

The Chartered Institute for Securities & Investment's (CISI) Response to the PRA/FCA's Consultation on Whistleblowing in deposit-takers, PRA-designated investment firms and insurers; FCA CP15/4 and PRA CP6/15

General Comments

The CISI is the largest and most widely respected professional body for those working in the securities and investment industry in the UK and in a growing number of major financial centres around the world. The CISI has more than 40,000 members in 110 countries, and in the past year we set almost 37,000 examinations in 74 countries, covering a range of vocational qualifications.

CISI members sign up to a Code of Conduct, and are required to meet the standards set out within the CISI's Principles, also known as the Lord George Principles. Principle 8 states members will "strive to uphold the highest personal and professional standards at all times", and sometimes, this may involve speaking up about an issue which does not meet those high standards. For this reason, the CISI considers speaking up is part of being a professional.

Helping employees to raise concerns is therefore particularly important to the CISI, and in September 2014 we launched a Speak Up initiative to give individuals the tools and confidence needed to speak up, and to encourage firms to adopt an open culture where concerns are raised quickly, allowing problems to be addressed at an early stage.

The CISI sees speaking up as an action with four stages. The first, informal internal disclosure, may involve approaching the wrongdoer, or speaking informally to a colleague or line manager, whilst the second is a formal internal disclosure, where an employee may follow internal whistleblowing procedures or raise the issue formally with his/her line manager, compliance officer or senior manager. The third stage is disclosure to a regulator – before which a whistleblower may also consider seeking guidance from his/her professional body or other organisation. The final stage, stage four, is public disclosure, and involves disclosing issues to the media, government or onto the net. This final stage is what many people think of when they think of whistleblowers or whistleblowing.

For this reason, the CISI sees 'whistleblowing' as one stage which forms part of a 'speak up' culture. The CISI believes speaking up is a better term than whistleblowing, especially for the early, internal, stages, as it has positive and constructive connotations and helps to foster an open culture within firms. Whilst whistleblowing is akin to a referee blowing his whistle after a foul has been committed, speaking up focuses on prevention of problems – encouraging employees to raise concerns at an early stage so they can be fixed, rather than reporting once the problem has already become entrenched.

It is relevant that, in their [response to the Parliamentary Commission on Banking Standards](#), The FCA stated “The Commission makes a series of recommendations for better arrangements and support for whistleblowers. We agree with these principles and believe a culture where people are prepared to speak up can significantly improve behaviour throughout a firm, and ultimately improve consumer outcomes. Formal whistleblowing practices play an important role in creating this culture but should not be a first port of call.”

Therefore, it is the opinion of the CISI, that whilst the proposals contained within the Consultation Paper, particularly in regards to raising awareness of whistleblowing and efforts to ensure workers are supported when blowing the whistle, are to be welcomed, these formal practices should be seen as one part of a wider effort to encourage open speak up cultures within firms.

Q1: Do you agree that the requirements should apply to these firms? 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?

The CISI agrees that the requirements should apply to the firms as listed. We also believe guidance should be put in place for small credit unions, since they are being exempted from these requirements, giving them information as to how they can make whistleblowing work with limited resources.

The challenges of extending the requirements to branches of overseas bank are twofold – due to both legislation and culture.

1. There are mixed protections for whistleblowers in overseas legislation. For example, a September 2014 survey of [‘Whistleblower Protection Rules in G20 Countries’ by Wolfe et. al.](#) compares the whistleblower protection laws in all G20 countries in both the public and private sectors and notes “Many G20 countries’ whistleblower protection laws continue to fail to meet international standards, and fall significantly short of best practice”. For example;
 - The survey by Wolfe et. al. found that “whistleblower protection laws in Saudi Arabia are non-existent”, and that a terrorism law introduced in February 2014 “makes virtually all exposure of corruption, “dissident thought” or any speech critical of the government or society a criminal offence. This will make it extremely difficult for whistleblowers to come forward”.
 - In India there is protection in the form of the Whistleblowers Act 2011, which protects the identity of whistleblowers and aims to encourage disclosure of misuse of power by government officials. However, it lays down punishment of up to two years in prison and a fine of up to 30,000 rupees (£300) for false or frivolous complaints.
 - Even within Europe there are significant differences between the whistleblower protection laws in different countries. The survey by Wolfe found that “Germany has no specific legal protections for whistleblowers other than a limited provision that applies only to public officials who report bribery and the offering or acceptance of any gratuity with respect to any office holder’s position”. Whilst “labour courts [in Germany] have ruled that company employees who report wrongdoing in good faith cannot be dismissed for this reason... they have also ruled that even if a whistleblower was unjustly fired, an employer can dissolve an employment contract if it is determined that constructive cooperation between the two parties is not likely”.

Therefore, encouraging whistleblowing in countries where legal protections for whistleblowers are insufficient or non-existent could cause a number of problems including the whistleblower being dismissed from their job, fined or even found guilty of a criminal offence.

2. Cultural attitudes towards whistleblowing vary between overseas countries. A 2014 survey by Freshfields [‘Fair Game or Foul Play? Tackling the rising tide of global whistleblowing’](#) notes “the idea of reporting on someone else is not well received in France. It’s something people tell their children not to do when they’re growing up” and “the cultural reluctance applies in Germany... [where] ‘whistleblowing’ has negative connotations that are rooted in the country’s past”. These kinds of cultural attitudes towards whistleblowing can affect how a whistleblower is treated by their peers and employer, which can make the experience very difficult no matter what legal protections are in place.

The proposals contained within the Consultation Paper are very UK-specific (questions 3 and 4 both refer to the Public Interest Disclosure Act (PIDA) and the proposed statement to be included in settlement agreements and employment contracts refers to the Employment Rights Act 1996). If, therefore, banks are expected to extend the requirements to their overseas branches, it should be noted that there may be significant differences between whistleblowing protection laws and attitudes towards whistleblowing in those jurisdictions. Whilst this does not preclude whistleblowing policies and requirements being implemented in overseas branches, it may be impractical to introduce the same policy that a firm has in the UK into overseas branches, and it may be more appropriate to tailor requirements to suit different global offices.

Q2: Do you agree that all UK-based employees of relevant firms should be informed about the whistleblowing services run by the PRA and FCA?

The CISI agrees that all UK-based employees of relevant firms should be informed about the whistleblowing services run by the PRA and FCA.

In order for this measure to be an effective option for employees, the PRA and FCA need to ensure that the service provided to whistleblowers is able to cope with an increase in the number of whistleblowing disclosures, in particular:

- Assurances that the concern will be dealt with
- Assurances that action will be taken where appropriate
- Guidance regarding how long the whistleblower can expect the process to take
- Guidance regarding the amount of feedback the whistleblower can expect to receive

It should also be made clear to employees that reporting to a regulator is an *external* disclosure and is therefore not necessarily the appropriate starting point for making a whistleblowing disclosure. An *internal* disclosure (i.e. raising the concern within the firm) may actually be a more suitable starting point.

Additional guidance should be given as to when disclosure directly to the regulator would be appropriate. Principle 4 of the [Statements of Principle for Approved Persons](#) states: “An approved person must deal with the FCA, the PRA and other regulators in an open and cooperative way and must disclose appropriately any information of which the FCA or the PRA would reasonably expect notice.” Therefore, particularly for approved persons, but also for individuals who are not approved persons, guidance should be given regarding when an issue should be reported to the regulator before one’s firm, or when a whistleblower should report to both their firm and the regulator.

Q3: Do you agree that firms' whistleblowing arrangements should cover all types of disclosure, not just those related to regulatory matters or protected disclosures under PIDA?

Extending firms' whistleblowing arrangements to cover all types of disclosure is a positive recommendation in the campaign to extend protections for whistleblowers and to encourage open cultures within firms.

However, the CISI is concerned that individuals may blow the whistle within firms about an issue which is not currently classed as a protected disclosure under PIDA, and find themselves without the protection of the law. We would encourage the regulator to require firms to make it clear to staff which types of disclosure are/are not covered under PIDA, and what protections will be afforded to them if they choose to blow the whistle regarding an issue which falls outside a protected disclosure.

Q4: 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?

The CISI agrees that firms' whistleblowing arrangements and protections should be available and apply to all individuals. However, it should still be made clear to staff what protections are available to them under PIDA – what the limitations are and what protections they will be afforded – as this may still impact an individual's decision about whether or not to raise a concern.

Q5: 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?

The CISI agrees 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.

However, the text suggested by the PRA and FCA notes that “nothing shall preclude [the employee's name] from making a “protected disclosure” within the meaning of Part 4A (Protected Disclosures) of the Employment Rights Act 1996...”. It should be noted that Part 4A (Protected Disclosures) of the Employment Rights Act 1996 ([full text](#) included below) mentions only the types of disclosure protected under PIDA;

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Disclosures qualifying for protection.

- (1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—
 - (a) that a criminal offence has been committed, is being committed or is likely to be committed,
 - (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
 - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
 - (d) that the health or safety of any individual has been, is being or is likely to be endangered,
 - (e) that the environment has been, is being or is likely to be damaged, or
 - (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.
- (2) For the purposes of subsection (1), it is immaterial whether the relevant 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.
- (3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.
- (4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
- (5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).]

The CISI is therefore concerned that a situation may arise where a worker is encouraged to make a disclosure, falls under a category other than those set out as a protected disclosure under PIDA, for example, gross waste or mismanagement of funds, or serious misuse/abuse of authority. Neither of these examples currently qualifies as a protected disclosure under the UK legislation). However, the worker may then find that their settlement or employment contract does not protect them for doing so, as the statement only refers to the more limited types of disclosure covered under PIDA.

More thought needs to be given to this issue, and the wording of the settlement agreement/employment contract passage needs to be revisited and reviewed to ensure that any loopholes are either closed or made clear to staff.

The CISI believes that firms should be required to impose the same requirement on agencies that provide them with staff, to ensure consistent and comprehensive protection is available for all staff members.

Additionally, despite welcome moves by the regulators and individual firms to protect whistleblowers, repercussions are still all too often suffered by whistleblowers. A 2013 survey by Public Concern at Work and the University of Greenwich ([Whistleblowing: The Inside Story](#)) revealed the difficulties experienced by whistleblowers. 60% of the 1,000 callers surveyed did not get any response from management, and when a response was received, it was generally not supportive. Of the remaining 40% (399 people), the most common response, experienced by 33% (132 people) was formal action being taken against them, as whistleblower, albeit short of dismissal, such as demotion, suspension or disciplinary. The second most common response was dismissal – with 24% of individuals (96 people) being dismissed after initially raising a concern. In financial services, 81% of whistleblowers stated their position had worsened after their first attempt at raising a concern.

This proposed statement in settlement agreements and employment contracts is a step towards increasing whistleblower protection. However, it is unlikely that whistleblower victimisation will be stopped altogether, and cases will still be referred to employment tribunals. It is at this stage – whilst waiting for a case to be heard by a tribunal – that whistleblowers often suffer the greatest financial difficulty. Therefore, the CISI suggests that

a financial hardship fund should be established, financed from fines imposed by the regulator, to provide comfort to potential whistleblowers that they will receive financial support where necessary.

Q6: Do you agree with the FCA's proposed treatment of whistleblowing arrangements for staff of appointed representatives and agents?

The CISI agrees with the proposal that firms should require their appointed representatives and tied agents to inform their UK-based employees who are workers about the FCA whistleblowing service.

Additionally, the CISI agrees that firms should be encouraged to work with their appointed representatives and tied agents to establish appropriate whistleblowing arrangements. Guidance should be given to all workers, including appointed representatives and tied agents, about what protection is available to whistleblowers under PIDA. Appointed representatives and tied agents, in particular, should be informed about the definition of 'worker' under the legislation, so they are aware of what protection, if any, is afforded to them. For example, as they are not workers of the principal firms, they cannot make an employment tribunal claim against the principal firm in the event of victimisation.

Q7: Do you agree with these proposals for the role of whistleblowers' champion?

The CISI believes there should be a whistleblowers' champion responsible for oversight of the effectiveness of the firm's whistleblowing arrangements. However, we have a number of reservations:

1. Making one individual responsible for whistleblowing as part of the Senior Managers Regime could force a firm's whistleblowing arrangements to be too formalised. Staff members speak up and raise concerns in a multitude of ways – such as bringing something to light with a line manager who can then fix/escalate the problem as necessary. The FCA recognise this, and in their [response to the Parliamentary Commission on Banking Standards](#), stated "If staff have a good understanding of conduct standards, and feel secure about speaking out, they will inform senior management when they see malpractice occurring, through both informal and formal channels." The CISI is concerned that, if the whistleblowers' champion is held personally accountable for proving the whistleblowing arrangements are working, line managers may have to 'tick a box' to indicate that each time a problem is brought to them, they have taken action and then to evidence what they have done as a result. As well as being cumbersome, this may discourage potential whistleblowers from raising a concern at an early stage.
2. The role of a whistleblowers' champion might dilute the responsibility of every manager to listen and deal with employees concerns. All managers should be aware that it is their duty to deal with problems that are brought to them.
3. The Chairman/non-executive director may be too far removed from how staff go about raising concerns on a daily basis. The CISI's personal experience of discussing whistleblowing case studies with senior management has revealed that senior managers generally have the confidence to take a very direct approach to problem solving, whereas more junior employees may actually not feel comfortable taking such an approach, which may be uncomfortably confrontational.

Q8: 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?

The CISI agrees that the firm's senior governance committee should be presented with an annual report on the effectiveness of the firm's whistleblowing policy and that the report should be made available to regulators on request. However, the CISI has the following concerns regarding the role of the whistleblowers' champion in preparing the report, and particularly the recommendation that the report not be made public:

1. A conflict of interest may arise should the whistleblowers' champion be held personally accountable for the effectiveness of whistleblowing arrangements within a firm, as well as being responsible for preparing an annual report to the firm's senior governance committee. If the results of a whistleblowing report aren't good, being held accountable for the results of the report puts the whistleblowers' champion in a position where they might be tempted to 'gloss' the report for the sake of their job. It may therefore be more appropriate for the audit function to be responsible for compiling the report.
2. It may be prudent to issue guidance on 'what success looks like'. Many firms may think that keeping whistleblowing reports low represents success, whereas the CISI believes that an increase in whistleblowing reports may demonstrate that a firm's culture is open and that employees are supporting in raising concerns with management. However, if there are a large number of whistleblowing concerns about the same issue – it can demonstrate a failure in that nothing is being done to address the issue or attempts to rectify it haven't worked. Therefore, success may include how many whistleblowing reports lead to real change within the organisation.
3. The CISI understands that it may not be in the interest of whistleblowers for details of their disclosures to appear in the public domain. However, the CISI believes that the public should be able to access a statistical version of the report (e.g. how many disclosures have been made/what type of disclosures were made/how long they took to resolve). This is in the interests of rebuilding trust in the financial services industry – the public needs to see that problems are being dealt with.

Q9: Do you agree with our proposed treatment of the role of the whistleblowers' champion in financial groups?

The CISI agrees with the proposed treatment of the role of the whistleblowers' champion in financial groups.

Q10: Do you agree that the FCA should require firms to inform it of cases where an employment tribunal finds in favour of a whistleblower?

The CISI agrees that the FCA should require firms to inform it of cases where an employment tribunal finds in favour of a whistleblower.

However, the CISI believes that the FCA should go further and require firms also to inform it of cases where an employment tribunal finds in favour of the employer, and where a firm settles a whistleblowing case through a financial settlement before the case reaches tribunal.

The CISI is concerned that if firms are only required to inform the FCA of cases where an employment tribunal finds in favour of a whistleblower, firms will instead be driven to settle the case before the case is referred to a tribunal, thus preventing the whistleblower from having the opportunity to have their case heard. This would also skew the numbers of whistleblower victimisation cases that are being brought to the attention of the regulator.

Q11: Do you agree that the FCA and PRA should not place a requirement on employees to speak up when they see wrongdoing?

Yes.

Q12: Do you have any other comments on the proposals in this consultation paper?

As set out in the 'general comments' section, above, the CISI sees 'whistleblowing' as one stage which forms part of a 'speak up' culture. 'Speaking up' is a better term than whistleblowing, as it has positive and constructive connotations and helps to foster an open culture within firms.

As noted by the FCA in their [response to the Parliamentary Commission on Banking Standards](#), "... a culture where people are prepared to speak up can significantly improve behaviour throughout a firm, and ultimately improve consumer outcomes. Formal whistleblowing practices play an important role in creating this culture but should not be a first port of call."

Therefore, the formal practices set out in the Consultation Paper should be seen as one part of a wider effort to encourage open speak up cultures within firms. Formal whistleblowing procedures (stages 2 and 3 in the CISI's four Speak Up stages) are good (and necessary), but having a culture where workers are empowered to raise issues at an early stage, and where managers will listen to concerns and implement real change, is better.

Q13: Do you have any comments on the FCA's cost benefit analysis?

The CISI has no further comments.