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Navigating Whistleblower Protections Across The Atlantic

By **Lynne Bernabei and Kristen Sinisi**

Americans are used to thinking that the American legal system was developed separately from its origins in Great Britain's common law system. However, the parallel developments of protections for whistleblowers and development of requirements for corporate governance reveal more similarities than differences.

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In the wake of the 2007 subprime mortgage crisis in the United States that precipitated the global financial crisis, American lawmakers sought to curb financial firms' risk-taking through the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The act afforded broad protection to whistleblowers, in light of their ability to "provide a vital early warning system to detect and expose fraud in the financial system" and to "help root out the kinds of massive Wall Street fraud that contributed to the current financial crisis."

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At the same time, the global effects of the financial crisis hit hard in Europe and contributed to the European debt crisis in 2011. In 2013, the Libor scandal struck another blow to London's economy. The United Kingdom's Parliamentary Commission on Banking Standards (PCBS) reported that it "was shocked ... so many people turned a blind eye to misbehaviour and failed to report it." The PCBS recommended that institutions implement "robust and effective whistleblowing procedures" and clarify employees' internal duty to report wrongdoing. So, in 2015, the U.K.'s Financial Conduct Authority (FCA) and Prudential Regulation Authority of the Bank of England (PRA), two agencies charged with regulating the U.K.'s financial services industry, jointly established whistleblower rules applicable to deposit-takers with assets of 250 million pounds or greater and PRA-designated investment firms, among others.

Both the Dodd-Frank Act and the FCA's new rules provide whistleblower protections for financial industry employees who report fraud and regulatory breaches. Whereas the specific protections available to whistleblowers in the U.S. and U.K. differ somewhat, many of the protection mechanisms are remarkably similar. This article explores some of the significant developments in those protections and highlights areas ripe for improvement.

Anonymity and Confidentiality

Generally, employers must protect the identity of whistleblowers in both the U.S. and the U.K.

In the United States, the disclosure of a whistleblower's identity may be considered an adverse action which subjects an employer to claims of retaliation. In Halliburton Inc. v. Administrative Review Board, an employee reported the company's fraudulent accounting practices internally and subsequently to the U.S. Securities and Exchange Commission. The SEC opened an investigation, and Halliburton surmised that the employee was the source of the report to the SEC. Halliburton disclosed the employee's identity within the company, and as a result, his colleagues refused to work or associate with him. The ARB determined that Halliburton's disclosure of the whistleblower's identity constituted adverse action, and that the whistleblower's protected activity contributed to the adverse action. On appeal, the Fifth Circuit affirmed and held that disclosure of the whistleblower's identity was "harmful enough that it well might have dissuaded a reasonable worker from engaging in statutorily protected whistleblowing," regardless of the company's motive in making the disclosure. Similarly, SEC Rule 21F-9 permits whistleblowers to submit tips anonymously, and Rule 21F-7 prohibits the SEC from disclosing the identity of a whistleblower, except in limited circumstances.

The FCA's new rules also require covered firms to develop internal reporting systems capable of handling disclosures from anonymous whistleblowers and whistleblowers who request confidentiality. The systems must include mechanisms to ensure the firm does not seek reprisal against the whistleblower. Among other requirements, each firm must appoint a nonexecutive director as its "whistleblowers' champion." The champion bears responsibility for overseeing the firm's whistleblowing regime and ensuring its integrity and effectiveness,

including the efficacy of policies to protect whistleblowers from retaliation. The FCA has cautioned that evidence of reprisal against a whistleblower weighs upon the FCA's determination of whether a covered firm or its staff are fit and proper to perform certain controlled functions. Like the SEC, the FCA commits to protecting whistleblower identity from disclosure, unless a court order mandates it.

The FCA rules, which became effective only last year, and "aim to encourage a culture in which individuals raise concerns and challenge poor practice and behaviour," are already being tested by Barclays' American CEO, Jes Staley. Recently, Staley attempted to unmask the identity of an internal whistleblower who made protected disclosures about one of his recruits, using the bank's security team. Barclays formally reprimanded Staley, but the FCA's and PRA's investigations of Staley and the bank remain pending. Their much-anticipated decision will provide a glimpse into the seriousness with which the regulators intend to enforce the new regime and compel financial giants to change their corporate cultures from the top down.

Internal Reporting

Both the FCA and the SEC encourage whistleblowers to report internally through employers' established channels, but neither requires it. The regulators make clear that whistleblowers may report misconduct exclusively to the agencies. That means whistleblowers reporting to the FCA will remain entitled to protection, and whistleblowers reporting to the SEC will remain entitled to potential bounties. However, it remains to be seen whether U.S. anti-retaliation provisions apply to employees who report externally but not internally. In Somers v. Digital Realty, the U.S. Supreme Court will resolve the circuit split concerning whether the Dodd-Frank Act's anti-retaliation provision applies to individuals who report internally or only to those who report to the SEC. Arguments took place Nov. 28, 2017.

Presence of Counsel

Although the reasons differ, in both jurisdictions, companies increasingly permit a whistleblower's attorney to accompany him to investigative proceedings. Generally speaking, U.S. private-sector whistleblowers do not have a constitutional right to counsel during workplace investigations, absent some nexus between the employer and the government. Nonetheless, U.S.-based employers frequently allow counsel to accompany employees for practical reasons: to foster more cooperation from employees, to increase the credibility of their investigations, and to limit collateral attacks upon the investigative findings. In the U.K., counsel is specifically recommended where criminal or regulatory repercussions may result from the investigation. In fact, in-house counsel typically maintain a list of independent legal advisers for the employee's reference.

Settlement Agreements

Both the United States and the United Kingdom prohibit covered firms from requiring language in settlement agreements that would preclude whistleblowers from making protected disclosures to the relevant authorities. However, American firms attempt to circumvent this requirement by requiring whistleblowers to confirm in the body of settlement agreements whether they: (1) made protected disclosures to regulators, and if so, to whom; and (2) know of any information that could form the basis of a protected disclosure, and if so, require them to specifically list all such information. The FCA bans all such practices.

Culpability

Currently, neither the Dodd-Frank Act nor the SEC rules wholly exclude culpable individuals from whistleblower protections or SEC bounties, although the SEC does consider a whistleblower's culpability in determining the amount of the bounty to which he is entitled. The Financial Choice Act of 2017, which passed the House of Representatives earlier this year but has yet to gain Senate support, seeks to deny awards not only to whistleblowers who bore responsibility for violations, but also to those who had a duty to prevent the violation.

Since the FCA does not offer bounty awards to whistleblowers, the culpability concern is at issue only in litigation. In 2013, the U.K. repealed its requirement that whistleblowers make protected disclosures in good faith and opted to cover disclosures where the whistleblower reasonably believed the disclosure was in the public interest. Thus, a whistleblower remains entitled to protection even if he made his report in bad faith, although damages for bad-faith reports may be reduced.

Privilege in Internal Investigations

The rules of privilege applicable to internal investigations in the U.S. and the U.K. share many commonalities. From a broad policy standpoint, both sets of rules seek to protect confidential communications between attorneys and clients made for the purposes of seeking or providing legal advice, and to protect attorneys' working papers, prepared in anticipation of litigation. In practice, however, the privileges are markedly different; the legal trend in the U.K. has been to recognize a very narrow attorney-client privilege, whereas the U.S. courts often find that internal investigations are privileged.

The American attorney-client privilege extends to a much broader range of employees than does the British legal

advice privilege (LAP). Under English law, the courts narrowly define "client." "Clients" are not necessarily employees or even corporate officers, regardless of their seniority in the corporate hierarchy. Rather, in the U.K., "clients" include only individuals authorized to obtain legal advice on the corporation's behalf, including those who "direct the mind and will" of the employer.

Moreover, U.S. courts broadly apply the attorney-client privilege to cover communications made by or to attorneys during internal investigations, whereas such protections are more limited in the U.K. So long as obtaining or providing legal advice was one of the primary purposes — even if not the primary purpose — of an internal investigation in the United States, the privilege will attach. U.S. courts have reasoned that more than one primary purpose may exist and therefore have declined to distinguish communications made for providing legal advice from those made for business purposes.

Conversely, in the U.K., the LAP attaches only when the communication concerns a lawyer acting in his or her professional capacity. As such, practitioners encourage in-house counsel to segregate communications concerning business advice from those concerning legal advice, since only the former are protected. As one example, under English law, the LAP does not protect in-house counsel's notes of interviews with nonclient employees or former employees.

Criminal or regulatory investigations of the corporate organization can complicate matters in both countries. In the U.K., the work-product privilege, known there as the litigation privilege, applies to materials developed only when litigation already commenced or is reasonably contemplated. Although seemingly similar to the U.S. standard on its face, England has construed the "litigation" prerequisite to require adversarial litigation, which it has distinguished from regulatory investigations. Therefore, materials prepared by an attorney in anticipation of investigations are not protected (except to the extent the LAP applies). Late last year, the English High Court applied this principle to work product U.S.-based attorneys developed after they received SEC subpoenas and interviewed witnesses in the U.S., in preparation for the SEC's investigation. The court declined to extend the privilege, declined to apply American law, and ordered production of the materials.

Although the U.S. affords more protection to information obtained through an internal investigation than does the U.K., American corporations confront a different issue. In the context of regulatory or criminal investigations, they must decide whether to (1) maintain the confidentiality of their findings and preserve the applicable privilege; or (2) disclose their results to the investigative body, in hopes of being deemed "cooperative" for prosecutorial purposes, but at the risk of waiving the privilege.

Conclusion

In response to the global financial crisis, financial industry regulators in both the United States and the United Kingdom have implemented robust whistleblower regimes which seek to provide whistleblowers the necessary protection to speak up. While those systems differ in some material respects, they strive to further the same underlying policies and have largely developed parallel reporting mechanisms. Because the rules are still in their infancy, many questions remain unanswered, and the courts will clarify the protections only incrementally.

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