

Whistleblower Desk
Central Bank of Ireland
PO Box 559
Dame Street
Dublin 2

10 June 2014

Consultation Paper 79 : 2014
Handling of Protected Disclosures by the Central Bank of Ireland

Dear Sir/Madam,

Raiseaconcern.com welcomes the opportunity to comment on the Central Bank's proposals for handling disclosures made under Part V of the Central Bank (Supervision and Enforcement) Act 2013 ("the Act").

Raiseaconcern.com provides specialist advice to employers and public bodies on the set up/re-launch of whistleblowing schemes. We also act as an outsourced service provider for the operation of schemes and enhance their effectiveness by protecting the identity of the whistleblower.

We make nine recommendations in this submission. We do so in the interest of obtaining maximum clarity on the operation of Part V of the Act. This will assist in the incorporation of these provisions into the whistleblowing schemes of the regulated financial services clients we deal with. We also do so in the interest of making the operation of the legislation and the Guidelines more effective.

General

Raiseaconcern.com welcomes the opportunity to comment on the process planned for handling Protected Disclosures under the Act. In addition to putting internal processes and procedures in place, Raiseaconcern.com assumes that the Central Bank intends publishing Guidelines on the operation of the processes and procedures and we have prepared this response on that basis.



Raisea concern.com also welcomes the proposal by the Central Bank to establish a central Whistleblowing Desk to deal with protected disclosures reported to the Central Bank. Such a structure is best suited to :

- Encouraging good faith reporting by having a single, identifiable and dedicated point of contact in the Central Bank, particularly where employees of financial services firms decide to use this channel for reporting suspected breaches of legislation/regulation;
- Protecting, as far as possible, the identity of whistleblowers;
- Protecting the rights of individuals or organisations against whom allegations are made;
- Achieving consistency of treatment between similar allegations, and
- Maintaining centralised records.

Raisea concern.com also welcomes the alternative available to whistleblowers to elect to deal with a supervisor or another official of the Central Bank whom they know, who will record the approach on the system used by the Whistleblower Desk.

Items Covered in the Consultation Paper (referenced by their paragraph number)

4.7 Feedback to the Whistleblower

The Consultation Paper proposes that the Central Bank will not inform whistleblowers of what action, if any, has been taken as a result of their disclosure. This is justified in the Paper by the view that “such an exchange of information could breach the legal rights of any person, or firm who has been accused of wrongdoing by the whistleblower, or could infringe confidentiality obligations of the Central Bank generally and under Section 33 AK of the Central Bank Act 1942”. It is also justified in the Paper by the fact that “providing information to whistleblowers might compromise the investigation of a case in some circumstances”.

This feature of no feedback is stated to be similar to the FCA (UK) model of dealing with whistleblowers.

Raisea concern.com’s view is that this proposal is not tenable. The Central Bank process should be designed to encourage whistleblowing. A key issue for anyone raising a concern will be to get some indication that their concern was deemed to be or, as the case may be, not deemed to be well founded. They also expect to be given an indication of what, if any, changes are going to arise as a result of their disclosure. If it is known that the concern will go into a ‘black hole’ with no feedback at all, the whistleblower will lose confidence in the process and will be less inclined to raise genuine issues. It is a reasonable expectation that whistleblowers should receive ongoing feedback during an investigation and feedback on conclusion of an investigation (including where there are no adverse findings).



That said, the Central Bank's concerns about protecting the rights of all parties are legitimate. It is appreciated that in giving feedback, the rights of all parties must be protected. It is also accepted that the extent of feedback must be limited for these reasons. However, the propensity should be to give as much feedback as legally possible rather than taking the legally safe route of none at all. It should be possible to accommodate the rights and expectations of all parties.

The Report by the UK Parliamentary Commission on Banking Standards published in June 2013 recommended that the FCA provide feedback to whistleblowers. The FCA published its response to the Report in October 2013 stating that they were looking at how transparency could be increased further and promised to engage more actively with whistleblower support groups on this issue. The Wall Street Journal reported on 31 March 2014¹ that the FCA has now adopted a policy on whistleblower feedback

Recommendation 1

Raiseaconcern.com recommend that the Central Bank reconsider its proposal not to provide feedback to whistleblowers and instead provide such feedback to the maximum possible extent, subject to legal constraints.

Raiseaconcern.com recommend that the Central Bank procedures are prescriptive about the frequency of giving periodic feedback to whistleblowers during the investigation of a disclosure and places an outer limit on the date for final feedback.

4.8 Recording of telephone calls

The Consultation Paper proposes that the Central Bank should record all telephone calls on the dedicated whistleblower telephone line and that callers should be informed of this by a pre-recorded voice message prior to the telephone being answered. While accepting that this may discourage some potential whistleblowers from making contact, the Consultation Paper considers this to be the better route.

Raiseaconcern.com's view is that whistleblowers call Whistleblower Desks for any one of a number of reasons : (i) they may be seeking guidance or assurance that their proposed action is an appropriate thing to do, or (ii) they may have questions about the process and be seeking reassurance about the protections they will receive, or (iii) they may be ready to immediately make a disclosure. Having considered the response to (i) and (ii), they will decide whether or not to raise a concern. All callers are typically nervous and unsure and will be intimidated by the fact that every word they utter will immediately be recorded.

¹ <http://online.wsj.com/news/articles/SB10001424052702304157204579473532443927444>



Raisea concern.com's view is that any calls which are preliminary to formally making a report should not be recorded as the process will discourage whistleblowers who are only seeking guidance or who have any doubt about their proposed course of action.

Whistleblowers often need to be assisted in explaining their concern in order to illicit relevant information. The Whistleblower Desk should be competent to listen to the concern and be capable of providing guidance on how to raise it, at which point the proceedings can be recorded with the whistleblower's consent.

Recommendation 2

Raisea concern.com recommends that callers to the Whistleblower Desk be advised in advance that their call will not be recorded until such time as they have decided to formally make a report, at which point the Whistleblower Desk will activate the recording with their permission.

Raisea concern.com recommends that the staff on the Whistleblower Desk should be competent to listen to the concern and then provide guidance on how to raise it.

5. Section 38(2) Disclosures by Persons Holding Pre-Approval Controlled Function ("PCF") Roles

The Consultation Paper proposes that PCFs who are obliged to report prescribed contraventions to the Central Bank should do so in writing. It offers the option of disclosure through a dedicated email or to a postal address.

Raisea concern.com does not consider standard e-mail as a safe medium for making such disclosures, particularly if there are sensitive attachments accompanying the email.

E-mails can be intercepted, read and made public.

Recommendation 3

Raisea concern.com recommends that the Central Bank sets up an encrypted web-enabled facility on its secure servers on which PCFs can register and report prescribed contraventions. Only notifications to log on and check the secure facility should travel by email.



Items not referred to in the Consultation Paper

Disclosures by PCFs (i)

The first paragraph in Section 5 of the Consultation Paper refers to the obligation on PCFs to report a “prescribed contravention” or “the destruction of evidence relating to such contraventions”. This does not cover the full extent of the disclosure requirements under Section 2(a) of the Act.

Recommendation 4

Raisea concern.com recommends that the Central Bank extend first paragraph in Section 5 of the Guidelines to cover all obligations contained in Section 38 (1)(a) to (d).

Disclosures by PCFs (ii)

Section 38 (2) (a) of the Act requires a PCF, as soon as it is practicable to do so, to disclose to the Central Bank information relating to one or more of the matters specified in Section 38 (1) (a) to (d) which he or she believes will be of material assistance to the Central Bank. While the scope of legislation and financial regulation covered is broad, subsection (c) in particular is extremely broad covering, as it does, a breach of “any other provision of financial services legislation”.

The Consultation Paper provides no clarity on what the Central Bank considers would be of ‘material assistance’ to it.

It is not clear what maximum timeframe the Central Bank envisages by ‘as soon as it is practicable to do so’.

In the interest of clarity for all concerned, the Central Bank Guidance on Handling Protected Disclosures should address both matters.

Recommendation 5

Raisea concern.com recommends that the Central Bank provide clarity in the Guidelines on the criteria it will apply in deciding what will be of material assistance to it. It would be helpful if this clarity was supported by as many examples as possible of what should be reported.

Raisea concern.com also recommends that the Central Bank provides clarity on what maximum timeframe from becoming aware of the issue the Central Bank envisages by “as soon as it is practicable to do so”.

Section 39 of the Act seems to envisage that such guidance may be given.



Disclosures by PCFs (iii)

Most if not all regulated financial services firms have a policy of reporting material compliance breaches to the Central Bank. Given the obligations placed on PCFs by Section 38 of the Act, this could give rise to multiple reports - by the institution itself and by each of its PCFs. Section 38 (2) (e) seems to recognise this by providing that it will be a reasonable excuse for a PCF not to have reported relevant matters as soon as practicable after they become aware of them if the information has already been disclosed by another person.

The Central Bank should clarify whether or not it expects all PCF who are aware of 'disclosable' matters to disclose them as a matter of course or whether they can rely on Section 38 (2) (e), provided they have evidence of the disclosure by another person. If so, this calls for practical arrangements to be put in place to address this by each regulated financial services firm. The legislation and the protection it offers will then only come into play where one or more PCFs feel a disclosure should be made and the firm disagrees or where one or more PCFs disagree with the proposed timing or content of the firm's disclosure.

In the interest of clarity and efficiency and the prevention of duplication or omission, the Central Bank Guidance on Handling Protected Disclosures should outline how you envisage this will operate at a practical level.

Recommendation 6

Raisea concern.com recommends that the Central Bank provide clarity in the Guidelines on steps to be taken by PCFs that the Central Bank will find acceptable to ensure that appropriate disclosures have been made and that are made as efficiently and effectively as possible.

Failure by a PCF to make a Disclosure

The Act is silent on the consequences of failure by a PCF to make a disclosure.

Recommendation 7

Raisea concern.com recommends that the Central Bank clarifies in the Guidelines what action, if any, under existing regulation or legislation the Central Bank intends to take in response to failure by a PCF in their obligation set out in Section 38 (1)(a) to (d) of the Act.

Prescribed Form

The Central Bank has already published a prescribed form for use by PCFs when making a disclosure. However, this is not mentioned in the Consultation Paper.



Recommendation 8

Raisea concern.com recommends that the Guidelines should refer to and incorporate as an Appendix the Prescribed Form already published by the Central Bank for use by PCFs when making a disclosure.

Protected Disclosures Bill

The Protected Disclosures Bill may well be enacted before the publication of these Guidelines. The Guidelines should differentiate between both pieces of legislation.

Recommendation 9

Raisea concern.com recommends that the Guidelines differentiate between the Protected Disclosures Act and the Central Bank (Supervisory and Enforcement) Act and sets out the circumstances and recommendations where each should be used.

If the Central Bank wishes to discuss or requires clarification on any of the above matters, we will be please to assist further.

Yours faithfully,

Philip Brennan
Managing Director