UK Clients Can Benefit From US Whistleblower Law

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Introduction: UK employment and labor lawyers are in a unique position to help clients concerned about misconduct by their corporate employers. US law allows, in certain circumstances, for clients with information about corporate frauds to obtain financial rewards through US whistleblower programmes.

Following several high-profile financial scandals – including the Madoff and Alan Stanford Ponzi schemes that cost investors billions of dollars – the US Congress included within the Dodd-Frank Act of 2010 robust financial incentive programmes for individuals who provide significant and timely information concerning violations of US securities or commodities laws to US financial regulators.

Congress recognised that as financial frauds become less transparent and more complex, the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) need high quality, insider information and insights to help fight and deter practices that harm investors and undermine the markets.

The use of whistleblower incentives to fight significant frauds is not new in the United States. The False Claims Act of 1986, which creates liability for fraud against the US government, includes robust whistleblower ("qui tam") provisions and allows for nondiscretionary awards to qualified whistleblowers. Through whistleblower-initiated actions, the False Claims Act has recovered more than $50 billion in civil settlements and criminal fines in cases involving fraud against the federal government, such as defense contractor fraud and fraud in government healthcare programs.

The success of False Claims Act whistleblower cases created further impetus for the adoption of SEC and CFTC whistleblower programmes. Both Congress and the SEC believed a whistleblower award programme similar to the False Claims Act's would strengthen regulators' ability to fight fraud in the financial services industry.

Dodd-Frank amended the Securities Exchange Act of 1934 and the Commodity Exchange Act to create whistleblower offices in each agency and direct the SEC and CFTC to pay rewards to individuals who provide original, significant and timely information to them that leads to enforcement action and monetary sanctions. The law created separate funds for the SEC and CFTC that are used to pay the awards. Unlike other US whistleblower programmes, the funds used to pay whistleblower awards do not come directly from monies collected in the particular matter, so that injured investors are compensated as fully as practical.

Providing information about misconduct to enforcement authorities can cost people their jobs and careers, particularly on Wall Street, so Congress created substantial financial incentives to encourage individuals to take those risks and report wrongdoing to US authorities. Whistleblowers who provide information to the SEC or CFTC about wrongdoing may receive

awards ranging from 10 percent to 30 percent of the amounts recovered, whether through civil penalties or criminal fines, as long as the SEC or CFTC recovers a minimum of US$1 million.

To qualify as a “whistleblower” under the Dodd-Frank Act, individuals must provide “original information,” which may be derived from whistleblower’s "independent knowledge" or "independent analysis.” Independent knowledge is simply knowledge that is not available to the public and not already known to the SEC from any other source. In contrast, independent analysis is the examination and evaluation of information – public or not – that reveals information generally unknown or unavailable to the public. “Original information” specifically excludes information that is obtained in a manner that is determined by a court to violate applicable criminal law.

As a general matter, anyone with “original information” may qualify as a whistleblower. There are exceptions, however, for certain limited categories of individuals. These include: company officers and directors; lawyers; auditors and compliance personnel; foreign government officials; employees of the SEC, CFTC and the US Department of Justice and their family members; and accountants and auditors, if submission would be contrary to Section 10A of the Securities Exchange Act. Such individuals may not be able to qualify as a whistleblower unless they have a “reasonable belief” that it is their fiduciary duty to disclose information to regulators or they believe the entity is attempting to impede an investigation. They also may qualify as whistleblowers if they reported violations internally and the company has not addressed the violations within 120 days.

In addition, individuals who are “convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award” will not qualify for a reward. Congress felt strongly that individuals who are the architects of a fraud scheme shouldn’t be rewarded.

The SEC and CFTC welcome detailed, credible information about fraud and other violations of US securities and commodity laws, no matter the nationality or geographic location of the individual providing the information. The nationality of the whistleblower is irrelevant to qualifying for a reward. Four of the 14 whistleblower awards the SEC has made to date were to individuals living outside of the US – a point the SEC has highlighted. Just a few months ago, an individual (my client) from overseas received an award of over US$30 million from the SEC for blowing the whistle on a massive securities fraud.

As Sean McKessy, chief of the SEC’s Office of the Whistleblower, noted when he announced the record-setting whistleblower award in September, ‘This award of more than $30 million shows the international breadth of our whistleblower program as we effectively utilize valuable tips from anyone, anywhere to bring wrongdoers to justice. Whistleblowers from all over the world should feel similarly incentivized to come forward with credible information about potential violations of the US securities laws.’

Headlines from the financial pages about current government investigations reflect the types of wrongdoing that might be of interest to US authorities. Violations of likely interest are: price and rate-rigging -- be it LIBOR, foreign currency, electric power or any other type of commodity,

financial index or derivative instrument; bribery of public officials outside of the US; predatory execution and/or order-routing practices; fraudulent practices by asset managers and hedge funds; misevaluation of financial instruments; financial accounting frauds; mischarging of equities, options, futures and other derivative products; and many, many more.

In some cases, such as wrongdoing by international banks or foreign corrupt practices, both UK and US authorities may have jurisdiction. However, only the US offers a financial award to those willing to risk their livelihoods by stepping forward to regulators.

To encourage employees to report concerns internally rather than go to regulators, counsel for companies should examine internal compliance programmes to ensure that those programmes are responsive and effective. Research has found that more than 80 percent of employees who report misconduct to regulators raise their concerns internally first, but are ignored, rebuffed or retaliated against. The Tesco accountant who warned superiors months before the problem became a public scandal that the company was overstating profits is a good example of that. His concerns "failed to get traction" according to *The Sunday Times*.

In the past two years, the SEC has paid whistleblowers awards ranging from US$150,000 to over US$30 million. The CFTC has made only one whistleblower award so far, which was for US$240,000, but it is expected to make a number of sizeable awards in 2015.

The SEC and CFTC will award a larger percentage to those who provide very significant and reliable information in a timely fashion, and who, along with their legal teams, provide ongoing assistance during the federal investigation. Other considerations that will influence the size of an award include: whether the whistleblower's information saved the SEC or CFTC time and resources; the timeliness of the whistleblower submission and whether any delay in reporting was reasonable; and whether the whistleblower suffered any unique hardships as a result of stepping forward to regulators.

To encourage internal reporting, the SEC also will consider whether the whistleblower raised his or her concerns internally, to the extent internal reporting is reasonable or feasible.

At the same time, the SEC may reduce the award if the whistleblower unreasonably delayed reporting the violations to the SEC or interfered with or hindered the efforts of the company's internal compliance department to investigate the wrongdoing.

About 12 percent of the whistleblower submissions the SEC receives each year come from individuals outside the US, with the UK topping the list. Since the SEC Office of the Whistleblower was established in 2011, it has received submissions from more than 200 whistleblowers in the UK. Canada is second in the number of submissions from outside the US, with 166.

Under the Dodd-Frank Act, the SEC and CFTC are required to keep the identity of whistleblowers confidential to the fullest extent allowed by the law. In addition, whistleblowers may submit their information to both of those programmes anonymously. However, they must have an attorney representing them to do so. The SEC and CFTC programmes also provide

redress against employment retaliation provided that the US has jurisdiction over the retaliatory conduct.

There are certain limitations on who may qualify for an award. For example, foreign officials and employees of foreign state-owned entities are not eligible for SEC whistleblower awards. The SEC said in its rulemaking that it excluded those groups of employees to avoid creating 'the perception that the United States is interfering with foreign sovereignty . . . .'

Since the creation of the Dodd-Frank programmes, both the SEC and the CFTC have been very welcoming and responsive to whistleblowers who file substantive and detailed claims. However, the SEC receives several thousand whistleblower claims each year, so it is helpful to have legal counsel who is both familiar with the programme requirements and very experienced in the demands of fraud investigations and prosecutions to get the whistleblower's allegations the attention they deserve. Whistleblowers should not only file Form TCR with the SEC or CFTC, they should work with their lawyers to put together a strong case on the need for enforcement action and submit that, too. The stronger the case submitted, the more likely it is that the SEC or CFTC will investigate. No matter how strong a case, government investigations and legal proceedings can take years.

Whistleblowers may submit their claims anonymously, but if they do, they must have counsel whom the agencies can contact. Both the SEC and the CFTC are committed to keeping the identities of whistleblowers anonymous to the fullest extent allowed by law, but they would have to release the name if required in an administrative or court proceeding. Once the whistleblower matter is resolved and the minimum $1 million is recovered by the SEC or CFTC, the whistleblower is eligible to apply for an award. The agencies post notices of sanctions exceeding $1 million, so that those who believe they are eligible for an award may apply.

Whatever legal recourse clients have under UK employment and labor laws, counsel should consider whether a client might benefit from participating in the SEC or CFTC whistleblower programmes. The UK lacks meaningful whistleblower incentive programmes, which is why more and more Britons aware of financial fraud and wrongdoing are turning to the US.

Key:

1) Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203) - http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf
2) Whistleblower incentives section of the Dodd-Frank Act: 15 USC § 78u-6 and 7 USC § 26 (http://www.phillipsandcohen.com/SEC-Whistleblowers/SEC-whistleblower-provisions.shtml and http://www.phillipsandcohen.com/SEC-Whistleblowers/CFTC-whistleblower-provisions.shtml)
3) Securities Whistleblower Incentives and Protections (17 CFR Parts 240 and 249): http://www.phillipsandcohen.com/SEC-Whistleblowers/SEC-whistleblower-rules-76-FR-34300-6-13-2011-00033519.PDF
4) CFTC Whistleblower Incentives and Protections (17 CFR Part 165): http://www.phillipsandcohen.com/SEC-Whistleblowers/CFTC-whistleblower-final-rules-76-Fed-Reg-53172-00035069.PDF

5) "Inside the Mind of a Whistleblower," Ethics Resource Center, 2012. http://www.ethics.org/files/u5/reportingFinal.pdf
6) Record award to SEC whistleblower: http://www.phillipsandcohen.com/P-C-News/SEC-awards-Phillips-Cohen-whistleblower-client-30-million-to-35-million-largest-reward-yet.shtml and http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290#.VKFtFcA8QA
7) "Securities and Exchange Commission 2014 annual report to Congress on the Dodd-Frank whistleblower program." http://www.sec.gov/about/offices/owb/annual-report-2014.pdf
8) CFTC whistleblower award: http://www.cftc.gov/PressRoom/PressReleases/pr6933-14
9) Commodity Exchange Act, 15 U.S.C. §78u-6(c)(2)(B)
10) Securities Exchange Act, 17 C.F.R. 240.21F-6
11) 'Tesco ignored first warning of missing £250m,' Oliver Shah, *The Sunday Times*, 28 Sept. 2014, http://www.thesundaytimes.co.uk/sto/business/Retail_and_leisure/article1464572.ece

Extracts:

1) The nationality of the whistleblower is irrelevant to qualifying for a reward.
2) 'This award of more than $30 million shows the international breadth of our whistleblower program as we effectively utilize valuable tips from anyone, anywhere to bring wrongdoers to justice.' -- Sean McKessy, chief of the US SEC's Office of the Whistleblower