Association for Financial Markets in Europe

AFME response to Consultation Paper FCA CP15/4 - PRA CP 6/15 (Whistleblowing)

22 May 2015

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is registered on the EU Transparency Register, registration number 65110063986-76.

We summarise below our high-level response to the consultation, which is followed by answers to the individual questions raised.

AFME and its members support the idea of encouraging all employees to blow the whistle where they suspect misconduct, confident that their concerns will be considered and that there will be no personal repercussions.

As a general point, however, we do query whether it is strictly necessary to have an FCA whistleblowing policy in place alongside and in addition to the general law and EU regulation. As the consultation paper (CP) itself states, most banks do already have whistleblowing arrangements in place, regarding it as good practice. Whistleblowing is also covered by the Public Interest Disclosure Act, which applies to the regulated financial sector as it does to all employers. In addition, ESMA's technical advice on MAD/MAR contains extensive new processes for whistleblowing, which should be in force in the UK next year.

We would, therefore, urge the regulators to be careful not to impose any obligations in the UK which go above and beyond those set out in MAD/MAR, and thus create overlapping and potentially duplicative or inconsistent rules across the EU and an even greater new regulatory burden for firms in the run up to MiFID, MAD/MAR and the Strengthening Personal Accountability regime, than already exists.

We have the following specific additional points in relation to some of the specific questions in the consultation.

Q1: We support the idea that the consultation will not impose new requirements on UK branches of foreign banks.

Q2: We agree that all UK-based employees of relevant firms should be informed about the whistleblowing services provided by the PRA and the FCA with regard to relevant disclosures, but would see a case for explicitly encouraging the use of workplace arrangements in the first instance, unless there is good reason for not doing so.

Q3: No, we do not agree. While a firm's whistleblowing arrangements need to cover relevant disclosures related to regulatory disclosures, or crimes, or breaches of a legal obligation as set out in the Public Interest Disclosures Act (PIDA), there will equally be a need in many instances to direct initial enquiries to a more appropriate channel, such as HR, or customer complaints. And in many cases, line management or HR will in fact be the first and best point of contact. Enquiries correctly so redirected should not be subject to onerous

record-keeping for whistleblowing purposes. Also, many firms' whistleblowing hotlines are operated by third party providers with a clearly defined remit in order to provide the whistleblower with an additional layer of confidence regarding confidentiality and anonymity. Similarly, whistleblowing reports should be suitably ring-fenced and kept separate from an individual's personnel records and other records not related to the scope of the whistleblowing arrangement.

Q4: As regards making whistleblowing arrangements available to all individuals and offering them the same protections, we believe that the list of individuals suggested, e.g. volunteers and employees of suppliers, is extremely broad. Whilst we support the idea that whistleblowing channels should be available to a broad range of individuals, we are concerned about what offering the "same protections" to such individuals could mean in practice. For example, would this mean that firms would have to include statements in their contracts (where applicable) to the same effect, as well as all the other protections/obligations being proposed? Furthermore, from the CP text it is not entirely clear whether the individuals to be offered these protections are limited to exclusively UK-based individuals. Such provision could be problematic if it is not limited to UK-based individuals, due to jurisdictional issues (including data protection, and conflicts with other whistleblowing regimes).

Q5: We agree that employment contracts and settlement agreements should not discourage workers from making a protected disclosure, but would see as disproportionate a wholesale rewrite of employment contracts in order to make an explicit statement to this effect.

Q6: We agree that it would not be feasible for a firm to promote its whistleblowing services to staff of appointed representatives or tied agents, nor to require arrangements to be put in place, and therefore agree with the approach whereby firms are encouraged to work with appointed representatives and tied agents to establish appropriate arrangements.

QQ7-9: Many of our members have a whistleblowing champion who is on the board of a company elsewhere in the member group. The FCA and PRA say that they are content for such an arrangement to be put in place provided the person is the whistleblowing champion of a parent company that is itself regulated by the FCA and the PRA. In most cases that will not be the case for AFME members. The whistleblowing champion of a major group that is not based in the UK will probably himself or herself not be based in the UK. It is not inconsistent with the Strengthening Personal Accountability Regime for Senior Managers to be based outside the UK, and indeed many will be so based. We would suggest, therefore that the rules be modified to permit the whistleblowing champion to be based outside the UK.

Q11: We agree that a legally defined duty or obligation on individuals to blow the whistle is not appropriate.

As before, we may have further points as our members continue to assess the impact of the new regime; and as before, we would be happy to continue to meet the regulators to talk through the issues. We regard the debate to date to have been both useful and constructive.

Responsible Executive

Will Dennis
020 7743 9341
will.dennis@afme.eu