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# Whistleblowing in the financial services sector

Guidance for a Whistleblowers' Champion





## Obligations and responsibilities

Almost all firms have been required to have a “Whistleblowers’ Champion” in place since 7 March 2016.

The Whistleblowers’ Champion is:

- > required to **establish, implement and maintain appropriate and effective arrangements** for the disclosure of **reportable concerns** by whistleblowers;
- > must inform the FCA/PRA (as relevant) if they **lose** an Employment Tribunal **whistleblowing claim**;
- > must ensure UK employees are made aware of the **FCA (and PRA’s) whistleblowing services** and that they can approach either regulator directly without first raising a concern internally; and
- > must comply with new **requirements for settlement agreements** (e.g. making clear that nothing in the settlement agreement prevents the individual from making a protected disclosure).

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## Appropriate and effective arrangements

### SYSC 18.1.3R (1)

A firm must establish, implement and maintain appropriate and effective arrangements for the disclosure of reportable concerns by whistleblowers.

- > UK-based employees
- > Managers (wherever located) of UK-based employees
- > Employees responsible for firm's arrangements

- > Annual report on operation and effectiveness of systems and controls
- > Reports to FCA on successful Tribunal claims

- > Prepare and maintain appropriate records of disclosures and outcomes
- > Prepare and maintain up-to-date written procedures on complying with FCA obligations

- > Provide feedback to whistleblower where feasible and appropriate



- > Where whistleblower has requested confidentiality
- > Disclosures possible through a range of methods

- > Including escalation to the FCA

- > Reasonable measures to ensure no victimisation of whistleblowers

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## Training and development

### SYSC 18.3.4G

A firm's training and development ... should include:

All UK-based employees

- (a) statement that the firm takes the making of reportable concerns seriously
- (b) a reference to the ability to report reportable concerns to firm and the methods for doing so
- (c) examples of events that might prompt the making of a reportable concern
- (d) examples of action that might be taken by firm after receiving a reportable concern by a whistleblower, including measures to protect the whistleblower's confidentiality
- (e) information about sources of external support such as whistleblowing charities

Managers (wherever located) of  
UK-based employees

- (a) how to recognise when there has been a disclosure of a reportable concern by a whistleblower
- (b) how to protect whistleblowers and ensure their confidentiality is preserved
- (c) how to provide feedback to a whistleblower, where appropriate
- (d) steps to ensure fair treatment of any person accused of wrongdoing by a whistleblower
- (e) sources of internal and external advice and support on the matters above

Employees (wherever located)  
responsible for arrangements

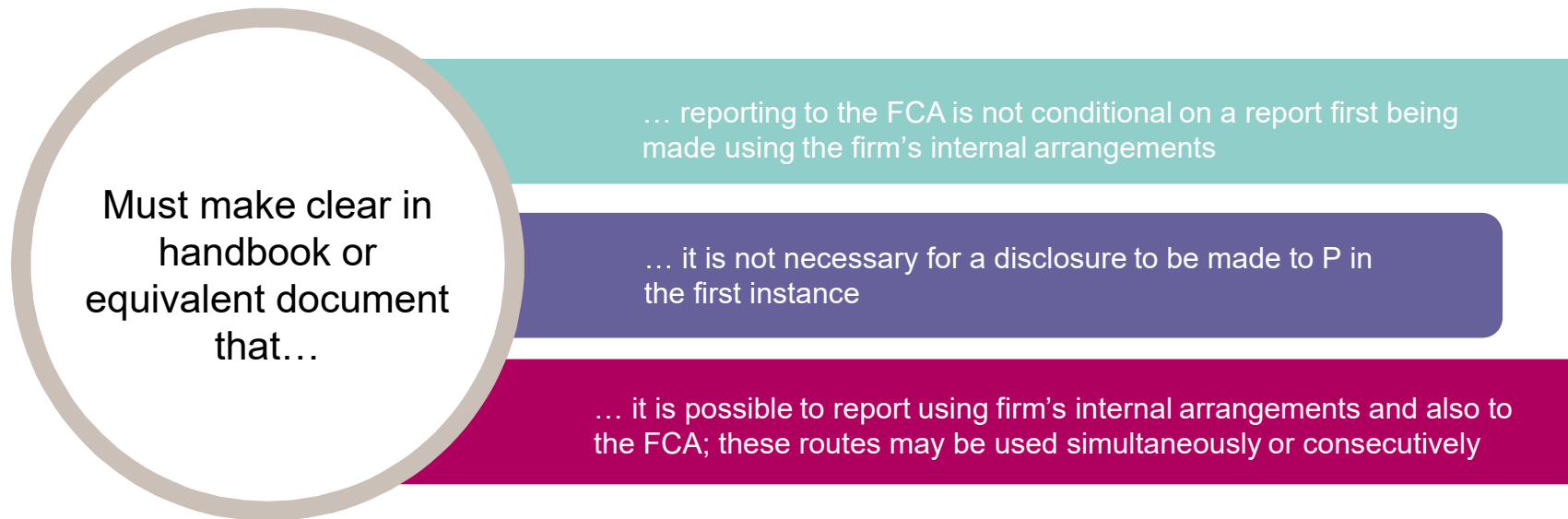
- (a) protect a whistleblower's confidentiality
- (b) assess and grade the significance of information provided by whistleblowers
- (c) assist the whistleblowers' champion when asked to do so

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## Reporting of concerns by employees to regulators

### **SYSC 18.3.6R (1)**

Firm must communicate to its UK-based employees that they may disclose reportable concerns to the PRA or the FCA and the methods for doing so.





## Having robust whistleblowing policies and procedures

In addition to the recent FCA / PRA requirements relating to whistleblowing, the importance of having robust policies and procedures has been recognised elsewhere:

- > **Bribery Act 2010:** Having a robust whistleblowing regime that encourages the reporting of bribery could show that an organisation had in place adequate procedures designed to prevent bribery (a defence to the corporate offence under the Bribery Act 2010).
- > **UK Corporate Governance Code:** The audit committee is required to review the company's whistleblowing arrangements, with the objective of making sure arrangements are in place for: (i) the proportionate and independent investigation of any matters raised; and (ii) appropriate follow-up action.
- > **Market Abuse Regulation:** EU member states are required to have in place certain protections for employees who make disclosures about market abuse (e.g. secure reporting channels; protection for whistleblowers against retaliation, discrimination and other unfair treatment; and protection of a whistleblower's identity).



## Features of effective whistleblowing procedures

- > Multiple channels for raising concerns:
  - Internal channels include line managers or other designated contacts, internal hotlines, and informal Q&A channels (e.g. through a company's intranet).
  - External channels include independent advice hotlines (e.g. *Safecall*, *Red Flag Reporting* and *Protect*).
- > Raise awareness:
  - Promote the importance of whistleblowing, and the positive business case for reporting and dealing with concerns.
  - Publicise the whistleblowing policy and provide regular training.
- > Get the response right:
  - Investigators should be independent (and perceived as such), properly resourced and effectively mandated.
- > Gather and analyse whistleblowing data:
  - Balance the need to keep the whistleblower up-to-date with the investigation against the need to maintain confidentiality (particularly in relation to disciplinary proceedings against other individuals).
  - Where possible, inform the whistleblower of the outcome of the investigation and any steps which are being taken to deal with his/her concerns.
- > Gather and analyse whistleblowing data:
  - Gather, organise and analyse the data to assess trends and analyse the effectiveness of internal procedures.
  - Ensure that any personal data recorded is held and processed in accordance with data protection requirements.



## Legal protections for whistleblowers

- > There are two key protections under the Employment Rights Act 1996: (i) protection from being unfairly dismissed (for employees); and (ii) protection from suffering unlawful detriment (for employees and workers, including some LLP members).
- > Any information disclosed by the whistleblower must, in his/her reasonable belief, tend to show that one of the following has occurred or is likely to occur: (i) a criminal offence; (ii) breach of a legal obligation; (iii) a miscarriage of justice; (iv) danger to the health and safety of any individual; (v) damage to the environment; or (vi) the deliberate concealment of information regarding any of these categories.
- > The disclosure must be made to the appropriate person or organisation – usually the employer, although whistleblowers may be protected if they disclose information externally.
- > There is no requirement for the disclosure to be made in “good faith”, but it must (in the reasonable belief of the whistleblower) be made in the “public interest”.





## Consequences for employers of legal breaches

- > Compensation for whistleblowing is uncapped; it is based on loss and is what is “just and equitable” in the circumstances (and could include “career loss”).
- > If details of the claim become public, there are potentially significant reputational risks to the employer (both in relation to the underlying disclosure, and the manner in which it was investigated).
- > Whistleblowers can request that the Employment Tribunal sends a copy of the ET1 claim form (or information from it) to the relevant regulator(s).
- > Whistleblowers can apply to the Employment Tribunal for interim relief (i.e. continuation of employment pending the final determination of the case) within seven days of being terminated.
- > Employment Tribunals can make awards for injury to feelings, or order exemplary damages. They can also require the employer to reinstate the whistleblower to his/her previous role, or re-engage him/her in a different role.



## Checklist for Whistleblowers' Champion

1. Do your policies and other documentation (e.g. template settlement agreements) comply with recent regulatory changes?
2. Are there appropriate internal and external channels through which disclosures can be made?
3. Are you taking steps to ensure workers know how to raise concerns, and to ease any fears of reprisals or inaction if they speak up?
4. Are staff trained to receive, investigate and act on disclosures?
5. Are there procedures in place to capture and analyse data on disclosures, investigations and outcomes?
6. Do you have a clear and up-to-date statement of responsibilities as the Whistleblowers' Champion?
7. Do you have a designated point-of-contact who can liaise with the FCA / PRA on whistleblowing matters?