

# 101

Financial Services Authority

## Whistleblowing, the FSA & the financial services industry

July 2001



# Contents

1	Executive Summary	3
2	Introduction	4
3	Purpose	6
4	Background	7
5	Proposal	9
6	Compatibility Statement	12
7	Cost Benefit Analysis	15
8	Feedback	16
	<b>Annex A:</b> Proposed information sheet	
	<b>Annex B:</b> Proposed text for the Handbook	

The Financial Services Authority welcomes comments on this Consultation Paper. Comments should reach us by 5 October 2001.

Comments may be sent by electronic submission using the form on the FSA's website (at [www.fsa.gov.uk/pubs/cp/cp101\\_response.html](http://www.fsa.gov.uk/pubs/cp/cp101_response.html)).

Alternatively, please send comments in writing to:

Christine Fawcett  
The Financial Services Authority  
25 The North Colonnade  
Canary Wharf  
London E14 5HS

Telephone: 020 7676 4660

Fax : 020 7676 9945

Email: [cp101@fsa.gov.uk](mailto:cp101@fsa.gov.uk)

**It is the FSA's policy to make all responses to formal consultation available for public inspection unless the respondent requests otherwise.**

# 1 Executive summary

1.1 This consultation paper is about public interest whistleblowing. Responding constructively to whistleblowing disclosures is a cost effective way both to contribute towards effective risk management systems in regulated firms and towards effective risk-based regulation by the FSA. It is focused on the Public Interest Disclosure Act 1998 (PIDA) which provides protection for whistleblowers in certain circumstances. It reflects preliminary discussions with industry and worker representatives.

1.2 The purpose of this consultation paper is to

- draw attention to model whistleblowing arrangements and practical points for small firms;
- tell firms of our own revised arrangements for handling whistleblowers;
- invite comments on our information sheet;
- provide information on how we intend to monitor the outcome of these proposals;
- invite comments on guidance to be included in the Handbook;
- invite comments from firms on the costs to them of these proposals.

In the process we shall encourage firms to consider putting in place whistleblowing procedures where they do not have them already.

# 2 Introduction

- 2.1 It has always been the FSA's policy to keep an open door to tip-offs and complaints, whether from consumers or the industry. Not only can this be considered an integral part of our role as a public regulator, but it also makes economic sense as a cost effective way of being alerted to potential problems in the industry. And it is particularly relevant to FSA's new focus on risk-based regulation. The FSA's designation as a prescribed regulator under PIDA is a natural extension to this approach and our first two years' experience of the legislation has shown that it has begun to prove its usefulness.
- 2.2 But above all PIDA encourages internal disclosures to the employer<sup>1</sup> through its tiered approach: only the simplest test needs to be satisfied for protection to apply when the disclosure is made to the employer. Whistleblowing procedures which encourage a worker<sup>2</sup> to blow the whistle internally mean that senior management is the first, not the last, to know about a potential problem and the employer is helped to achieve an effective risk management system at very little cost.
- 2.3 With two years of PIDA legislation behind us and the FSA's new emphasis on a risk-orientated approach, we consider the time is now ripe to call on the financial services industry to consider adopting appropriate procedures for handling workers' concerns.
- 2.4 For our part, we have centralised our own procedures and plan to issue an information sheet early in the new year publicising our new dedicated whistleblowers' telephone line and e-mail address. Our approach will be to encourage anyone with a concern who works for a regulated firm to use their firm's whistleblowing procedures in the first instance. But we also plan to publicise the fact that, where a worker chooses to contact us, or where a

---

1 The definition of "employer" in PIDA includes the person who substantially determines or determined the terms on which an agency worker is or was engaged and, in the case of trainees on work experience or vocational schemes, the person providing the work experience or training.

2 In this paper "worker" includes, but is not limited to, an individual who has entered into a contract of employment.

worker is concerned about unauthorised business, they can also make disclosures, which qualify for protection under PIDA, to the FSA.

- 2.5 Nothing in this paper applies to the normal day to day relationship between regulated firms and the FSA. This consultation is only about the unsanctioned disclosures which workers may want from time to time to make to the FSA; it covers ways of communicating our new dedicated whistleblowing contact details to workers and, more importantly, how the FSA and firms can encourage any workers with concerns to make the disclosures to their own employer in the first instance.

# 3 Purpose

- 3.1 The purpose of this guidance is to draw the attention of firms to the provisions of PIDA and to explain how they can be applied in the context of financial services. By issuing this guidance we aim to encourage firms to consider adopting appropriate internal procedures for handling workers' concerns and to set out the arrangements the FSA, as prescribed regulator under PIDA, has put into place for handling disclosures from whistleblowers who choose to come direct to the FSA. The guidance will be given under section 157(1) of the Financial Services and Markets Act 2000 (FSMA).

# 4 Background

- 4.1 PIDA came into force on 2<sup>nd</sup> July 1999. It is employment legislation, amending the Employment Rights Act 1996. PIDA creates a framework for whistleblowers across private and public sectors by protecting workers who meet the tests laid down in PIDA for making disclosures of certain information in the public interest and allowing such individuals to bring a legal claim in respect of victimisation. It also provides that any term in an agreement between a worker and his employer is void in so far as it purports to preclude the worker from making a protected disclosure. The word “agreement” is given a broad definition: the provision would cover a term contained in an employment contract, in a contract of a worker who is not an employee or in any other agreement between a worker and employer, including an agreement to settle legal proceedings.
- 4.2 PIDA defines a “qualifying disclosure” as any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following has been committed, is being committed or is likely to be committed:
- a criminal offence
  - a failure to comply with any legal obligation
  - a miscarriage of justice
  - the health and safety of any individual endangered
  - damage to the environment
  - deliberate concealment of information relating to any of the above.

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.

- 4.3 A protected disclosure to the employer is one which meets the requirements set out in paragraph 4.2 and is made in good faith. PIDA also makes special provision for disclosures to bodies prescribed for the purpose under the Act. Such disclosures will qualify where the whistleblower meets the tests for internal disclosure, reasonably believes the information and any allegation in it are substantially true and reasonably believes the matter falls within the prescribed person's (prescribed regulator's) area of responsibility. PIDA does not tell prescribed regulators what procedures to follow, nor does it place any obligations or responsibilities on them.
- 4.4 A number of organisations have been prescribed under the Public Interest Disclosure (Prescribed Persons) Order 1999 (the Order), as organisations to whom qualifying disclosures can be made about matters described in the Order. These include, for example, the Health & Safety Executive and the Inland Revenue as well as the FSA family of regulators. After N2, the date when FSMA comes into force, there will be a single regulator for financial services and markets (the FSA) and a single prescribed regulator for these financial services (the FSA).

# 5 Proposal

- 5.1 The proposal is in three stages. First of all we are encouraging all regulated firms actively to consider adopting appropriate internal procedures for handling workers' concerns. PIDA encourages rather than requires firms to have whistleblowing procedures. The advantage to the employer is that workers should have greater confidence about blowing the whistle internally rather than externally. Problems in a firm are for the firm to sort out and it is right that senior management should be the first to know. The management should be able to resolve the problem without the glare of publicity, but of course telling the FSA where appropriate.<sup>3</sup> A whistleblowing policy will help avoid crises, minimise bad press and reassure customers and regulator alike. It will do this by:
- increasing the likelihood that the firm will hear about wrongdoing in time to prevent serious damage;
  - reducing the amount of time and resources which would have had to have been diverted to managing a crisis;
  - reducing the chances that workers will feel driven to take their concerns to the media, for example;
  - deterring people from engaging in malpractice, by increasing the likelihood that they will be caught.
- 5.2 PIDA provides other persuasive reasons for having such procedures: if a worker makes a "wider disclosure" (eg to the police, an MP, the media or a non-prescribed regulator) there is, in addition to other requirements, a reasonableness test to be met in order for the whistleblower to enjoy protection under PIDA: if the employer had a whistleblowing procedure which the worker failed to use it is less likely that the worker will meet the test. This encourages the worker to blow

---

<sup>3</sup> FSA's Principle 11 for Businesses states "A firm must deal with its regulator in an open and co-operative way, and must disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice." FSA's Statement of Principle 4 for Approved Persons states "An approved person must deal with the FSA and with other regulators in an open and co-operative way and must disclose appropriately any information of which the FSA would reasonably expect notice".

the whistle internally. It follows that, if employers have effective procedures which are known to and used by workers, it is much less likely that a situation will arise which will lead to a claim against the firm under PIDA.

5.3 Guidance already exists on key elements of a whistleblowing policy. The 2<sup>nd</sup> Report of Lord Nolan's Committee on Standards in Public Life<sup>4</sup> says "In the course of the present study, we received evidence from the independent charity, Public Concern at Work, which specialises in this area. They proposed that an effective internal system for the raising of concerns should include:

- a clear statement that malpractice is taken seriously in the organisation and an indication of the sorts of matters regarded as malpractice;
- respect for the confidentiality of staff raising concerns, if they wish, and the opportunity to raise concerns outside the line management structure;
- penalties for making false and malicious allegations;
- an indication of the proper way in which concerns may be raised outside the organisation if necessary.

We agree."

5.4 We know that some firms have already gone to considerable efforts to draw up appropriate whistleblowing policies and procedures for their business. Some already explain the role of the FSA in their procedures: we hope that others will do the same. The FSA has put its own procedures as an employer into place and would encourage all financial services firms to do the same as part of an effective risk management system.

5.5 A policy and procedures in themselves will not produce the desired effect: all workers need to be aware of them, whether in isolation or as part of a package of measures giving workers an opportunity to voice their views and concerns.<sup>5</sup>

5.6 We recognise, though, that full-blown whistleblowing procedures may not be appropriate for smaller firms. Nevertheless, we believe it is helpful even for small firms to think about how to address the issue of worker concerns. Public Concern at Work have drawn up a list of practical points for small firms to consider. They include the following:

- explaining the issue
- practising what you preach
- being open to concerns
- responding to a concern.

---

4 Volume 1: Report CM 3270-1. © Crown copyright. Reproduced with the permission of the Controller of HMSO.

5 This package could include the firm's grievance procedure, any staff consultative arrangements and/or trade union arrangements.

- 5.7 The second stage of the proposal concerns the FSA's arrangements for responding to whistleblowers from the industry. The following arrangements are now in place primarily to handle disclosures potentially attracting protection under PIDA but, at a practical level, also handling other disclosures from the industry not covered by PIDA.
- 5.8 We have centralised our arrangements for such calls, letters or e-mails so that once they are identified as a potential PIDA disclosure they are referred to a central point before being passed on to appropriate colleagues elsewhere in the FSA for investigation. We undertake to treat the whistleblower sensitively and do our best to protect the whistleblower's identity, if desired - but we cannot give any categorical assurances on confidentiality since circumstances may be such that disclosure of identity becomes unavoidable in law.
- 5.9 There is a dedicated telephone line (with secure voicemail) and email address set up for this purpose. We shall not be publicising the telephone number or email address until after we have received all the comments on these proposals and provided a feedback statement.
- 5.10 The FSA's resources for this work are limited. When we do publicise the number and address we shall emphasise not only that the firm should ordinarily be the first port of call but also that we are interested in live concerns or matters of recent history rather than issues from the distant past, unless they continue to have an impact on the present.
- 5.11 We plan to publish an information sheet with the telephone number and email address. A draft is at Annex A. The emphasis is intentionally on encouraging the worker with a concern to use his employer's whistleblowing procedures rather than coming to us in the first instance. The sheet has been designed for distribution to individual workers and for use by external advisory bodies to whom workers may turn for advice. It can also be used as a poster for office and staff or trade union notice boards.
- 5.12 The third stage is the monitoring and review. There will be no requirement for firms either to have their own whistleblowing arrangements or to distribute the information sheet to staff. But the effectiveness or otherwise of the industry's whistleblowing arrangements will be kept under review in case we need to consider making rules under FSMA at a later date. We will judge the effectiveness of the industry's arrangements by asking those firms where a worker has made a disclosure to us to let us have details of their arrangements - but we will only do so after the disclosure has been investigated and where to do so would not compromise the whistleblower's position. In addition, the FSA would regard as a serious matter any evidence that a firm had acted to the detriment of a worker who had made a protected disclosure. Such evidence could call into question the fitness and propriety of the firm concerned and/or relevant members of the firm's staff.

# 6 Compatibility statement

6.1 The FSA believes that the proposed guidance in Annex B is compatible with the FSA's regulatory objectives under FSMA as follows:

- *Market Confidence: maintaining confidence in the financial system*  
The effect of these proposals to encourage firms to have appropriate internal procedures to handle workers' concerns will be to increase confidence in the financial system by making it more likely that malpractice will be stopped at an early stage, whether as a result of disclosure to the firm or to the FSA.
- *Public awareness: promoting public understanding of the financial system*  
The guidance is compatible with this objective, although it is not expected to have a direct impact on achieving it.
- *Protecting consumers: securing the appropriate degree of protection for consumers*  
The proposals should lead to greater protection for consumers by promoting strong, safe, internal and external reporting mechanisms which will help to prevent abuses and financial crime. The matters to which the FSA must have regard in pursuing this objective are not relevant to these proposals.
- *Reduction of financial crime: reducing the extent to which it is possible for a business carried on by a regulated person, or in contravention of the general prohibition, to be used for a purpose connected with financial crime*  
The proposals should reduce financial crime by encouraging good practices within regulated firms. Publication of the FSA information sheet should also lead to more information reaching the FSA about businesses operating in contravention of the "general prohibition" (doing regulated business without authorisation from the FSA), since it should encourage workers in those firms to blow the whistle to the FSA.

The matters to which the FSA must have regard in pursuing this objective are also very relevant:

- they will heighten awareness amongst firms of the risk of their businesses being used in connection with the commission of financial crime;
- appropriate whistleblowing procedures will contribute towards firms having appropriate measures to prevent financial crime, facilitate its detection and monitor its incidence;
- resources spent by firms in support of these procedures will contribute to firms' overall resources devoted to the prevention, detection and monitoring of financial crime.

6.2 We also believe the guidance is consistent with the matters which the FSA must have regard to in fulfilling its general functions:

- *The need to use the FSA's resources in the most efficient and economic way*  
By promoting internal procedures within firms we are reducing the likelihood that problems will need to be reported to and investigated by the FSA. In having procedures in place to identify and respond effectively to whistleblowing disclosures which are made to us we obtain potentially useful information to contribute to our risk-based regulation at minimal cost.
- *The responsibilities of those who manage the affairs of authorised persons*  
We consider that our encouragement to the industry to have arrangements, so that workers with concerns blow the whistle internally, correctly leaves the responsibility where it should be - with senior management.
- *The principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction*  
The benefits to maintaining market confidence, protecting consumers and reducing financial crime outlined above are relevant here. So also are:
  - the effect our proposals will have in educating managers to be aware of the protection PIDA provides; in responding positively to public interest whistleblowers firms reduce the likelihood that they will face claims for compensation under PIDA through allegations that a whistleblower had been victimised in breach of PIDA;
  - the benefits of a better informed work force who know that management want to be told of their concerns and that they will not be penalised if they act in good faith, even if the concern proves to be unfounded;
  - the opportunity to address workers' concerns at an early stage before the problem (and the costs) have escalated;

- the reduced risk to firms, markets and consumers of unfounded allegations being made public.

Many firms will already have developed and communicated appropriate whistleblowing procedures. There will be very limited costs for them. As to the others, we believe that the costs of the proposals will be proportionate to the benefits arising, but see paragraph 7.1 below.

- *The desirability of facilitating innovation in connection with regulated activities*  
Firms legitimately operating near the boundary of authorisation (if unauthorised) or near the boundary of their permissions (if authorised) might feel deterred from certain initiatives by the fear that employees might mistakenly report them to the FSA. However, the FSA will be able to provide an authoritative response to such whistleblowers so as not to impede innovation.
- *The international character of financial services and markets and the desirability of maintaining the competitive position of the United Kingdom*  
The guidance is not expected to have a direct effect on this principle.
- *The need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions*  
If there were an impact on innovative activities at the boundary of authorisation or boundary of permissions given there could be adverse effects on competition. To the extent that these might arise they are expected to be negligible.
- *The desirability of facilitating competition between those who are subject to any form of regulation by the Authority*  
These proposals have no impact on this principle.

6.3 We plan to issue this guidance to promote awareness of the interface between FSMA's provisions and PIDA. This guidance is the most appropriate way to achieve our statutory objectives at this time because we want to promote good practice in a flexible, non-prescriptive way. If, however, we find from our monitoring and review (see paragraph 5.12) that this does not happen we shall consider making rules under FSMA.

# 7 Cost Benefit Analysis

7.1 We believe that the costs of these proposals will be proportionate to the benefits arising but we would welcome comments from respondents on:

- the steps which, if they are a regulated firm, they would take in response to the guidance;
- the costs of doing so; and
- the nature and extent of the benefits of the proposals.

As there is no guidance on rules in these proposals the FSA is not required to publish a cost benefit analysis, but the FSA will undertake such an analysis in the light of responses it receives and publish the outcome as part of the feedback on this consultation.

# 8 Feedback

8.1 We shall publish a policy statement giving feedback on the comments received.

# Worried about possible malpractice?



If you are concerned about possible financial irregularity or a compliance issue, it can be difficult to know what to do even in the best run organisation. The Public Interest Disclosure Act (PIDA) provides guidance for dealing with whistleblowing issues in a safe and constructive way and encourages you to raise concerns internally in the first instance.\*

## Internal

We hope that you will feel able to raise any such concern internally, confident that it will be dealt with properly. If you don't feel able to raise or resolve a concern with your line manager, please contact the person within your firm who has been nominated for this purpose. In this firm it is:

Name \_\_\_\_\_ Phone \_\_\_\_\_

## Advice

If you want free, confidential advice on your concern, you can contact

\_\_\_\_\_  
[e.g. the independent charity Public Concern at Work on 020 7404 6609].

## External - Financial Services Authority

If you think you ought to contact the FSA about your concern, PIDA protects you where

- you make the disclosure in good faith
- you reasonably believe the information and any allegations in it are substantially true, and
- you reasonably believe the FSA is responsible for the issue.

[Contact details will be in the final version]

\* PIDA provides that individuals who make qualifying disclosures of information in the public interest have the right not to suffer detriment by any act or omission of their employer because of the disclosure.

## Annex B

### Chapter X GUIDANCE ON PUBLIC INTEREST DISCLOSURE ACT WHISTLEBLOWING

#### X.1 Application and purpose

**X.1.1 G** This chapter is relevant to every *firm*.

**X.1.2 G** (1) The purposes of this chapter are:

- (a) to remind *firms* of the provisions of the Public Interest Disclosure Act 1998 ("PIDA"); and
- (b) to encourage *firms* to consider adopting appropriate internal procedures for handling workers' concerns.

(2) In this chapter "worker" includes, but is not limited to, an individual who has entered into a contract of employment.

**X.1.3** The *guidance* in this chapter concerns the effect of PIDA in the context of the relationship between *firms* and the FSA. It is not comprehensive guidance on PIDA itself.

#### X.2 Practical measures

**X.2.1 G** (1) Under PIDA, any clause or term in an agreement between a worker and his employer is void in so far as it purports to preclude the worker from making a protected disclosure.

(2) In accordance with section 1 of PIDA:

- (a) a protected disclosure is a qualifying disclosure which meets the relevant requirements set out in that section;
- (b) a qualifying disclosure is a disclosure, made in good faith, of information which, in the reasonable belief of the worker making the disclosure, tends to show that one or more of the following (a "failure") has been, is being, or is likely to be, committed:
  - (i) a criminal offence;
  - (ii) a failure to comply with any legal obligation;
  - (iii) a miscarriage of justice;
  - (iv) the health and safety of any individual endangered;
  - (v) damage to the environment;
  - (vi) deliberate concealment relating to any of (i) to (v);

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.

## Annex B

- X.2.2 G**
- (1) *Firms* are encouraged to consider adopting, as part of an effective risk management system, appropriate internal procedures which will encourage workers with concerns to blow the whistle internally about matters which are relevant to the functions of the FSA.
  - (2) Appropriate internal procedures would include:
    - (a) a clear statement that the *firm* takes malpractice seriously;
    - (b) an indication of what is regarded as malpractice;
    - (c) respect for the confidentiality of a worker who raises concerns;
    - (d) the opportunity to raise concerns outside the line management structure;
    - (e) penalties for making false and malicious allegations; and
    - (f) an indication of the proper way in which concerns may be raised outside the *firm* if necessary (see (4)).
  - (3) Small *firms* should consider addressing the issue of worker concerns by explaining the issue, being open to concerns and responding to them.
  - (4)
    - (a) *Firms* should also consider telling workers (through the *firm's* internal procedures, or by means of an information sheet available from the FSA's website, or by some other means) that they can blow the whistle to the FSA, as the regulator prescribed in respect of financial services and markets matters under PIDA.
    - (b) The FSA will give priority to live concerns or matters of recent history, and will emphasise that the worker's first port of call should ordinarily be the *firm*.
    - (c) For the FSA's treatment of confidential information, see SUP 2.2.4G.
- X.2.3 G**
- The FSA would regard as a serious matter any evidence that a *firm* had acted to the detriment of a worker who had made a protected disclosure (see X.2.1(2)). Such evidence could call into question the fitness and propriety of the *firm* or relevant members of its staff, and could therefore affect the *firm's* continuing satisfaction of *threshold condition 5* (Suitability) or, for an *approved person*, his status as such.

**ISBN: 011704444X**

The Financial Services Authority  
25 The North Colonnade Canary Wharf London E14 5HS  
Telephone: +44 (0)20 7676 1000 Fax: +44 (0)20 7676 1099  
Website: <http://www.fsa.gov.uk>

Registered as a Limited Company in England and Wales No. 1920623. Registered Office as above.