



Ms Catherine Tustin  
Whistleblowing Commission  
Public Concern at Work  
Third Floor  
Bank Chambers  
6-10 Borough High Street  
London SE1 9QQ

28<sup>th</sup> June 2013

Dear Whistleblowing Commission,

The Chartered Financial Analyst Society of the United Kingdom (CFA UK) is keen to share its views, ideas and observations with the Whistleblowing Commission set up by Public Concern at Work (PCAW).

**Context and rationale for our response**

*"I don't want any yes-men around me. I want everybody to tell me the truth even if it costs them their jobs."* (Samuel Goldwyn)

CFA UK appreciates the importance of whistleblowing; it is our view that the practice does require special consideration given the difficulties and risks entailed for those who speak up.

Good citizens have a duty to stand firm, and if necessary speak up, where inappropriate activity is detected. The act of whistleblowing is in some ways similar to other situations where individuals can report crimes. It is however, particular in that there are often competing duties (to the employer, to the client and to the public) and the employee is hardly independent of the employer. The close relationship between the employer and employee means that extraneous considerations may enter into the picture for both parties.

Ideally the act of whistleblowing should be akin to a person reporting suspicious activity in their neighbourhood to the police; a person reporting a suspected benefit cheat to the authorities or

calling the fire brigade to report a fire. Unless intentionally done to waste the time of the emergency services, there would be no negative consequences for reporting in any of these instances and furthermore witnesses are protected from the perpetrators of crime. The relevant authorities should then investigate the report and if a crime has been committed will take the matter further, otherwise the matter will be dropped. Either way there is little comeback for the person that made the report as long as they did so in good faith.

The issue with whistleblowing is that, although in our view it should be no different to the examples above, the fear of reprisal is very real, the career risk is significant and there is a lack of trust and confidence in the systems in place to investigate after the whistle has been blown.

The CFA UK is concerned with the effectiveness of whistleblowing in the financial sector naturally enough (given our professional orientation). As the PCAW's own survey states<sup>1</sup>, the risks are acute in this sector. To encourage good corporate citizenship one has to assess the integrity of both the legal and statutory framework and the implementation, supervision and enforcement of that framework.

### Legal and statutory framework

Some areas of the legal and statutory framework that may merit closer consideration include the following.

- PIDA focuses on encouraging internal disclosure to employers at first instance, and creates a higher bar for external disclosure. There may be circumstances where a higher bar may not be warranted, such as disclosure to a regulator. It is also worth noting that the legislation does not include provisions requiring firms to compulsorily report whistleblowing claims or the outcome of the relevant internal investigations to a regulator.
- The legislation focuses on actions that employers are prohibited from taking in response to whistleblowing claims from their employees. However, it does not impose obligations on firms to implement and monitor effective whistleblowing policies and procedures, or to ensure independence and authority of the compliance or appropriate department that is responsible for investigating and dealing with whistleblowing claims. It also does not

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<sup>1</sup> 'UK whistleblowing bankers 'ignored' and 'victimised' by employers', PCAW 20 May 2013  
<http://fairwhistleblower.ca/content/whistleblowing-bankers-%E2%80%98ignored%E2%80%99-and-%E2%80%98victimised%E2%80%99-employers>

incorporate mechanisms to provide positive incentives for firms to adopt appropriate whistleblowing procedures to encourage and protect whistleblowers (for eg, requiring regulators to take into account a firms prior treatment of past whistleblowers during an investigation)

- The legislation does not clarify the extent to which confidentiality obligations can restrict the ability of employees to pass information to the relevant regulator, or any potential future liability of an employee who is unable to prove their claim. It is also currently not clear whether the act of gathering of information by an employee to substantiate their whistleblowing claims is protected.

### Implementation, supervision and enforcement of the framework

The following quote highlights a point made above – there is not the confidence that a whistleblower in financial services will be heard and that their career will not suffer:

*“I realised the bank was moving too fast and I raised those challenges very strongly at board level. I also raised issues of cultural indisposition to challenge and inappropriate behaviours, and ultimately I was sacked.... I raised and reported all of this whistle-blowing claim that I had with the FSA but they did nothing either.”*

(Paul Moore, former Head of Group Risk at Halifax Bank of Scotland)

Any law or regulation needs to be supervised and enforced to be effective. It is vital that those affected by regulatory requirements for whistleblowing could be called upon to demonstrate that they act in the spirit and letter of the law.

It is both perception and reality that attempts at whistleblowing often turn out to the disadvantage of those that made the reports in the financial sector. Within financial services all employees are bound by the money laundering requirements for individuals to report any suspicion (even without basis) of money laundering to the relevant officer which then has to take the matter further. Perhaps a similar duty on employees and a role of whistleblowing officer should be created for whistleblowing.

It may often be the case that there will be little confidence in the employer to handle a whistleblowing claim appropriately. The highest levels of management may be complicit in matters worthy of whistleblowing, and even where this is not the case management may choose to bury, rather than deal with the issue. It is therefore essential that a whistleblower can turn to

a regulator. There are plenty of examples of individuals willing to act courageously to expose inappropriate conduct<sup>2</sup> in all walks of life. However the eventual resolution usually requires the intervention of external agencies. It is, then, of particular concern that, in the case of UK financial services, the regulator has a poor history of acting on claims made by whistleblowers. This is the case even when the whistleblowers are other regulators!<sup>3</sup>

In the wake of the financial crisis more emphasis is being placed on whistleblowing by the new conduct regulator, the Financial Conduct Authority (FCA). The FCA is keen to break with the past and ensure that whistleblowing becomes a key part of its market intelligence. However, there are still some that believe that the new regulator's approach to whistleblowing may be more in word than in deed<sup>4</sup>.

There needs to be more clarity provided to potential whistleblowers surrounding the role of the regulator and other actors such as professional bodies, trades unions, charities and even the press. All of these might assist whistleblowers to expose inappropriate or illegal conduct but it is not always very clear when and how each should play its part.

Of course in an ideal world there would be no need for whistleblowing. It may be valuable for the Commission to consider the questions

- Why is so much emphasis being placed on whistleblowing?
- What can we do to make our governance system more effective so that there is less reliance on whistleblowing?

Whistleblowing is not a panacea but those that are courageous enough to do it should be protected. If they suffer they should be able to seek recourse. Without adequate protection whistleblowing will continue to be a limited source of intelligence about employer behaviour. As background, appendix 1 sets out the responsibilities of CFA UK members with regard to whistleblowing as set out in the Code and Standards.

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<sup>2</sup> Top 10 whistleblowers  
<http://www.toptenz.net/top-10-whistle-blowers.php>

<sup>3</sup> Bank Of England, Financial Services Authority Missed Warnings On Barclays Libor Scandal", Reuters , Posted: 07/02/2012 1:14 pm Updated: 07/03/2012 12:31 am  
[http://www.huffingtonpost.com/2012/07/02/bank-of-england-fsa-barclays-libor\\_n\\_1643810.html](http://www.huffingtonpost.com/2012/07/02/bank-of-england-fsa-barclays-libor_n_1643810.html)

'Split Caps: Regulators did know' by Paul Lewis, BBC Money Box  
<http://news.bbc.co.uk/1/hi/programmes/moneybox/2342631.stm>

<sup>4</sup> 'The FCA's astonishing lack of MI on whistleblowing', Money Marketing , Paul McMillan, 30 May 2013  
<http://www.moneymarketing.co.uk/regulation/the-fcas-astonishing-lack-of-mi-on-whistleblowing/1071950.article>

## Questions:

### **1. How can we embed good practice whistleblowing arrangements in all sectors of the UK? For example, should they be mandatory?**

Where whistleblowing is relied upon to expose wrongdoing, we believe that there is a strong case to make whistleblowing mandatory in certain circumstances. Otherwise there is little incentive to whistleblowing as the risk is on whistleblowers rather than on those who choose to keep quiet.

Speaking at a debate on 'Good banks' the Archbishop of Canterbury said that "a corporate culture of participation will force people to raise issues." In this way businesses can make it more likely that employees will whistleblow should they encounter such a situation.

Given that less than half of UK employees are aware of a whistleblowing policy in their workplace<sup>5</sup> employees need educating about whistleblowing, what it is and how to go about it.

### **2. Do you think there should be financial or other rewards for whistleblowers? What are the advantages and disadvantages? How would the rewards be funded? And what about non-financial wrongdoing?**

We think the idea of financial reward for whistleblowing is deserving of discussion but we are not wholly convinced that such rewards would be beneficial. Rewards could lead to over-reporting of trivial matters making it harder for regulators to spot cases worthy of their attention. Certainly we believe that the compensation should be material where an employee career suffers as a result of whistleblowing and the logical place for such funding to come from is the company acting in prejudice of the whistleblower.

Whistleblowing complements a robust regulatory framework. Given the size of the financial services industry it is impossible to monitor every individuals' behaviour thus an effective framework for whistleblowing can help a cash-constrained regulator to regulate/police the industry. As such it may be desirable to incentivize whistleblowers to assist the regulator.

### **3. Do you think the Public Interest Disclosure Act is working? Are there any ways in which it can be simplified or improved?**

It should be noted that the Council of Europe states that PIDA is already one of the most comprehensive of its kind, but also see our comments above.

### **4. Should wrongdoing be more broadly defined within PIDA? Are there any other categories which should be added?**

Could/should 'unethical behaviour' be included in the categories of wrongdoing? This is especially pertinent to the banking industry given where we are post-crisis.

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<sup>5</sup> [http://www.pcaw.org.uk/files/news\\_attachments/Results%20for%20PCAW-YouGov%20Survey.pdf](http://www.pcaw.org.uk/files/news_attachments/Results%20for%20PCAW-YouGov%20Survey.pdf)

**5. Do the Government's amendments to the public interest test and to good faith achieve a fair balance between employer and employee interests?**

**6. Should there be a broader, more flexible definition of worker within PIDA to deal with the many different types of worker and working arrangements? Are there any categories of persons not now covered which ought to be?**

**7. Should a worker who has been wrongly identified as having made a protected disclosure be entitled to a claim under PIDA?**

**8. Should a job applicant be entitled to claim against a prospective employer if refused employment because of a previous protected disclosure?**

In theory this is desirable but we doubt the ability to implement and supervise it and without this, such an entitlement is without value. An employer will always be able to find a 'valid' reason to prefer another applicant.

**9. Should there be a broader, more flexible definition of prescribed persons within PIDA? Are there any types of prescribed persons not now covered that ought to be?**

**10. Should there be different protection for those who go to the media?**

**11. Should the causation test for unfair dismissal be the same as the test for detriment in whistleblowing cases?**

**12. Should a worker be able to obtain interim relief in detriment claims?**

**13. Is the protection related to gagging clauses in section 43J PIDA clear enough? Are people appropriately advised about this aspect of compromise agreements?**

**14. Should regulators take an interest in the whistleblowing arrangements of the organisations they regulate? Do they make adequate use of information brought to them via whistleblowing? Should regulators do more to protect whistleblowers?**

As expressed above, we believe that financial services regulators have made inadequate use of whistleblowing information and should do more to protect whistleblowers. We also believe that regulators should take an interest in the whistleblowing arrangements of financial services firms.

- 15. Should the UK set up a whistleblowing ombudsman service? If yes, what could this look like (an ombudsman for each sector or an overarching ombudsman)?**
- 16. Should there be specialist tribunals or specialised judges for PIDA claims?**
- 17. Should there be an open register of PIDA claims?**
- 18. Should the referral of PIDA claims to a regulator be mandatory?**
- 19. Should PIDA claims be exempt from employment tribunal fees?**
- 20. Should the Employment Tribunal have the power to make recommendations and levy fines in PIDA claims? If so, how?**
- 21. Should the ET have the power to refer regulatory or criminal matters to the appropriate authority(ies)?**
- 22. Please let us know if you have any other comments about whistleblowing or the consultation itself. The Commission would be very interested if you have any positive examples of where whistleblowing has worked well from the perspective of the whistleblower or the organisation receiving the whistleblowing report.**

Yours,



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## **About CFA UK and CFA Institute**

CFA UK serves society's best interests through the provision of education and training, the promotion of high professional and ethical standards and by informing policy-makers and the public about the investment profession.

Founded in 1955, CFA UK represents the interests of approximately 10,000 investment professionals. CFA UK is part of the worldwide network of member societies of CFA Institute and is the largest society outside North America.

CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion for ethical behaviour in investment markets and a respected source of knowledge in the global financial community. The end goal: to create an environment where investors' interests come first, markets function at their best, and economies grow. CFA Institute has more than 110,000 members in 139 countries and territories, including 100,000 Chartered Financial Analyst® charterholders, and 136 member societies.

The aim of CFA UK's advocacy initiative is to work with policy-makers, regulators and standard-setters to promote fair and efficient-functioning markets, high standards in financial reporting and ethical standards across the investment profession. The society is committed to providing members with information regarding proposed regulatory and accounting standards changes and bases its responses on feedback direct from members or relevant committees.

Members of CFA UK abide by the CFA Institute Code of Ethics and Standards of Professional Conduct. Since their creation in the 1960s, the Code and Standards have served as a model for measuring the ethics of investment professionals globally, regardless of job function, cultural differences, or local laws and regulations. The Code and Standards are fundamental to the values of CFA Institute and its societies.

## Appendix 1 – CFA UK members duty with regard to whistleblowing (extracts from the Code and Standards, Tenth edition, 2010)

### Standard IV: Duties to Employers

#### (A) Loyalty

In matters related to their employment, Members and Candidates must act for the benefit of their employer and not deprive their employer of the advantage of their skills and abilities, divulge confidential information, or otherwise cause harm to their employer.

#### Guidance

Highlights:

- *Employer Responsibilities*
- *Independent Practice*
- *Leaving an Employer*
- *Whistleblowing*
- *Nature of Employment*

Whistleblowing. A member's or candidate's personal interests, as well as the interests of his or her employer, are secondary to protecting the integrity of capital markets and the interests of clients. Therefore, circumstances may arise (e.g., when an employer is engaged in illegal or unethical activity) in which members and candidates must act contrary to their employer's interests in order to comply with their duties to the market and clients. In such instances, activities that would normally violate a member's or candidate's duty to his or her employer (such as contradicting employer instructions, violating certain policies and procedures, or preserving a record by copying employer records) may be justified. Such action would be permitted only if the intent is clearly aimed at protecting clients or the integrity of the market, not for personal gain.

Incident-reporting procedures. Members and candidates should be aware of their firm's policies related to whistleblowing and encourage their firms to adopt industry best practices in this area. Many firms are required by regulatory mandates to establish confidential and anonymous reporting procedures that allow employees to report potentially unethical and illegal activities in the firm.

**Example 11** (Whistleblowing Actions): Meredith Rasmussen works on a buy-side trading desk and concentrates on in-house trades for a hedge fund subsidiary managed by a team at the investment management firm. The hedge fund has been very successful and is marketed globally by the firm. From her experience as the trader for much of the activity of the fund, Rasmussen has become quite knowledgeable about the hedge fund's strategy, tactics, and performance. When a distinct break in the market occurs, however, and many of the securities involved in the hedge fund's strategy decline markedly in value, Rasmussen observes that the reported performance of the hedge fund does not reflect this decline. In her experience, the lack of any effect is a very unlikely occurrence. She approaches the head of trading about her concern and is told that she should not ask any questions, that the fund is big and successful and is not her concern. She is fairly sure something is not right, so she contacts the compliance officer, who also tells her to stay away from the issue of this hedge fund's reporting.

**Comment:** Rasmussen has clearly come upon an error in policies, procedures, and compliance practices in the firm's operations. Having been unsuccessful in finding a resolution with her supervisor and the compliance officer, Rasmussen should consult the firm's whistleblowing

policy to determine the appropriate next step toward informing management of her concerns. The potentially unethical actions of the investment management division are appropriate grounds for further disclosure, so Rasmussen's whistleblowing would not represent a violation of Standard IV(A).