleblowing due consideration if they are not the designated Senior Manager. However, as set out in Supervisory Statement 28/15,[1] although only the whistleblowers' champion will be required to take on individual responsibilities, the PRA views the regime and its application as consistent with the principle of collective decision making. The SMR and SIMR co-exist with the statutory and fiduciary duties of directors under UK company law and domestic and international corporate governance standards. The regimes clarify and formalise the individual responsibilities which NEDs within their scope should already have in practice. For example, the whistleblowers' champion will be responsible for ensuring that a report on whistleblowing is made to the board at least once a year. The whole board will then have to consider the report and decide whether any action should be taken as a result.

5.3 Others worried that some of the proposed functions of this individual represented a blurring of the roles of executive and non-executive directors and, in particular, that the description of the role of the whistleblowers' champion in the supervisory statement seemed better suited for an executive director.

5.4 In response, the supervisory statement has been amended to make clear that the role is concerned with the oversight of whistleblowing policies and procedures within the firm, rather than day-to-day operations.

# 6 Implementation

6.1 Both the SMR and SIMR come into force on 7 March 2016. By this point, firms will need to have allocated the prescribed responsibility relating to whistleblowing to a Senior Manager but some firms may not have internal whistleblowing procedures in place, or existing procedures may not meet the new rules fully. The whistleblowers' champion should oversee the creation of these procedures, or updates to them. The PRA will give firms an additional six months to put procedures in place so that they comply with these requirements. The rules will then come into force on 7 September 2016.

[1] 'Strengthening individual accountability in banking', July 2015; www.bankofengland.co.uk/pra/Pages/publications/ss/2015/ss2815.aspx.

## Appendices – see www.bankofengland.co.uk/pra/Pages/publications/ps/2015/ps2415.aspx

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| 1 | **Handbook Whistleblowing Instrument 2015** |
| 2 | **CRR Firms: Whistleblowing instrument 2015** |
| 3 | **Solvency II Firms: Whistleblowing Instrument 2015** |