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Bank of England, Prudential Regulation Authority and FCA consultation on Whistleblowing in deposit –takers, PRA-designated investment firms and insurers: PRA CP6/15 and FCA CP15/4.

Response from the Employment Lawyers Association

22 May 2015

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Response from the Employment Lawyers Association

INTRODUCTION

1) The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation, rather it is to make observations from a legal standpoint. Accordingly in this consultation we do not address such issues. ELA's Legislative and Policy Committee is made up of both barristers and solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

2) The Legislative and Policy Committee of ELA set up a sub-committee under the co-chairmanship of Caroline Stroud of Freshfields Bruckhaus Deringer LLP and Stephen Levinson of Keystone Law to consider and comment on the consultation paper from the Bank of England, Prudential Regulation Authority and the Financial Conduct Authority (FCA) on Whistleblowing in deposit takers, PRA-designated investment firms and insurers that was published in February 2015. Its report is set out below. A list of the members of the sub-committee is in Appendix 1 to this response.

3) Our comments are only addressed to those non-policy questions we considered it appropriate to address.

Executive Summary

A. Not all those who are encouraged to whistleblow in the FCA guidance would be protected by our current legislation and this should be made clear to employees and workers by firms when putting their policies in place.

B. The guidance covers all types of disclosure, not just of regulatory issues, and therefore there is some danger the FCA will be deluged with disclosures which are unrelated to regulatory issues.

C. The whistleblowing champion should be someone who is not a recipient of a disclosure or responsible for the operation of the whistleblowing process but someone who has oversight of that process to avoid any conflict of interest.

D. The procedures set out in the rules is very prescriptive and we would recommend a lighter touch is applied to requiring a process to be put in place – this would mean that we see no reason why even small credit unions could not be included in the regime.

E. We do not believe that there should be a requirement to whistleblow but employees and workers should be encouraged to whistleblow if they have concerns.

Question 1: 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?

4) We agree that the requirements should apply widely to UK regulated banks, building societies and credit unions and PRA-designated investment firms and insurers. Transparent and clear ways for employees to raise misconduct concerns without fear of repercussion is a key way for such behaviour to be spotted and stopped.

5) Extending the requirements to UK branches of overseas banks would promote consistency but there may be cultural issues which would make this difficult e.g. a UK branch of a French bank may have French employees who would not be used to a prescriptive whistleblowing regime due to strict data protection restrictions in France.

6) We see no objection to extending the requirements to non-PRA-designated investment firms.

7) Because the FCA rules are very prescriptive we can see that it is sensible to exclude small credit unions, however, if the rules were less prescriptive we see no reason why small organisations could not also have a whistleblowing procedure

Question 2. Do you agree that all UK-based employees of relevant firms should be informed about the whistleblowing services run by the PRA and the FCA?

8) We agree that it is sensible to advise employees that the FCA and PRA have a whistleblowing hot line. However, the suggestion that they should be told they can blow the whistle to the FCA or the PRA regardless of whether they have made an internal report might encourage employees not to blow the whistle internally.

9) Our employment legislation protects employees who make a protected disclosure to a prescribed person i.e. FCA or PRA if they not only believe the disclosure is in the public interest but also if it is substantially true. The requirement that they have a reasonable belief that the disclosure is substantially true is an additional condition which has to be satisfied when blowing the whistle to a regulator, to enable the employee to be protected by the legislation.

10) If the employee makes a disclosure to the employer they only have to have a reasonable belief that the disclosure is in the public interest (but not a reasonable belief that the disclosure is substantially true) in order to gain the protection of the legislation.

11) From a cultural and practical perspective, misconduct can be more quickly addressed by an employer if they know about it at an early stage.

12) We would, therefore, suggest that the guidance states that employees should use their employers internal whistleblowing procedures wherever possible whilst also informing them of the FCA and PRA whistleblowing hotlines as an alternative, rather than encouraging employees to blow the whistle externally

Question 3. 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?

13) Yes, in principle.
14) The definition of "reportable concern" is extremely wide and would require firms to provide whistleblowing arrangements in respect of matters beyond the scope of PIDA protected disclosures and beyond the scope of the regulated activities within the remit of the FCA and the PRA.

15) We note that the intention of this very wide coverage is to encourage a culture of disclosure and ELA agrees in principle with this approach.

16) Moreover, ELA notes that the scope of PIDA is a developing area of law and an inclusive definition would have the advantage of simplicity and predictability for employers and employees.

17) However, one consequence of the proposed scope of the whistleblowing arrangements is that they would include concerns which are purely personal to an individual employee and which do not have any wider public interest implications. On the current state of the law, such concerns may fall outside PIDA; see *Chesterton Global Ltd* v *Nurmohamed* UKEAT/0335/14/DM. ELA agrees that initial access to the whistleblowing arrangements should not be restricted to exclude such complaints. However, on the very wide definition of 'reportable concerns', many disclosures will be capable of falling within more than one of an employer's internal procedures, such as an existing grievance or harassment procedure.

18) We therefore suggest that the guidance states that whistleblowing arrangements may provide that concerns can be addressed under alternative procedures where this is more appropriate to the nature of the concern raised in a particular case (by analogy with the suggestion in paragraph 2.18 of the Consultation Paper that customer complaints may be appropriately referred elsewhere in the firm).

19) We also expect the wide scope of the proposed whistleblowing arrangements to result in a large number of disclosures, potentially including trivial complaints. We therefore suggest that the scope of the arrangements be reviewed after the initial period to monitor the effects of such wide coverage.

Question 4. 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?

20) As a preliminary point, we believe there is a lack of clarity as to how firms are expected to offer "the same level of confidentiality as employees would receive and the same protections against being mistreated" (paragraph 2.17 of the CP; though we note the next sentence in brackets). To truly offer the same protections, those individuals would require something akin to a contractual right to those protections (which we acknowledge would be problematic). Otherwise, if those protections are to be put in place only as a matter of the firm's policy (albeit supported by FCA/PRA guidance and supervision of the firm's application of its policy), we would query whether that can sensibly be said to be the "same protections" as are afforded to an individual with statutory rights under PIDA. We believe the FCA/PRA should provide further guidance as to how in practice they anticipate those protections being put in place.

21) Putting that point aside, we agree in principle that it is appropriate for the FCA/PRA to require firms to widen the scope of those entitled to whistleblower protections beyond those protected under PIDA, for the reasons given in the consultation paper.

22) Another reason for doing so is the lack of clarity for would-be whistle-blowers as to who is protected under PIDA. Although a number of the categories of individual set out in paragraph 2.16 of the consultation paper are protected by PIDA, we believe a lay person would require specialist legal advice to understand the same. Further, the case-law is still developing: see for example *Onyango* v *Berkeley (t/a Berkeley Solicitors)* 2013 ICR D17 (post-termination disclosures by former workers) and *Bates van Winkelhof* v *Clyde & Co LLP* [2014] UKSC 32 (whether members of LLPs are workers).

23) However, we are concerned that firms will find it difficult to implement the proposed rules because the definition of 'whistle-blower' in the proposed rules is too wide. Under the proposed definition of 'whistle-blower' in the FCA/PRA's rules, a 'person' (natural, legal or a partnership) is entitled to whistle-blower protection under certain conditions. The scope of this definition is significantly wider than is necessary to include the categories of individuals set out at paragraph 2.16 of the consultation paper.

24) We suggest that the rationale for 'whistle-blower' protection is to protect individuals with close links to the firm (about which the whistle is being blown), because it is those close links that are likely to lead the whistle-blower: (a) to have relevant information about the firm; and, (b) to need protection from any detriment that could be imposed by the firm. We suggest that this rationale applies with less force as the scope of whistle-blower protection is widened in respect of both points (a) and (b).

25) For example, under the proposed regime it would appear that a person with no connection to a firm is entitled to whistle-blower protection if they have disclosed or intend to disclose a reportable concern in accordance with the proposed rules. It is difficult to see why this should be treated as a case of whistleblowing. Similarly, it is difficult to see what 'all reasonable measures' (to ensure that there was no victimisation of that individual) means in practice for a firm in such a context, given the lack of antecedent relationship (see the proposed rule at SYSC 18.3.1R (2) (i)).

26) We recognise that drawing up a definitive list of those entitled to whistleblowing protection would be difficult, and that a definitive list approach might leave out individuals who it would be desirable to include. We therefore propose that the regulators should adopt an indicative list approach. We believe that an indicative list such as that set out within paragraph 2.16 of the consultation paper (perhaps with the addition of job applicants) would be a sensible approach for the regulators to adopt. One reason for choosing an indicative list-based approach would be that it would provide comfort to those explicitly cited within that list that they will receive some protection from the firm (see further our comments in paragraph 3 above as to the uncertainty as to who is protected under PIDA).

27) The draft Handbook rules do not appear to provide the protection (referred to in the guidance) which requires the firm to take appropriate action against those responsible for victimisation of whistle-blowers.

Question 5. 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?

28) In practice many settlement agreements already state that nothing in the agreement prohibits the employee from making a protected disclosure. In addition section 43J(1) of Employment Rights Act

1996 renders contractual terms void insofar as they purport to preclude the making of a protected disclosure and this would apply to either contracts or settlement agreements.

29) We agree that it would be helpful for employment contracts and settlement agreements to contain such a term. It will require many firms to amend existing precedents but the cost would not be prohibitive. We believe these documents would communicate the message more effectively than in a handbook or code of conduct though there is no reason they should not be included there as well. It would be sensible when communicating the rule to be clear that it applies only to documents created after the rule is promulgated and also to allow adequate time for implementation.

30) We doubt it would be practicable to introduce a rule that firms should impose the requirement on agencies that such a term to be included in their contracts with staff. Such individuals may well however be informed by firms that their whistle-blowing procedures are open to them in connection with their work at the firm.

Question 6. Do you agree with the FCA's proposed treatment of whistleblowing arrangements for staff of appointed representatives and agents?

31) We agree the proposal for the reasons stated in the consultation paper.

Question 7: Do you agree with these proposals for the role of whistle-blowers' champion?

32) We are concerned that the proposals (together with other new regulatory obligations) place significantly increased responsibilities on non-executive directors (NEDs). This may make the role of an NED less attractive and more difficult to recruit. It may also impact the independence of NEDs given the requirement for them to spend more and more time exercising the role.

33) The PCBS made clear that it would prefer the whistle-blowers' champion (WBC) to be the Chairman. What will firms be required to do in the event that the Chairman is deemed not to be the most appropriate person to be the WBC? Will firms need to justify their choice to the regulators?

34) We think there is a need to be realistic about the impact the WBC will be able to have in large organisations and the remit of their responsibility - they will not be able to ensure that no person is victimised as a result of raising a whistleblowing concern. However, they can oversee / ensure that policies and procedures are in place that make it clear that persons should not be victimised.

35) Similarly, in large organisations we query whether it will be practical for the WBC always to be "open to approaches by concerned members of staff". In addition, if the WBC is overseeing a whistleblowing function, we wonder whether it is right that the WBC also receives approaches personally. One could argue that the WBC might provide better independent oversight of the whistleblowing process in an organisation if they are separate from it rather than being directly part of it i.e. if the WBC is involved in the process, who oversees his involvement? It would be helpful if the final guidelines / rules make it clear that the WBC is there to purely oversee process and procedure rather than be someone that an individual can blow the whistle to – to this end calling the person the whistle-blowers' champion may not be appropriate.

Question 8: Do you agree that the whistle-blowers' champion should prepare an annual report to the firm's senior governance committee, which is available to regulators on request, but not made public?

36) We agree that it is sensible for the WBC to report to the board, rather than requiring a new regulatory return.

37) We agree with the proposal to leave it up to each firm to decide the extent to which the report is made public.

38) Many organisations will already have some form of reporting in relation to whistleblowing matters. In many instances this may be on a global basis and as such the proposals may impose an additional layer of reporting for the UK.

39) The information required for the report as set out in paragraph 18.4.5(3) of the proposed amendments to the FCA handbook is quite prescriptive. Some of the information listed may not even be held by many organisations, for example data on the ethnic background of whistle-blowers and the persons against whom a reportable concern has been made. The inclusion of all of the data required would, in many cases, render it impracticable to maintain the confidentiality of whistle-blowers. It is also unclear what "information about any settlement agreements" is expected to be included, and we would note that most settlement agreements also include confidentiality obligations. We would therefore encourage greater flexibility in relation to the information required to be included in any such report.

Question 9: Do you agree with our proposed treatment of the role of the whistle-blowers' champion in financial groups?

40) We welcome the recognition that it might be more convenient/efficient for firms to have their WBC on the board of another group company.

41) Organisations have a diverse range of corporate structures: in our view, firms should be given a wide discretion to identify the relevant entity for the WBC to sit in.

Question 10: Do you agree the FCA should require firms to inform it of cases where an employment tribunal finds in favour of a whistle-blower?

42) Yes, in principle, however our experience is that in the vast majority of cases, firms or individuals will have already made the FCA aware of the subject matter of the employment tribunal proceedings and the fact of the proceedings.

43) In addition employment tribunal claims may succeed or fail for a range of case-specific reasons which are not in themselves relevant to the supervisory work of the FCA or whistle-blowers' champions.

44) We would therefore welcome clarification of what is meant by an employment tribunal 'finding in the worker's favour'; in particular, we suggest that this should be limited to cases where the employment tribunal finds that a worker has been subjected to a detriment or dismissed by reason that he or she made a protected disclosure.

Question 11: Do you agree that the FCA and the PRA should not place a requirement on employees to speak up when they see wrongdoing?

45) We agree that it is not appropriate to impose an obligation upon employees to 'blow the whistle'. In particular, we agree that such a duty would lead "worried employees to make defensive reports of little value that overwhelm whistleblowing services" (paragraph 4.3 of the consultation paper) and that individual employees would feel they had been put in an impossible position.

46) We further comment that the extremely wide scope of the subject matter of potential whistleblowing reports ('reportable concerns') makes such an obligation even more inappropriate. Individuals would face considerable uncertainty as to what should lead to whistleblowing report and what should not. We also believe that the existing requirements placed upon approved persons under APER Statement of Principle 4, and in particular the proposed Conduct Rule SM4 applying to Senior Managers, will to a limited degree act as a substitute for such an obligation.

47) We also consider that the imposition of such a duty could have perverse effects. For example, we would regard as pernicious the possibility of an employer (or the FCA/PRA) pursuing disciplinary/enforcement proceedings against an employee in circumstances where there were no substance to allegations of wrong-doing, save that it was arguable that a 'reportable concern' should have led to a whistleblowing report by that individual.

48) Whilst we would not support the imposition of a specific duty upon individuals to blow the whistle, we believe that the FCA and PRA should consider encouraging firms to take pro-active measures to encourage a positive risk management culture in relation specifically to whistleblowing. We set out two examples below.

49) First, firms could engage with their staff individually and pro-actively as to whether they have concerns that could form the basis of a whistleblowing report. This could be by means of an annual 'risk management return', whereby individual staff members are specifically requested to report anything that should be of concern to the risk committee or could form the basis of a whistleblowing report. It would be important that such a return was not conducted as part of an appraisal process or during the period in which the level of variable remuneration was assessed, so as to avoid groundless whistleblowing detriment claims being made under PIDA. One model for such a return may be found in the internal processes used by some law firms to give an annual notification to their professional indemnity insurers. Under these processes, individual lawyers are requested to tell the firm's risk committee if they are aware of any grounds on which a claim may be made against the firm.

50) Secondly, the firm's approach to their deployment of staff can influence a firm's risk management culture. A positive risk-management culture would be encouraged, for example, through secondments (which can be relatively short-term) between the different areas of the business within firms. In particular, we suggest that the relationship between the trading floor and compliance (and the understanding of how they operate within the firm) would be much improved following secondments in both directions, particularly if that arrangement continued for a number of years. We note that secondments between law firms, their clients, and the FCA/PRA are common.

Question 12. Do you have any other comments on the proposals in this consultation paper?

51) No.

20 May 2015

APPENDIX 1

Members of the Sub-Committee

Caroline Stroud: Freshfields Bruckhaus Deringer LLP (Co-Chair)
Stephen Levinson: Keystone Law Limited (Co-Chair)
Alice Greenwell: Freshfields Bruckhaus Deringer LLP
Jane McCafferty: 11, KBW Chambers
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