



Whistleblowing in financial services

When are letters of complaint about a member of staff a protected whistleblowing disclosure? This question recently tripped up CEO Jes Staley and engulfed Barclays in another scandal. **Alexandra Carn** considers recent rules about whistleblowing and the steps that relevant firms should be taking now.

On 10 May 2017 Jes Staley, the chief executive of Barclays, made a public apology concerning his role in trying to uncover the identity of a whistleblower that had made confidential and anonymous disclosures to the Barclays board. He now faces an internal investigation and investigations by the Prudential Regulation Authority and Financial Conduct Authority. Mr Staley's actions were against a background of increasing awareness of protection for whistleblowers and a raft of recent legislation specific to the financial services sector. However, it would appear that there is more work to be done.

The various new rules for financial services are contained in the PRA policy statement PS24/15 and the FCA Handbook SYSC 18 and came into force in March and September 2016. In summary the rules provide:

Whistleblowers' champion

Firms must appoint an individual with specific responsibility for systems and compliance for whistleblowing. The individual is required to make an annual report to the board.

Information and confidential channels

Staff must be informed of the whistleblowing services of the PRA and the FCA as well as their legal protection under the Public Interest Disclosure Act 1998.

Firms must also establish their own channels by which staff can make confidential and anonymous disclosures.

Settlement agreements

Terms in settlement agreements must:

- include a term stating that the agreement does not prevent the worker from making a protected disclosure; and
- not include any warranty under which workers are asked to confirm that they have not made a protected disclosure and that they do not know of any information that could lead to them making a protected disclosure (SYSC 18.5.1).

This may be of limited importance save as to highlight protections for workers, as contractual terms that seek



to preclude or limit the making of a protected disclosure are void in law in any event (Employment Rights Act 1996, section 43J(1)).

Training

Training must be provided and, specifically, training must include:

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

Managers should receive bespoke training on recognising whistleblowing disclosures, escalating them appropriately and ensuring that whistleblowers are not subjected to detrimental treatment. The FCA Handbook refers to the following, which must be included in any training:

- how to recognise when there has been a disclosure of a reportable concern by a whistleblower;
- 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; and
- (e) sources of internal as well as external advice and support on the matters referred to above (SYSC 18.3.4, FCA Handbook).

Small Business, Enterprise and Employment Act 2015

Together with firms, regulators have new duties as well. An amendment to the Small Business, Enterprise and Employment Act 2015 came into force on 1 April 2017, and the first period the amendment will apply to is April 2017 to April 2018.

This amendment provides that ‘Prescribed Persons’ must publish an annual report. Prescribed Persons include the Bank of England, the Competition and Markets Authority, the Serious Fraud Office, the FCA and the PRA among others. Publication must be on the relevant website or otherwise as appropriate to bring the report to the attention of the public. The report must disclose:

- (a) the number of qualifying disclosures received during the reporting period and how many of those were subject to further action by the Prescribed Person (regulations 5(a) and 5(b)); and
- (b) a summary of the action taken by the Prescribed Person with respect to the disclosures and how the disclosures have impacted on the relevant Prescribed Person’s ability to perform their functions and meet their objectives during the reporting period (regulation 5(c)).

What now for firms?

The compliance measures expected of firms are clearly set out and firms need to ensure that their internal procedures are working properly. This is more than just having a written policy and requires regular review, monitoring and active training.

The purpose of such policies is not just to protect individuals but also to protect the firms themselves. If there is a problem then firms should want to know about it and know about it as soon as possible. This only works if the employees understand how to bring matters to the attention of the firm and believe that their concerns will be handled properly. A firm that has early notification of a potential issue can move forward on the front foot in addressing the matter, including with the regulators, and this can be of very considerable benefit for management of matters and damage limitation.

Further, many firms have international offices. A matter raised in one jurisdiction may not have any obvious legal consequences in that jurisdiction, but may have very serious ones in another. Firms that operate in multiple jurisdictions need to ensure there is a central function which is capable of identifying and acting on potential legal

contraventions in all the jurisdictions that it operates, not just considering a disclosure in light of the local law where the issue was raised.

It is often asked if there is a duty to blow the whistle. For firms there is the longstanding obligation to inform the PRA and/or FCA of anything of which they should reasonably be aware. For most individuals there is no positive whistleblowing duty. However, the Senior Manager Conduct Rule 4, provides that a Senior Manager must “disclose everything of which the FCA or PRA would reasonably expect notice”. This imposes a positive obligation to raise relevant matters. It may be that to raise this internally is the correct first step, but given the prescribed accountability of Senior Managers, if matters are not addressed properly and promptly internally they may be left with no option but to raise matters directly with the regulator or face being in breach of the Conduct Rules.

Overarching all of this is how regulators will view and act upon a firm’s or indeed an individual’s approach to managing whistleblowing issues. This is something that will be taken into account when assessing the suitability of a firm for regulatory authorisation as well as the fitness and propriety of an individual.

Financial compensation

Pursuant to the Dodd-Frank Act 2010 any individual who provides “original” information to the United States Securities and Exchange Commission can receive an award of 10-30% of monies collected as a result of the information provided.

No such remuneration provisions exist here. The view of the PRA and FCA has been that offering financial incentives would be unlikely to increase the number or quality of the disclosures. The Serious Fraud Office adopts the same approach. The only exception is a policy introduced by the Office of Fair Trading in 2008 under which individuals may be offered financial rewards of up to £100,000 for providing information about cartel behaviour. The Competition and Markets Authority now operates this policy.

There has been an increase in cross-border enforcement activity in recent years (LIBOR and foreign exchange to name but a few cases) and in a world where transactions are increasingly digitalised, the trend can only continue. This may lead to more collaborative investigations and enforcement activity with various regulators worldwide.

A final note on the future. The European Commission public consultation on the benefits and drawbacks of whistleblower protection ended on 29 May 2017. The response to that consultation is awaited and may set the tone for the developing landscape in this complex area.

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