

Consultation Paper

CP16/25**

Whistleblowing in UK branches of overseas banks



September 2016

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We are asking for comments on this Consultation Paper by 9 January 2017.

You can send them to us using the form on our website at:
www.fca.org.uk/cp16-25-response-form.

Or in writing to:

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Canary Wharf
London E14 5HS

Telephone: 020 7066 6600
Email: cp16-25@fca.org.uk

We have developed the policy in this consultation paper in the context of the existing UK and EU regulatory framework. We will keep the proposals under review to assess whether any amendments will be required due to changes in the UK regulatory framework, including as a result of any negotiations following the UK's vote to leave the EU.

We make all responses to formal consultation available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure.

Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

All our publications are available to download from www.fca.org.uk. If you would like to receive this paper in an alternative format, please call 020 7066 0790 or email publications_graphics@fca.org.uk or write to Editorial and Digital Department, Financial Conduct Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS

Abbreviations used in this paper

CP	Consultation Paper
FCA	Financial Conduct Authority
PCBS	Parliamentary Commission on Banking Standards
PRA	Prudential Regulation Authority
PS	Policy Statement
RAP	Relevant Authorised Person

1. Overview

Introduction

- 1.1 In 2013, the Parliamentary Commission on Banking Standards (PCBS) recommended that banks put in place mechanisms to allow their employees to raise concerns internally (i.e. to 'blow the whistle'). The Commission also recommended that banks assign the responsibility for overseeing the effectiveness of those arrangements to a senior person.
- 1.2 In October 2015, the FCA and the PRA introduced new rules requiring internal whistleblowing arrangements to be introduced by banks, building societies, credit unions and PRA-designated investment firms (collectively known as Relevant Authorised Persons, or "RAPs"), as well as insurers¹.
- 1.3 Those rules did not apply to UK branches of overseas banks, although we said then that a consultation about branches would follow. This document sets out our proposed approach to apply new whistleblowing requirements to UK branches of overseas banks. It does **not** apply to UK branches of overseas insurers. We may choose to consult in future on applying whistleblowing requirements more widely to other firms we regulate, including to UK branches of overseas insurers, pending further consideration as warranted.
- 1.4 The policy contained in this consultation paper has been designed in the context of the existing UK and EU regulatory framework. We will keep the proposals under review to assess whether any changes would be required due to any intervening changes in the UK regulatory framework, including as a result of any negotiations following the UK's vote to leave the EU.

Who does this consultation affect?

- 1.5 This consultation proposes new rules for UK branches of overseas banks.

Is this of interest to consumers?

- 1.6 Whistleblowing is a topic of wide public concern, although the details of the specific proposals in this consultation are unlikely to be of direct interest to consumers.

¹ www.fca.org.uk/publication/policy/ps-15-24.pdf

Context

- 1.7** Individuals working for financial institutions may be reluctant to speak out about bad practice for fear of suffering personally as a result. Mechanisms within firms to encourage people to voice concerns – by, for example, offering confidentiality to those speaking up – can provide reassurance to whistleblowers.
- 1.8** The rules we introduced in October 2015 were designed to formalise for UK firms the generally good practice which already exists in the financial services industry. Their aim is to encourage a culture in which individuals feel comfortable raising concerns and challenging poor practice and behaviour. Those rules complemented other recent initiatives to reform senior management arrangements and remuneration in the financial services industry.

Summary of our proposals

- 1.9** We propose that **UK branches of overseas banks** tell their UK-based employees about the FCA and PRA whistleblowing services.
- 1.10** We also propose that, where a branch of an **overseas bank sits alongside a UK-incorporated bank** that is subject to our whistleblowing rules, the UK-based staff of that branch should be informed of the subsidiary's whistleblowing arrangements.
- 1.11** We propose to **not** require UK branches of overseas banks to implement any other of our rules related to whistleblowing. However, the rules do represent good practice guidance for these firms, as they do for all firms we regulate.

Equality and diversity considerations

- 1.12** We have considered the equality and diversity issues that may arise from the proposals in this consultation. Overall, we do not consider that the proposals in this consultation raise concerns with regards to equality and diversity issues. We do not consider that the proposals in this consultation adversely impact any of the groups with protected characteristics i.e. age, disability, sex, marriage or civil partnership, pregnancy and maternity, race, religion and belief, sexual orientation and gender reassignment. We will continue to consider the equality and diversity implications of the proposals and welcome comments on this during the consultation period, we will revisit them when publishing the final rules.

Next steps

- 1.13** We would welcome comments on our proposals. Please send us your comments by 9 January 2017. Please see page 2 for details about the different ways you can contact us. We will consider your feedback and publish our final rules in a Policy Statement.

2. Whistleblowing requirements for UK branches of overseas banks

- 2.1** As part of our consultation CP15/4 in February 2015, the FCA and the PRA asked for views about the benefits and challenges of applying whistleblowing requirements to branches of overseas banks.² The proposals in that paper included, among other things, that certain firms put internal whistleblowing arrangements in place, inform UK-based employees about these arrangements and inform UK-based employees they can blow the whistle to the FCA or the PRA.
- 2.2** Twenty-one respondents commented on the benefits and challenges of applying whistleblowing requirements to branches of overseas banks. Of these, thirteen favoured applying whistleblowing requirements to branches, and the remainder either disagreed or raised the following concerns:
- Some 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 UK 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 UK could be faced with a dilemma if blowing the whistle in the UK meant they were committing an offence under the laws of their home country.
 - Some respondents suggested that the **employment contracts** of some people working for the UK branch of an overseas bank could be prepared under overseas law. In these cases, that person may not benefit from the protections British law gives whistleblowers.
 - Several respondents said UK branches of overseas banks will have different governance arrangements to banks incorporated in the UK. There will be **no non-executive directors** able to take the role of 'whistleblowers' champion' as we have required for UK banks. There may be no other person within the governance of the branch with sufficient independence to perform this role credibly.
- 2.3** We have considered these views, and understand that some firms have concern that there may be legal obstacles to embedding whistleblowing procedures. As a consequence, we do not believe it is appropriate for all of the requirements related to whistleblowing we published last October to be applied to UK branches of overseas banks. The rules do nonetheless represent good practice for such firms, as they do for all firms we regulate.
- 2.4** We do, however, propose to **require UK branches of overseas banks to tell their UK-based employees that they can blow the whistle to the FCA and the PRA's whistleblowing services**. The whistleblowing service operated by the FCA is happy to receive reports from

² CP15/4 Whistleblowing in deposit-takers, PRA-designated investment firms and insurers

anyone, anywhere. If people contacting the FCA's whistleblowing service want to remain anonymous, protecting their identity is our top priority. If individuals come forward anonymously we would always seek to protect their identity to the best of our ability. Anyone who wants to contact the FCA's whistleblowing service can call 020 7066 9200 or email whistle@fca.org.uk.

- 2.5** We recognise that many UK branches of overseas banks sit alongside a UK-incorporated bank, with both having a common parent company or headquarters abroad. We are aware that this is true for a number of banking groups operating in the UK from a range of countries. There are also some UK-based banking groups whose overseas banking operations have a UK-based branch. In these situations, the UK-incorporated bank will be subject to the FCA's whistleblowing rules that we published in October 2015³. 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 people who are making disclosures from a UK-based branch within the same group.
- 2.6** We propose to **require a UK branch of an overseas bank that has a sister or parent company which is subject to our whistleblowing rules to tell its staff they are able to make use of the sister or parent company's whistleblowing arrangements.**

Q1: Do you agree with our proposals?

³ See: www.fca.org.uk/publication/policy/ps-15-24.pdf. Note that if the UK-incorporated bank has assets below £250m the requirements discussed in this paragraph do not apply.

Annex 1

List of questions

Q1: Do you agree with our proposals?

Q2: Do you agree with our cost benefit analysis?

Annex 2

Cost benefit analysis

1. Our February 2015 consultation⁴ analysed the costs and benefits of introducing new whistleblowing arrangements. This section supplements that analysis. The methodology used here is set out in detail in CP15/4.

Summary of the cost estimates from February 2015

2. We previously estimated that, as a result of our proposals, UK deposit-takers, insurers, and PRA-designated investment firms would collectively incur annual costs of:
 - £8.5m for operating internal reporting arrangements
 - £7.9m in training staff
 - £2.2m for overseeing the effectiveness of reporting arrangements.
3. We estimated the FCA would spend £200,000 a year supervising firms' compliance with the new requirements.
4. Seven respondents commented on our cost benefit analysis. Five thought we underestimated costs. One suggested we had overestimated costs. One said our estimates looked reasonable.

The costs to UK branches of overseas banks

5. There are about 160 branches of overseas banks in the UK. We estimate they collectively employ about 40,000 people. The main cost arising from our proposals will be the need to inform staff about the FCA and the PRA's whistleblowing services. If we take the cost of staff training used in CP15/4 as a proxy for this, we estimate that the cost of implementing this proposal will be £552,000 annually. This is the upper limit of this cost, because the training requirements set out in CP15/4 are more onerous than those proposed here.

The costs to the FCA

6. The annual costs we incur overseeing overseas branches' compliance with these requirements form part of the £200,000 we estimated in CP15/4.

⁴ CP15/4 Whistleblowing in deposit-takers, PRA-designated investment firms and insurers

Benefits

7. We intend our proposals to increase the volume of disclosures made by whistleblowers in the financial industry. However, we recognise it is difficult to credibly predict how our proposals will affect the quantity or quality of those reports. We do not feel it is reasonably practicable to estimate the value of these benefits.

Q2: Do you agree with our cost benefit analysis?

Annex 3

Compatibility statement

Compatibility with the FCA's general duties

1. Please see the compatibility statement in CP15/4, which we believe remains valid for this consultation.

Appendix 1

Draft Handbook text

ACCOUNTABILITY AND WHISTLEBLOWING (NO 2) INSTRUMENT 2017

Powers exercised

- A. The Financial Conduct Authority 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 137A (The FCA’s general rules);
 - (2) section 137T (General supplementary powers); and
 - (3) section 139A (Power of the FCA to give guidance).
- B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on [*date*].

Amendments to the Handbook

- D. The Senior Management Arrangements, Systems and Controls sourcebook (SYSC) of the FCA’s Handbook of rules and guidance is amended in accordance with the Annex to this instrument.

Citation

- E. This instrument may be cited as the Accountability and Whistleblowing (No 2) Instrument 2017.

By order of the Board
[*date*] 2017

[*Editor's Note: The numbering of the provisions in this Annex is designed to take account of the changes proposed to SYSC 18 by CP16/19 (Markets in Financial Instruments Directive II implementation proposals)*]

Annex

Amendments to the Senior Management Arrangements, Systems and Controls sourcebook (SYSC)

In this Annex underlining indicates new text and striking through indicates deleted text.

18 Whistleblowing

...

18.1 Application and Purpose

...

18.1.1A R This chapter applies to:

- (1) a *firm*;
- (2) in relation to the guidance in SYSC 18.3.9G to every *firm*; and
- (2A) in relation to the rules in SYSC 18.3.6R and SYSC 18.3.10R, to EEA relevant authorised persons and third-country relevant authorised persons only in relation to a branch maintained by them in the United Kingdom.

...

18.3 Internal arrangements

...

Reporting of concerns by employees to regulators

18.3.6 R This rule applies to a firm, an EEA relevant authorised person and a third-country relevant authorised person.

- (1) ~~A firm~~ A person subject to this rule must, in the manner described in (2), communicate to its UK-based employees that they may disclose reportable concerns to the PRA or the FCA and the methods for doing so. A firm must make clear that:
 - (a) reporting to the PRA or to the FCA is not conditional on a report first being made using the firm's internal arrangements;
 - (b) it is possible to report using the firm's internal arrangements

and also to the *PRA* or *FCA*; these routes may be used simultaneously or consecutively; and

- (c) it is not necessary for a disclosure to be made to the *firm* in the first instance.
- (2) The communication in (1) must be included in the *firm's* employee handbook or other equivalent *document*.

...

Additional rules for UK branches

- 18.3.10 R (1) This rule applies where an *EEA relevant authorised person* or a *third-country relevant authorised person* has:
- (a) a *branch* in the *United Kingdom*; and
 - (b) a *group* entity which is a *UK relevant authorised person*.
- (2) An *EEA relevant authorised person* and a *third-country relevant authorised person* must, in the manner described in (3), communicate to the *UK-based employees* of its *UK branch*:
- (a) the whistleblowing arrangements of the *group* entity that is a *UK relevant authorised person*; and
 - (b) indicate that these arrangements may be used by *employees* of its *UK branch*.
- (3) The communication in (2) must be included in the *branch's* employee handbook or other equivalent document.

Financial Conduct Authority



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