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4 Questions About Whistleblowing In The UK And Beyond

By **Chris Warren-Smith, Melanie Ryan, Matthew Howse, Sarah Bouchard and K. Lesli Ligorner** (May 16, 2018, 3:50 PM EDT)

In this article, Morgan Lewis & Bockius LLP lawyers from the U.K., U.S. and Asia consider developments in whistleblowing from their different regional perspectives. Chris Warren-Smith, deputy chair of the firm's white collar and corporate investigations practice, based in London asked questions of Melanie Ryan, a white collar crime and disputes partner in London, Matthew Howse, head of employment in London, Sarah E. Bouchard, labor and employment practice leader based in the U.S. and K. Lesli Ligorner, a labor and employment partner based in Shanghai.

Chris Warren-Smith

Q: We have some seen significant developments in whistleblowing regimes outside the U.S. in recent years. What is the current position in your region?

Ryan: The U.K. financial services sector provides an interesting example. Whistleblowing, and the protection of whistleblowers, has only really started to receive more attention from the U.K. regulators, the Financial Conduct Authority and Prudential Regulation Authority, in recent years. Whistleblowers working in regulated firms have historically been able to avail themselves of the reporting mechanism within their firms, in whatever form it existed, or by reporting directly to the FCA / PRA. However, it was not until October 2015 that whistleblowing rules were introduced into the FCA Handbook to formalize firms' whistleblowing procedures and they only became effective in September 2016. Those rules, which are aimed at encouraging a culture where individuals feel able to challenge certain conduct, apply predominately to larger dual regulated entities having assets over 250 million pounds. For most regulated entities, these rules are simply nonbinding guidance.

Ligorner: In general, Asia (which is made up of very disparate legal jurisdictions) does not protect whistleblowers. Japan is one of the more advanced in this area in that those who blow the whistle on corporate and even criminal misconduct should be protected from termination of employment in retaliation. However, the law is relatively toothless and not seen as an effective deterrent against retaliation.

Q: So, how much protection is there in practice for whistleblowers at the moment?

Bouchard: In the United States, significant protection exists for employees who "blow the whistle." The Sarbanes-Oxley Act and Dodd-Frank Act have complementary whistleblower protection provisions that

prohibit retaliation for making complaints about company fraud, but protect different types of whistleblowers. The Sarbanes-Oxley Act generally protects whistleblowers who raise internal complaints within their company, and the remedies include attorneys' fees, back pay and certain compensatory damages. Dodd Frank provides protection for whistleblowers who raise issues to the SEC, and that statute provides for double damages for employers who have been found to retaliate. There was some debate previously as to whether Dodd Frank covered whistleblowers who reported concerns internally, as well as complaints to the SEC, but the U.S. Supreme Court recently ruled that Dodd Frank only protects whistleblowers who make claims to the SEC.

Howse: While whistleblowing laws in the U.K. do not involve the payment of rewards as in the US, it is incorrect to suggest that the U.K. regime is risky for the individual. The Public Interest Disclosure Act 1998, which came into force in 1999, is based on the premise that whistleblowers will come forward provided that they are protected properly from retaliation by their employer for making the disclosure of information. Accordingly, the act provides statutory protection for workers reporting malpractices by their employers or third parties against victimization or dismissal. The dismissal of an employee or employee shareholder will be automatically unfair if the reason, or principal reason, for their dismissal is that they have made a "protected disclosure."

The act also protects workers from being subjected to any detriment on the ground that they have made a protected disclosure. The definition of a "worker" is very wide and includes employees as well as a wide range of other types of individual including independent contractors, agency workers and members of an LLP. While only certain types of disclosure fall within the definition of a "protected disclosure," a claimant who has been dismissed or suffered a detriment because they made a such a disclosure is entitled to compensation which is uncapped. Compensation is based on financial loss and the employment tribunals — the U.K. court that hears whistleblowing claims — have been willing to make a substantial compensatory award in respect of lost future earnings on the basis that the employee may not be able to recommence their career in their industry or at a similar level of compensation because their actions and the resulting publicity has resulted in them being viewed as "toxic" in the job market.

Ligorner: In Asian cultures, whistleblowers are seen as "traitors" and as disrupting the social harmony of the workplace, so culturally, it is taboo, unless one can do so anonymously and with little chance of being caught. In China, for example, many individuals — employees and other third parties — make anonymous reports. In China, there are financial bounties for reports of tax evasion and other forms of noncompliance, but complaints within the company tend to be largely anonymous, though complaints to the regulator are increasingly by named individuals. The regulator does not share either the identity of the complainant or the actual complaint with the company or individuals under investigation.

Until the culture changes and the rule of law becomes more dependable, protection for whistleblowers in exposing financial misconduct is unlikely to change, as the law is already on the books in many places.

Q: Is there evidence of increased regulatory enforcement activity outside the U.S. that can be linked to whistleblowing?

Ryan: The relatively recent changes in the financial services sector means it is perhaps not surprising that only a small number of whistleblowing reports made to the FCA have led to enforcement activity. The FCA stated in 2014 that most of the disclosures made to the FCA and PRA lead to supervisory rather than enforcement outcomes and less than 1 percent of whistleblowing cases lead to financial penalties being imposed. This trend appears to have continued. In 2016/2017, only 7 of the 900 whistleblowing

reports directly contributed to FCA enforcement activity or the protection of consumers through other intervention. This is not to suggest that whistleblowing does not play an important role in the financial services industry in the U.K., but its effectiveness in exposing wrongdoing is, as yet at least, not able to be readily measured.

Q: So what are the main differences between the U.S. and other regimes nowadays?

Bouchard: In Europe, whistleblower protection is less robust, with the exception of the United Kingdom. This is likely due to at least two factors. First, in the United States, employment is "at will," which means that employees may be fired for any reason so long as it is not a discriminatory one. Because employees have less protection from discharge than their EU counterparts, anti-retaliation provisions serve to fill in certain gaps based on fairness concerns. Second, in the United States, the public perception of whistleblowers is different than in certain other jurisdictions across the globe. In the United States, a whistleblower is generally viewed as someone who is helping to expose institutional misconduct and whistleblowing is generally viewed by both Republicans and Democrats alike as necessary, under certain conditions and limitations.

Ryan: The situation in the U.S. is quite different, the U.S. having a more developed and longer standing whistleblowing regime. The most notable difference between the two jurisdictions is the use by the U.S. of financial incentives and rewards for whistleblowers. Those rewards can be substantial — for instance, in November 2016, the SEC announced a $20 million reward for one whistleblower. Prior to introducing the whistleblowing rules into the handbook, the FCA consulted extensively with U.S. authorities on the question of financial incentives and ultimately decided that they would be unworkable in U.K. This marked difference, along with the different stage of evolution of the respective UK — US whistleblowing regimes, means that a meaningful comparison is difficult to make.

Ligorner: Asia generally does not offer protection of the type found in the U.S., nor financial incentives. In Hong Kong, there is no protection against whistleblowers and it remains relatively easy to exit an employee on notice or pay in lieu of notice, without providing any basis for the dismissal. This is an area that has not evolved, in spite of the developments in regulating conduct in the financial sector. Nor is there such protection in Singapore. Given the recent developments in Singapore in the enforcement areas for money laundering and corruption, protection for whistleblowers may be enacted in the future, but there is no indication of this coming anytime soon.
