Public Concern at Work
Suite 301
16 Baldwins Gardens
London EC1N 7RJ

Tel. 020 7404 6609
Registered charity no. 1025557

Rt Hon John McFall MP (Chairman)

7 Millbank

House of Commons

London

SW1P 3JA

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Treasury Committee evidence session on the work of the Financial Services Authority.

Memorandum from Public Concern at Work.

Introduction:

1. Public Concern at Work (PCaW) is the independent authority on public interest whistleblowing. Promoting individual responsibility and organisational accountability are at the heart of the charity's work and PCaW has been instrumental in putting whistleblowing on the good governance agenda. PCaW's approach has been endorsed by the Committee on Standards in Public Life, courts and regulators. PCaW was instrumental in developing the statutory framework for whistleblowing, the Public Interest Disclosure Act 1998 (PIDA), which was widely supported by banks who recognised its value as an early warning system

2. PCaW was set up in response to a spate of disasters in the 1980s and 1990s including financial disasters such as the collapse of BCCI, Barings' Bank, Enron and Worldcom. What was clear from the inquiries into the above disasters is that staff knew of the risks and were either too scared to speak up or spoke to the wrong people in the wrong way. These scandals resonate within the recent

banking crisis. Now is a good time to refresh and renew some of the key messages from the past.

The value of whistleblowing:

3. The recent banking crisis has confirmed that no company is immune from unknowingly harbouring malpractice. Effective whistleblowing arrangements form an important part of the ability to manage this risk.

4. An unfortunate side-effect of economic downturn and recession can be an increase in financial crime and market abuse. This will often be accompanied by an understandable reluctance on the part of employees to risk their own position by raising a matter where they are doubtful of readily finding employment elsewhere. These two factors mean now more than ever, there is a need for clear, cogent guidance on whistleblowing. The plain message should be that it is safe and accepted for staff to speak up.

5. Commitment to the careful review of whistleblowing arrangements by banks and regulators alike will ensure that staff are encouraged to raise any concern about malpractice and that those responsible will either address the concern or have to say why they failed to do so. Staff will understand that their values count and the firm can demonstrate accountability. In a time of decreasing confidence, this will play a key role in reassuring investors, customers and the wider public.

Promotion of whistleblowing guidance to employees of FSA regulated companies:

6. Whilst AuditCo carried out a review of the FSA's own whistleblowing policy, the FSA may wish to consider reminding their regulated entities of their existing guidance in *SYSC 18: Guidance on Public Interest Disclosure Act: Whistleblowing* in order that businesses may keep abreast of good practice.

7. Our approach has always been to emphasise the critical importance of good whistleblowing practice to effective management and good corporate governance. To this end, we recently launched BSI Code of Practice *PAS 1998:2008 Whistleblowing Arrangements Code of Practice*, to provide a guide

for firms and agencies as to how they may incorporate best practice into their own policies and procedures which is available at www.pcaw.co.uk/bsi. The FSA may wish to take advantage of this guidance and promote the key good practice principles it contains.

8. While many firms have embraced good whistleblowing practice with the leadership the issue requires, there remain those firms who are reluctant to encourage employees to come forward and raise suspected misconduct. We continue to receive calls from employees at FSA-regulated firms who are confused as to how to go about raising their concern, or face difficulty in doing so. What we find particularly disturbing is that some employees continue to face considerable difficulty in raising their concern and have legitimate fears they will be 'blacklisted' if they have the tenacity to push for their concern to be addressed.

9. We acknowledge the increased efforts the FSA plans to make to boost its monitoring and regulatory efforts in the City. However, while it is undeniably important that the FSA is able to employ "poachers turned gamekeepers" to provide sufficient expertise to properly scrutinise and regulate practices in the City, ensuring the flow of intelligence from those employees who remain with regulated firms is equally important. Encouraging employees to raise concerns, and letting them know of the confidential support available are key to this objective.

Relevant concerns for the FSA in relation to PIDA:

10. What is especially worrying is that where employees are raising concerns, there is emerging evidence that firms in the financial services sector are settling ensuing claims under PIDA specifically to avoid scrutiny by the regulator. In a survey of City financial services firms by law firm Osborne Clarke "Whistleblowing – Sword or Shield'[1], 10 percent of respondent firms said that a business reason relevant to their decision to settle a whistleblowing claim was "Triggering an FSA investigation", with a smaller percentage citing "Concession that there may have been regulatory breaches".

[1] Osborne Clarke October 2008

11. The FSA may want to consider how they monitor or gather any information contained in claims made under PIDA that is of relevance to their regulatory or enforcement powers. At present, such claims are immune from scrutiny by any agency, regardless of the seriousness of the underlying concern.

12. We continue to receive calls on our helpline from employees of FSA regulated entities regarding when or how they should speak to the FSA when offered a settlement that they are concerned is an attempt to buy their silence.

13. The FSA may wish to highlight the preclusion of 'gagging clauses' under PIDA (s.43J).

14. This provides that any clause or term in an agreement between a worker and his employer is void insofar as it purports to preclude the worker from making a protected disclosure. In particular it should be noted that it covers settlement or compromise agreements.

15. In practical terms, their most significant effect will be in clauses in settlement agreements where the employer seeks to stop the worker from contacting a prescribed regulator under s.43F. [2]

16. The risk to (and in) such gagging clauses is particularly clear where the employer's response to a concern raised internally is to dismiss the whistleblower and to cover-up the malpractice.

17. However employees may either be unaware of this provision or be persuaded that their settlement is at risk should they wish to talk to raise their concern with the FSA. The FSA may want to highlight the invalidity of gagging clauses under PIDA when promoting whistleblowing arrangements as a good governance tool and the circumstances in which an employee is protected when raising concerns with their regulator.

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[2] Where important issues are at stake and the employer is seeking an injunction to restrain the disclosure of confidential information, it is suggested that the key issue for the court will be the identity of the recipient of the disclosure. This is because under the common law, courts are most unlikely to restrain a worker disclosing confidential information to a regulator or to the police, even where it is unclear the worker is acting in good faith or with reliable evidence (see Note on s.43F, supra). Where the employer fears the worker will make a media disclosure, it will be open to the employer to seek an order or a declaration from the court that such a disclosure was not a protected one within this Act, even assuming the worker met the conditions in s.43G(1) and (2).