ALERT MEMORANDUM

Whistleblower Regulations in the U.K. and the U.S.

July 13, 2021

Prior to the COVID-19 pandemic, whistleblowers were at the center of many of the world's biggest headlines; Lux Leaks, the Panama Papers, and Cambridge Analytica to name but a few. The past 15 months have only increased the importance of effective whistleblowing programs, as the crises and disruption caused by the COVID-19 pandemic have provided a fertile ground for fraud and misconduct. In many cases, these risks have been heightened by working patterns since the wave of global lockdowns started in 2020; businesses' usual systems of supervision, which may have identified wrongdoing at an early stage, are likely to have been disrupted by the rapid switch to home working, providing an opportunity for misconduct to evade detection. Unlike the aftermath of previous severe market shocks (such as the 2008 financial crisis), whistleblower procedures are now an entrenched part of commercial life and their effective implementation is expected by regulators.

In recent months there have been important developments in whistleblowing in both the United States and the United Kingdom. The U.K.'s Financial Conduct Authority has increased its resources devoted to addressing whistleblower reports, and U.S. Congress has amended whistleblower laws to expand the protection available to whistleblowers. In this memorandum we review these recent developments and place them in the context of other whistleblowing laws on both sides of the Atlantic.

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Developments in the U.K.

The Public Interest Disclosure Act 1998 ("PIDA") is the principal legislation in the whistleblower area and protects whistleblowers from negative treatment or unfair dismissal. PIDA makes it unlawful to dismiss an employee if the reason for the dismissal is that the employee has made a "protected disclosure". It also shields employees and certain categories of worker from detrimental treatment (*e.g.*, victimization, harassment or bullying) on the basis they have made a "protected disclosure". A "protected disclosure" has two components:

1. *what was disclosed* — the worker must disclose information which they reasonably believe shows wrongdoing that falls under at least one of the following categories: i) the commission of a criminal offence, ii) non-compliance with a legal obligation (including regulatory requirements), iii) a miscarriage of justice, iv) health and safety, environmental damage or v) deliberate concealment of any of the above.
2. *who was the disclosure made to* — the qualifying disclosure must be made to an appropriate person or organization. PIDA encourages workers to make "internal" disclosures to their employer. Disclosures to third parties may also qualify as "protected disclosures" but in more limited circumstances which vary according to the category of third party the disclosure is made to.[1] Disclosures to the media for instance will only be protected in very narrow circumstances.

The definition of "worker" in PIDA is broader than in other employment rights under English law, and includes contractors, members of a limited liability partnership, trainees and agency staff. The worker must also reasonably believe the disclosure is in the public interest. Additionally, there is no financial cap on compensation in whistleblower claims, nor a requirement for a minimum period of service.

In 2016, the Financial Conduct Authority (the "FCA") and the Prudential Regulation Authority (the "PRA") introduced enhanced whistleblowing rules[2] as part of the Senior Managers and Certification Regime (the "SMCR"), which aimed to improve culture and governance in financial services. These rules require large banks, building societies and insurers to appoint a senior manager or director (preferably a non-executive director) as a "whistleblowers' champion", responsible for overseeing the integrity, independence and effectiveness of the firm's whistleblowing policies and preparing an annual report for the board. Other measures which firms subject to the SMCR must take include:

1. maintaining appropriate and effective arrangements for the disclosure of "reportable concerns" (which is widely defined and includes "protected disclosures" under PIDA, breaches of the firm's policies and procedures, breaches of the FCA's or PRA's rules and behavior that may harm the reputation or financial wellbeing of the firm);
2. ensuring whistleblowers are able to make disclosures confidentially or anonymously;
3. escalating reportable concerns where appropriate, including to the FCA or PRA;
4. maintaining whistleblowing policies and procedures;
5. providing staff with appropriate training regarding whistleblowing; and
6. ensuring that wording in settlement agreements does not deter staff from making a protected disclosure.

In addition to regulatory provisions that expressly address whistleblowing, a number of other regulations impose relevant obligations, such as FCA Principle 11[3] and PRA Fundamental Rule 7[4]. These rules create an obligation to deal with regulators in an open and cooperative way and to disclose to the

[1] A "protected disclosure" may for example be made to a list of "prescribed persons" (available here), which includes the National Crime Agency, the Serious Fraud Office, the Competition and Markets Authority, Her Majesty's Revenue & Customs and the Health and Safety Executive.

[2] *See* the FCA Handbook (at Chapter SYSC 18) and the PRA Rulebook (at 2A (Whistleblowing) of the General Organisational Requirements Part of the PRA Rulebook for CRR firms, and the Whistleblowing Part of the PRA Rulebook for Solvency II firms).

[3] U.K. FCA Handbook, PRIN 2.1 The Principles

[4] PRA Rulebook, Fundamental Rules

regulators anything of which they would reasonably expect notice, which would include relevant issues raised by whistleblowers when appropriate.

Whistleblowing procedures may also be relevant to criminal liability under the Bribery Act 2010 and the Criminal Finances Act 2017. Under the Bribery Act, a company may be criminally liable for failing to prevent bribery committed by an associated person. An accused company can provide a complete defense if it shows it had "*adequate procedures*" in place at the relevant time to prevent bribery. Guidance on the Bribery Act published by the Ministry of Justice[5] suggests that appropriate whistleblowing procedures will be an important element of a company's "*adequate procedures*".

A similar position prevails in relation to the Criminal Finances Act 2017, which imposes corporate criminal liability for failing to prevent the facilitation of tax offences. Guidance issued by H.M. Revenue and Customs[6] suggests that a company may be unable to defend itself on the basis that it had "*reasonable procedures*" in place to prevent the tax facilitation offences where those procedures did not adequately address whistleblowing.

U.K. regulators do not reward whistleblowers financially unlike their counterparts in the U.S. (with the exception of the U.K.'s Competition and Markets Authority which provides up to £100,000 for information relating to cartel activity). This approach appears unlikely to change. In 2014, the FCA and PRA published the findings of their research into the impact of financial incentives on whistleblowing, which firmly concluded that financial incentives for whistleblowers did not encourage whistleblowing or significantly increase integrity and transparency in financial markets.[7]

In March 2021, the FCA launched a new campaign (titled "*In confidence, with confidence*"[8]) which aims to encourage individuals to report potential wrongdoing directly to the FCA, and remind them that their confidentiality will be protected when doing so. The FCA's Mark Steward (Executive Director of Enforcement and Market Oversight) has emphasized the FCA will listen to and support all whistleblowers who "*shine a light on serious misconduct*",[9] and the campaign highlights the tools the FCA will employ to achieve this end. For the first time, whistleblowers disclosing matters to the FCA will have a dedicated case manager, and they will be able to meet with the FCA to discuss their concerns and receive optional regular updates throughout an investigation. The headcount on the FCA's whistleblowing team has been increased. The FCA's website has been updated to provide more comprehensive information for potential whistleblowers and its whistleblowing team is developing a confidential web form, increasing the ways in which whistleblowers can make disclosures to the regulator. In addition, the FCA has published new materials for firms to share with employees, and will use its events to highlight the campaign's messages. The FCAhas also produced a digital toolkit for industry bodies, consumer groups and whistleblowing groups which details i) how the FCA protects whistleblowers' identities, ii) when individuals should step forward and contact the regulator and iii) what the FCA does with the information shared.

The FCA's campaign adds clarity and intent to their expectations for whistleblowing procedures, and is recognition of the valuable function which whistleblowers are perceived to perform, as is also evident from recent enforcement action. In 2018, the FCA and PRA imposed a joint £642,430 penalty on Barclay's CEO Jes Staley, for his repeated attempts to uncover the identity of an anonymous whistleblower, which the regulators found constituted a failure to act with the due skill, care and diligence expected from a CEO[10]. Mr Staley's conduct also led to a $15m

[5] Ministry of Justice Guidance on The Bribery Act 2010, March 2011
[6] Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion, 1 September 2017
[7] Financial Incentives for Whistleblowers – Note by the FCA and the PRA for the Treasury Select Committee, July 2014
[8] https://www.fca.org.uk/news/press-releases/fca-launches-campaign-encourage-individuals-report-wrongdoing
[9] *Ibid*
[10] FCA Final Notice to James Edward Staley, 11 May 2018

penalty being imposed on Barclays by the New York State Department of Financial Services.[11]

The FCA has also recently emphasized that non-financial misconduct (such as sexual harassment) is a priority and part of its push to improve the culture in financial services, and that firms need to have appropriate whistleblowing procedures to address the issue.[12] Equally, recent speeches from the FCA's executive team have indicated that issues of diversity and inclusion are regulatory matters and that firms should "*create the right environment in which people of all backgrounds can speak up*"[13].

Despite such messaging, there are indications that companies in the U.K. still have some way to go in order to meet regulators' expectations. In a recent survey of whistleblowing cases in the financial sector, a third of employers ignored the whistleblower's concerns.[14]

On the horizon there is the prospect of changes to the current whistleblowing legislation in the U.K., which was described in a 2019 report[15] by the All Party Parliamentary Group for Whistleblowing[16] as "*complicated, overly legalistic, cumbersome, obsolete and fragmented*" and in need of radical overhaul. Three different draft bills are making their way through the U.K. Parliament, each proposing far reaching changes to the current whistleblowing laws[17] The bills seek to achieve this in different ways but some of the features which they propose include:

1. extensions to the scope of those entitled to whistleblower protection, and to the definition of a "protected disclosure" (to include for example reckless financial speculation, the gross waste or mismanagement of public funds and a serious misuse or abuse of authority);
2. the creation of new criminal offenses, for subjecting a person to detriment as a consequence of being a whistleblower or being a close relative of a whistleblower, and for failing to handle a protected disclosure adequately;
3. the repeal of PIDA; and
4. the constitution of an independent body with powers to set, monitor and enforce standards for whistleblowing, and to investigate complaints from whistleblowers.

Although it is not clear which bill, if any, will succeed in passing into law, this is a clear indication of the momentum for reform in this area of the law.

The EU Whistleblower Directive[18] (the "Directive") provides some context for the prospective reform of whistleblowing laws in the U.K. On 16 December 2019 the Directive entered into force, with the aim of fortifying inconsistent and fragmented safeguards for whistleblowers across the EU. Member states have until 17 December 2021 to implement the Directive into national law. The Directive is broader than PIDA in some key respects, for example the Directive:

1. protects certain categories of person which PIDA does not, such as volunteers, non-executive directors, self-employed contractors and job applicants;
2. applies to almost any organization (*i.e.*, private businesses employing at least 50 employees and all public entities);
3. requires internal reporting channels are established that allow for disclosures to be made;
4. specifies time frames for implementing follow up actions after receiving a whistleblowing report; and

[11] https://www.dfs.ny.gov/system/files/documents/2019/01/ea181218_barclays.pdf
[12] Letter from Megan Butler (FCA Executive Director of Supervision (Investment and Wholesale)) to the Chair of the House of Commons Women and Equalities Committee, 28 September 2018
[13] *Why diversity and inclusion are regulatory issues*, Speech by Nikhil Rathi, CEO of the FCA, 17 March 2021
[14] Silence in the City 2, Protect, June 2020
[15] All Party Parliamentary Group Report on Whistleblowing, July 2019
[16] Established in 2018 to consider the adequacy of whistleblower protection in the U.K.
[17] The Public Interest Disclosure (Protection) Bill was introduced by Dr Philippa Whitford MP, the Office of the Whistleblower Bill was sponsored by Baroness Kramer (Co-Chair of the All Party Parliamentry Group for Whistleblowing) and A Bill to Strengthen Whistleblowing Protection has been drafted by the whistleblowing charity Protect.
[18] Directive of the European Parliament and of the Council on the protection of persons who report breaches of Union law, dated 23 October 2019

5. reverses the burden of proof in court proceedings. Where it is established that a whistleblower has suffered a detriment, it is presumed that the detriment was made in retaliation for the whistleblower's disclosure, and it is for the employer to show the detrimental measure was taken on "duly justified grounds".

Following Brexit the U.K. is not obliged to implement the Directive into U.K. law, but it remains relevant for those companies with European operations, in particular where a consistent global whistleblowing policy is to be implemented across offices in different regions.

U.K. Statistics

During the period 1 April 2019 to 31 March 2020:

— the FCA received 1,153 whistleblower reports (consisting of 2,983 separate allegations). The FCA took significant action to mitigate harm in only eight of those cases[19];

— the PRA received 196 "protected disclosures". Two of those disclosures directly contributed to enforcement activity or other intervention, and a further 13 disclosures were of significant value and contributed to the discharge of regulatory activity[20];

— the Serious Fraud Office managed 128 whistleblowing disclosures, taking further action in relation to 121 of those[21]; and

— the Competition and Markets Authority received 16 disclosures. Ten of those cases led to further investigation or action.[22]

Developments in the U.S.

Various U.S. federal agencies have whistleblower programs. The IRS's Whistleblower Office under the 2006 Tax Relief and Health Care Act provides monetary incentives to whistleblowers who inform the IRS of those who fail to pay taxes owed.[23] Depending on the qualities of the entity or person that failed to pay their taxes, the whistleblower may receive up to 30% of the taxes and penalties owed. The CFTC Whistleblower Program started in 2010 provides monetary incentives for whistleblowers who provide information regarding potential violations of the Commodity Exchange Act.[24] The law also provides the CFTC whistleblower with a cause of action if their employer retaliates against them. Similarly, the Criminal Antitrust Anti-Retaliation Act of 2020,[25] the Occupational Safety Health Act of 1970[26] and, most recently in 2021, the Anti-Money Laundering Act[27] each provide retaliation protection for whistleblowers who provide information regarding violations of these laws. The whistleblowers' remedies include reinstatement to their previous employment and back pay. Additionally, some courts have permitted whistleblowers to recover punitive damages under certain whistleblowing laws.[28]

Significant in the modern development of whistleblower protections in the U.S. is the Sarbanes Oxley Act of 2002. It provides protection to employees of publicly traded companies who report company conduct that the employee believes violates an SEC rule or regulation or a federal law prohibiting fraud.[29] The whistleblower may inform a federal regulatory or law enforcement agency, Congress, or an employee with supervisory authority over the whistleblower.[30] The company may not "discharge, demote, suspend, threaten, harass or discriminate" against the whistleblower for providing the information.[31] The whistleblower may file a complaint with the Secretary of Labor alleging such retaliation. They must do this within 180 days of the retaliation or within 180 days of learning of the

[19] FCA Annual Report and Accounts 2019/20
[20] The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017 Annual Report, June 2020
[21] SFO Annual Report on Whistleblowing Disclosures 2019-2020
[22] CMA Whistleblowing Statistics: 2019 to 2020
[23] 26 U.S.C. §7623
[24] 7 U.S.C. §26
[25] 15 U.S.C. §7a-3
[26] 29 U.S.C. §660(c)
[27] 31 U.S.C. §5323(g)
[28] *See, e.g., McNett v. Hardin Cmty. Fed. Credit Union,* 2006 WL 2473000 (N.D. Ohio Aug. 24, 2006); *Worcester v. Springfield Terminal Ry. Co.*, 827 F.3d 179 (1st Cir. 2016).
[29] 18 U.S.C. §1514A(a)
[30] 18 U.S.C. §1514A(a)(1)
[31] 18 U.S.C. §1514A(a)

retaliation.[32] If the Secretary of Labor does not render a final decision within 180 days of receiving the complaint, the whistleblower may bring an action in a federal district court. If the whistleblower wins their retaliation claim, they are entitled to "all relief necessary to make the employee whole" including reinstatement, back pay, litigation costs, and reasonable attorney fees.[33] A whistleblower's rights under the act cannot be waived by "any agreement, policy form, or condition of employment."[34]

In 2010, Congress passed the Dodd-Frank Act. It amended the Securities Exchange Act of 1934 and was intended to "promote the financial stability of the United States by improving accountability and transparency in the financial system."[35] Dodd-Frank provided "a new, robust whistleblower program designed to motivate people who know of securities law violation to tell the SEC."[36]

Like Sarbanes Oxley, Dodd-Frank provides whistleblowers with protection against retaliation. However, to qualify for protection under Dodd-Frank, a whistleblower must make their report directly to the SEC. The Supreme Court made this clear in its 2019 decision, *Digital Realty Trust, Inc. v. Somers*.[37] In that case, a whistleblower alleged that they brought a retaliation claim against their employer under the Dodd-Frank Act. The Court found that the whistleblower was not entitled to Dodd-Frank retaliation protections because they had reported the alleged violation to the company's senior management rather than the SEC.

Dodd-Frank allows a whistleblower to bring a private right of action against their employer for retaliation as well. However, Dodd-Frank does not require administrative exhaustion like Sarbanes Oxley. Instead, a whistleblower may bring their claim directly to federal district court. If they prevail in their retaliation action, remedies include reinstatement, two times the amount of back pay, litigation costs, and reasonable attorneys' fees.[38]

Significantly, Dodd Frank introduced a financial reward system for whistleblowers. A whistleblower is eligible for an award when the SEC brings a judicial or administrative action that results in sanctions exceeding $1,000,000.[39] The SEC has discretion in determining the amount of the whistleblower's award. The Commission considers factors such as the significance of the information provided and the degree of assistance by the whistleblower in setting the award.[40] The whistleblower must receive no less than 10%, but no more than 30%, of the monetary sanctions imposed against the company.[41] Certain individuals are not eligible to receive a whistleblower award, including employees of a regulatory agency, the DOJ or law enforcement. Additionally, a whistleblower may not recover an award if they are convicted of a crime related to the judicial action or if they obtained the information through an audit and its disclosure would violate 18 U.S.C. 78j-1 (which provides the process by which an auditor is to report illegal activity).

U.S. Statistics[42]

- Over $562 million has been awarded to 106 whistleblowers and $2.7 billion in monetary sanctions have been imposed as a result of whistleblower reports since the program's inception;
- In 2020, the SEC received over 6,900 whistleblower tips. This was a 31% increase from 2018 (the second highest tip year) and a 130% increase from the program's first year, 2012.
- Tips have come from over 130 countries with the highest number of tips coming from Canada, the U.K., and China.

[32] 18 U.S.C. §1514A(b)
[33] 18 U.S.C. §1514A(c)
[34] 18 U.S.C. §1514A(e)
[35] *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 773 (2019) (quoting 124 Stat. 1376).
[36] *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 773 (2019) (quoting S. Rep. No. 111-176, pp. 38 (2010)).
[37] *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2019)
[38] 15 U.S.C. §78u-6(h)(1)(C)
[39] 15 U.S.C. §78u-6(a)(1)
[40] 15 U.S.C. §78u-6(c)(1)(B)
[41] 15 U.S.C. §78u-6(b)ba
[42] These statistics were obtained from the Whistleblower Program 2020 Annual Report to Congress from the SEC. Pursuant to Section 924(d) of Dodd-Frank and Section 21F(g)(5) of the Exchange Act, the SEC is required to prepare this report annually. The most recent report is for the 2020 fiscal year which covers the period 1 October 2019 through 30 September 2020.

— In 2020, $175 million was awarded to 39 individuals, which equaled 31% of total dollars ever awarded to whistleblowers under the program and 37% of the individuals ever to receive awards. Approximately two-thirds of the awards in 2020 were at or near the statutory maximum of 30%.;

— The largest award since inception is $114 million in 2020.

SEC 2020 Amendments

On 7 December 2020, the SEC made a number of amendments to the whistleblower program. These included:

— a presumption of awarding the statutory maximum for whistleblowers who furnished information resulting in awards of $5 million or less;

— allowing awards based on deferred prosecution agreements, non-prosecution agreements and settlement agreements; and

— a uniform definition of "whistleblower" as explained by the Supreme Court in *Digital Realty*, specifically requiring that a whistleblower report directly to the Commission.

Anti-Money Laundering Act of 2020

Earlier this year, Congress passed the Anti-Money Laundering Act ("AMLA"), which creates a financial award program for whistleblowers who provided information regarding potential money laundering activity. The AMLA amends the Bank Secrecy Act of 1970 and among other changes, provides that if an individual furnishes information that results in a DOJ action that results in monetary sanctions of over $1 million, the Department of the Treasury is to award the whistleblower an amount equal to no more than 30% of the total sanctions imposed. The information must be original and the whistleblower may provide it to their employer, the Department of the Treasury or the Attorney General. In determining the amount of the award, the Department of the Treasury is to consider the significance of the information, the degree of assistance that the whistleblower provided and the interests of the Department of the Treasury in deterring future violations of anti-money laundering.

Similar to other whistleblower programs, the AMLA provides retaliation protections for whistleblowers. An aggrieved whistleblower must first seek remedy from the Secretary of Labor and may file an action with a district court if the Secretary of Labor does not issue a final decision within 180 days. Available remedies include reinstatement, two times the amount of back pay, and litigation costs.

Conclusion – Looking to the Future

Recent developments in the U.K. and the U.S. suggest the importance of whistleblowing in the enforcement context has grown and is likely to continue do so. This is supported by an increase in the number of whistleblower reports in the U.S. and the U.K. over the last decade, the implementation of legislation in the U.S. focusing on whistleblower protections and awards, the prospect of the reform of whistleblower laws in the U.K., the expansion of whistleblower programs and the growing size and frequency of awards made to whistleblowers in the U.S..

Companies with international operations must remain vigilant for whistleblowing regimes across the globe that may impact their activities, and design their whistleblower programs accordingly. Recent developments such as the EU Whistleblower Directive remain relevant in this regard. Firms should be mindful that their whistleblowing procedures must be agile and move in tandem with shifting regulatory expectations and the evolution of the workplace. Companies will need to keep abreast of this developing area of law and regulation to ensure that they remain in international as well as domestic compliance, and with the spirit as well as the letter of the relevant rules.

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