49. Rewards for whistleblowing

Caroline Bradley

1. INTRODUCTION

Whistleblowing involves a conflict between an employee's duties of loyalty to her employer and her duty to uphold the law – to participate in enforcement of the law by disclosing wrongdoing. When the disclosure involves issues of national security, as in the case of Edward Snowden,[1] governments, claiming to be guardians of the public interest, see employee duties of confidentiality (or non-disclosure) as consistent with the public interest.[2] Wikileaks[3] and Edward Snowden's disclosures have raised general questions about what citizens have a right to know about how their governments behave.[4] Governments may discourage or fail to encourage whistleblowing even where it might help to improve the quality of public services.[5] In these non-national security contexts governments which fail to encourage whistleblowing are more vulnerable to criticism. When governments have made commitments to open government and transparency (whether by proclamation, as in the case of the US, or by treaty, as in the case of the EU), these failures to encourage disclosures of wrongdoing and problems are especially significant.[6]

[1] See, e.g., William E. Scheuerman, 'Whistleblowing as Civil Disobedience: The Case of Edward Snowden' Philosophy & Social Criticism (2014) published online 8 June 2014 (DOI: 10.1177/0191453714537263) (noting the US Government's draconian response to Snowden's disclosures); Patrick Weil, 'Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a Case in the Courts' The Yale Law Journal Forum (23 April 2014).

[2] Cf. Alan M. Katz, 'Government Information Leaks and the First Amendment' 64 Cal. L. Rev. 108, 109 (1976) ('Discussion of information leaks most often focuses on national defense information, because national defense is the area in which the government presumably has the greatest interest in regulating the flow of information').

[3] See, e.g., Alasdair Roberts, 'WikiLeaks: the Illusion of Transparency' 78 International Review of Administrative Sciences 116 (2012); Mark Fenster, 'Disclosure's Effects: WikiLeaks and Transparency' 97 Iowa L. Rev 753 (2012).

[4] For a discussion of transparency see, e.g., Albert J. Meijer, Deirdre Curtin, and Maarten Hillebrandt, 'Open Government: Connecting Vision and Voice' 78 International Review of Administrative Sciences 10 (2012).

[5] See, e.g., House of Commons Committee of Public Accounts, *Whistleblowing* (HC 593, 1 August 2014) (noting that governments in the UK had sometimes failed to protect whistleblowers from victimization).

[6] On problems of transparency see, e.g., Caroline Bradley, 'Transparency Is the New Opacity: Constructing Financial Regulation after the Crisis' 1 Am. U. Bus. L. Rev. 7 (2011–2012).

Whistleblowing in the private sector does not involve the same type of conflict between different public interests.[7] Arguably duties to private sector employers should cede to the obligation to comply with the law – especially where breaches of the law carry criminal sanctions.[8] An employee who discloses insider trading, market manipulation, or sanctions-busting should not be criticized for breaching duties to an employer who, at the very least, did not work hard enough to prevent such activities. Whistleblowing in these contexts could help to improve compliance.[9]

Ensuring compliance with laws regulating economic and financial activity is a perennial concern for policy-makers and law enforcement personnel.[10] This concern has intensified as policy-makers increasingly rely on regulated financial firms as gatekeepers and aids to enforcement of a range of different objectives from the control of money laundering to the enforcement of sanctions.[11] Financial firms are required to know their customers and file suspicious activity reports,[12] and they are responsible for ensuring that they do not facilitate financial transactions in violation of sanctions[13] or to evade tax laws. But a number of visible examples of non-compliance with these obligations have threatened to reduce confidence in the integrity of the financial markets.[14] Similarly, concerns about ensuring the integrity of financial benchmarks involve an emphasis on ensuring compliance.[15]

---

[7] A potential whistleblower would need to weigh the risks of retaliation against a perceived duty to disclose. Employer retaliation may be counter-productive. See, e.g., Tina Uys, 'The Politicisation of Whistleblowers: A Case Study' 9 Business Ethics: A European Review 259, 259 (2000) (noting that retaliation may 'transform … a loyal employee into a political activist').

[8] Although cf. e.g., Orly Lobel, 'Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations' 97 Cal. L. Rev. 433, 434 (2009) (arguing that there is a 'deep ambivalence within judicial and statutory doctrines about the role of individuals in resisting illegality in their group settings').

[9] However, cf. Kate Kenny, 'Banking Compliance and Dependence Corruption: Towards an Attachment Perspective' Edmond J. Safra Working Paper No. 38 (6 March 2014) <http://ssrn.com/abstract=2405615> accessed 8 August 2014, at 27 (Whistleblowers suffer for disclosing wrongdoing: they are 'isolated, humiliated and cast out').

[10] Compliance is not a fee-generating activity. Cf Kenny, supra note 9, at 19 (noting that sometimes compliance personnel in banks are described as 'business prevention officers').

[11] See, e.g., Financial Action Task Force, *Guidance on the Risk-Based Approach to Combating Money Laundering and Terrorist Financing: High Level Principles and Procedures*, 2–3 (June 2007) ('A risk-based approach should not be designed to prohibit financial institutions from engaging in transactions with customers or establishing relationships with potential customers, but rather it should assist financial institutions to effectively manage potential money laundering and terrorist financing risks'); Maria Bergström, Karin Svedberg Helgesson, and Ulrika Mörth, 'A New Role for For-Profit Actors? The Case of Anti-Money Laundering and Risk Management' 49 J. Common Market Studies 1043 (2011).

[12] See, e.g., Basel Committee on Banking Supervision, *Sound Management of Risks Related to Money Laundering and Financing of Terrorism*, 9 (January 2014).

[13] See, e.g., Bank Mellat v. HM Treasury [2013] UKSC 39.

[14] See, e.g., United States Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, *Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts* (26 February 2014).

[15] See, e.g., Financial Stability Board, *Reforming Major Interest Rate Benchmarks* (22 July 2014).

Some commentators have argued that compliance may be improved through encouraging whistleblowing and, in particular, by paying rewards or financial incentives to whistleblowers. Paying rewards to whistleblowers may counteract the strong social pressures which favour silence.[16] For this reason policy-makers in the US have decided that in defined circumstances whistleblowers should be compensated. In other jurisdictions the situation of a whistleblower is more precarious as whistleblowers may infringe obligations of professional secrecy.[17] In some jurisdictions whistleblowers are protected from retaliation, but not remunerated for their efforts.[18] In the UK, the Parliamentary Commission on Banking Standards argued that whistleblowing should be encouraged,[19] but so far the UK's financial regulators are not persuaded that the payment of rewards to whistleblowers will in fact improve enforcement.[20]

2. REWARDING WHISTLEBLOWING: THE US

The US has long relied on private citizens as a component of law enforcement: bounty hunters are part of the cultural landscape.[21] Implied private rights of action have allowed citizens to act as 'private attorneys general' to enforce the law (even if the phenomenon has declined since the 1970s).[22] Provisions for multiple damages in antitrust suits encouraged litigation.[23] Class actions enabled groups of plaintiffs to join

---

[16] See, e.g., Kenny, supra note 9, at 22–23.

[17] See, e.g., Bradley J. Bondi, 'Don't Tread on Me: Has the United States Government's Quest for Customer Records from UBS Sounded the Death Knell for Swiss Bank Secrecy Laws' 30 Nw. J. Int'l L. & Bus. 1 (2010); Scott Schumacher, 'Magnifying Deterrence by Prosecuting Professionals' 89 Indiana L. J. 511 (2014).

[18] See, e.g., Terry Morehead Dworkin and A.J. Brown, 'The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws' 11 Seattle Journal for Social Justice 653, 655 (2013) (noting that the US approach 'contrasts sharply with the approach taken in Australia, where there are no rewards, and where, in addition to the institutional or structural model, law reform has focused on legitimating whistleblowing to the media as a means of inducing change').

[19] Report of the Parliamentary Commission on Banking Standards, *Changing Banking for Good* (Vol. 1, HL Paper 27-I, HC 175-I , June 2013) (Parliamentary Commission on Banking).

[20] Bank of England Prudential Regulation Authority (PRA), Financial Conduct Authority (FCA), *Financial Incentives for Whistleblowers: Note by the Financial Conduct Authority and the Prudential Regulation Authority for the Treasury Select Committee* (July 2014) (PRA/FCA Note).

[21] See, e.g., <http://www.dogthebountyhunter.com/> accessed 8 August 2014; Laura I. Appleman, 'Justice in the Shadowlands: Pretrial Detention, Punishment, and the Sixth Amendment' 69 Wash. & Lee L. Rev. 1297, 1308–1310 (2012) (although note that some states do not allow bounty hunters. Id. at 1309); Taylor v. Taintor, 83 U.S. (16 Wall.) 366 (1872).

[22] See, e.g., Jeremy A. Rabkin, 'The Secret Life of the Private Attorney General' 61 L. & Contemp. Probs 179, 180 (1998) (noting that '[f]or lawyers today, it is far less inviting to play the role of "private attorney general" than it was in the 1970s').

[23] See, e.g., Joshua P. Davis and Robert H. Lande, 'Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement' 36 Seattle U. L. Rev. 1269 (2013) (arguing that private antitrust enforcement has been effective in compensating victims and promoting deterrence).

together to enforce their rights in circumstances where individual suits would have been prohibitively expensive.[24] But commentators argued that many class actions were really nuisance suits designed to force businesses to agree to settlements to avoid the costs of litigation and Congress and the courts have limited the availability of class actions,[25] including securities class actions.[26] Policy-makers in the US worry about how to ensure the benefits of private enforcement while limiting its costs.[27]

Conceptually, rewarding whistleblowers for their disclosures is related to this idea of a private component to law enforcement.[28] Just as the possibility of treble or punitive damages[29] might encourage litigation the possibility of a reward may lead people to become whistleblowers rather than remaining silent. Indeed, writers about private law enforcement and whistleblowing often cite the US False Claims Act.[30]

When Congress enacted the Dodd-Frank Act in response to the global financial crisis it included new provisions in section 922 relating to rewards for whistleblowers,[31] to encourage people with knowledge of violations of the securities laws to help with the prosecution of the violations,[32] and similar provisions in section 748 with respect to violations of the Commodities Exchange Act.[33] There is some possibility for overlap of

---

[24] Cf. Samuel Issacharoff, 'Class Actions and State Authority' 44 Loy. U. Chi. L. J. 369, 371 (2012–2013) ('The class action offers an alternative form of collective organization to the state – without the elements of popular participation, political consent, and electoral accountability that justify governmental authority in a democracy').

[25] See, e.g., Wal-Mart Stores v. Dukes 131 S. Ct. 2541 (2011); Jean R. Sternlight and Elizabeth J. Jensen, 'Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?' 67 Law and Contemporary Problems 75–104 (Winter 2004).

[26] See, e.g., A.C. Pritchard, 'Securities Law in the Roberts Court: Agenda or Indifference?' 37 J. Corp. L. 105, 109–110 (2011–2012).

[27] See, e.g., David Freeman Engstrom, 'Agencies as Litigation Gatekeepers' 123 Yale L. J. 616, 619 (2014).

[28] Enforcement in the US clearly involves a mix of public and private elements. Cf. Margaret H. Lemos and Max Minzner, 'For-Profit Public Enforcement' 127 Harv. L. Rev. 853 (2014) (arguing that financial incentives affect public enforcement).

[29] For a discussion of punitive damages see, e.g., Robert J. Rhee, 'A Financial Economic Theory of Punitive Damages' 111 Mich. L. Rev. 33 (2012).

[30] See, e.g., Rabkin, supra note 23, at 197–199. See also, e.g., J. Randy Beck, 'The False Claims Act and the English Eradication of Qui Tam Legislation' 78 N.C. L. Rev. 539 (1999–2000). Cf. Mathew Andrews, 'The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations' 123 Yale L. J. 2422 (2014) (discussing implications of third party funding for false claims litigation).

[31] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010) codified at 15 U.S.C. Section 922 adds a new section 21F to the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.). The Sarbanes-Oxley Act of 2002 was an earlier attempt to encourage whistleblowing by employees of public companies by providing for protection from retaliation. See, e.g., Richard E. Moberly, 'Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win' 49 Wm. & Mary L. Rev. 65 (2007). The SEC had a bounty programme in place even before the Sarbanes-Oxley Act, but few applications for bounties were made. SEC, Office of Inspector General, *Evaluation of the SEC's Whistleblower Program* (Report No. 511, 18 January 2013) at v (SEC OIG Report).

[32] S. Rep. No. 111–176, at 110 (2010).

[33] Commodities Futures Trading Commission, *Whistleblower Incentives and Protection*, 76 Fed. Reg. 53172 (25 August 2011).

the two regimes as the same circumstances might give rise to regulatory action by both regulators.[34] The US Securities and Exchange Commission (SEC) and Commodities Futures Trading Commission (CFTC) rules implementing the Dodd-Frank whistleblower provisions are broadly similar.[35]

Under the Dodd-Frank Act the SEC may pay financial rewards to whistleblowers who provide information relating to a violation of the securities laws to the SEC which results in judicial or administrative action by the SEC under the securities laws that produces monetary sanctions exceeding $1,000,000. The SEC may pay a reward for 'original information' which is 'derived from the independent knowledge or analysis of a whistleblower' and 'is not known to the Commission from any other source, unless the whistleblower is the original source of the information'. The reward will generally be between 10 and 30 per cent of the amount of the monetary sanctions. Rewards may not be paid to whistleblowers who work for regulatory agencies, the Department of Justice, a self-regulatory organization, the Public Company Accounting Oversight Board, or a law enforcement organization, or to those who are convicted of a criminal violation related to the securities law violation in question. The statute aims to reward whistleblowers whose information was truly useful, and not those whose involvement in the acts in question are culpable. Initially whistleblowers may provide information anonymously, although they must disclose their identity before receiving any payment.

The SEC established an Office of the Whistleblower in August 2011, and has also issued regulations to implement the new rules.[36] The Adopting Release for the SEC's regulations noted that the SEC has received 240 comments on its proposals, many of which focused on the relationship between the whistleblower rules and internal corporate compliance programmes.[37] The Dodd-Frank Act had not indicated whether or not whistleblowers might be expected to work through internal compliance systems before making disclosures to the SEC. The SEC announced that it would provide incentives for whistleblowers to participate in internal compliance systems; for example, whistleblowers who do work through internal systems may receive increased rewards and those who interfere with internal compliance systems could see their rewards reduced as a consequence.[38] For employees of smaller companies the idea of reporting internally may be unrealistic because of the risk of retaliation.[39] Some

---

[34] See, e.g., SEC, *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34300, 34305 (13 June 2011).

[35] See, e.g., Thomas W. White et al., 'CFTC and SEC Whistleblower Bounties: Largely Similar But Important Differences Remain' (22 August 2011) <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=94288> accessed 8 August 2014. These are not the only US regimes for rewarding whistleblowers. See, e.g., Michelle M. Kwon, 'Whistling Dixie about the IRS Whistleblower Program Thanks to the IRS Confidentiality Restrictions' 29 Va. Tax Rev. 447 (2010).

[36] SEC, *Securities Whistleblower Incentives and Protections*, supra note 34, at 34300 (13 June 2011).

[37] SEC, *Securities Whistleblower Incentives and Protections*, supra note 36, at 34300.

[38] Id. at 34301.

[39] See, e.g., Chelsea Hunt Overhuls, 'Unfinished Business: Dodd-Frank's Whistleblower Anti-Retaliation Protections Fall Short for Private Companies and Their Employees' 6 J. Bus. Entrepreneurship & L. (2012).

commentators are concerned that employers may seek to limit whistleblowing through retaliation or through agreements with employees (even if the agreements are unenforceable) that undermine the SEC's Whistleblower Program and are inconsistent with the policy reflected in the Dodd-Frank Act.[40] Others worry that the Program may encourage employees to look to the SEC for rewards rather than working internally to fix compliance.[41]

As a result of comments, and in order to increase the possible number of awards, the SEC provided that the $1 million recovery prerequisite for awards could comprise two or more smaller recoveries.[42] Although the SEC had proposed to take a narrow view of when whistleblowers were coming forward voluntarily (in order to be eligible for rewards), commenters quibbled with the SEC's analysis of voluntariness. The SEC wrote that

> our final rule narrows the types of requests that that may preclude a later whistleblower submission from being treated as 'voluntary'. All requests from the Commission are still covered, as we believe that a whistleblower award should not be available to an individual who makes a submission after first being questioned about a matter (or otherwise requested to provide information) by the Commission staff acting pursuant to any of our investigative or regulatory authorities.[43]

In addition the rules provide that people who are subject to a legal duty to report information to the SEC are not eligible to be rewarded as whistleblowers.[44] Certain employees who are responsible for compliance are not eligible to be rewarded as whistleblowers,[45] nor are people responsible for outside audits who owe legal obligations to the SEC.[46]

---

[40] See, e.g., Jordan A. Thomas, Labaton Sucharow, *Petition for Rulemaking and the Issuance of a Policy Statement Regarding Certain Aspects of the Dodd-Frank Whistleblower Program* (18 July 2014) <http://www.sec.gov/rules/petitions/2014/petn4-677.pdf> accessed 7 August 2014.

[41] See, e.g., Rachel S. Taylor, 'A Cultural Revolution: The Demise of Corporate Culture through the Whistleblower Bounty Provisions of the Dodd-Frank Act' 15 Tenn. J. Bus. L. 69, 70 (2013) (arguing that 'Dodd-Frank's failure to meaningfully support internal reporting has an injurious effect on corporate cultures of trust and compliance'). Although cf. Justin Blount and Spencer Markel, 'The End of the Internal Compliance World as We Know It, or an Enhancement of the Effectiveness of Securities Law Enforcement – Bounty Hunting under the Dodd-Frank Act's Whistleblower Provisions' 17 Fordham J. Corp. & Fin. L. 1023, 1044 (2012) (doubting the effectiveness of internal compliance systems).

[42] SEC, Securities Whistleblower Incentives and Protections, supra note 36, at 34301.

[43] Id. at 34307.

[44] Id. at 34309.

[45] Id. at 34314 (noting that the exclusion promotes 'the goal of ensuring that the persons most responsible for an entity's conduct and compliance with law are not incentivized to promote their own self-interest at the possible expense of the entity's ability to detect, address, and self-report violations').

[46] Id. at 34314 ('The exclusion for auditors performing engagements required by the securities laws reflects the fact that these individuals occupy a special position under the securities laws to perform a critical role for investors. Further, as adopted, our rule permits such individuals to become whistleblowers under certain circumstances').

The SEC's Adopting Release covers 85 pages of the Federal Register, and a detailed analysis of the rules is therefore necessarily beyond the scope of this short chapter. The SEC's analysis of the issues of interpretation raised by the statute and attempts to balance the advantages and disadvantages of encouraging whistleblowing by means of financial rewards led to a complex set of rules.[47] This complexity is not unusual in US securities regulation, but analysing the complexities of the rules would be hard for prospective whistleblowers with no knowledge of securities regulation.[48] Whistleblowers need either a certain level of confidence in their ability to navigate the system or expert support.[49] The prospect of the financial rewards for whistleblowing seems to have engendered an industry of lawyer and non-lawyer representatives of prospective whistleblowers, which in turn has led to questions about whether the activity of representing whistleblowers should be regulated.[50]

The CFTC announced its first whistleblower payment in May 2014.[51] By that time the SEC had made a number of payments.[52] Evaluating how successful these programmes are is difficult. For example, when the SEC's Office of the Inspector General examined the SEC's programme and consulted other federal government agencies with whistleblower programmes to assess whether the amounts the SEC paid were appropriate it discovered that the agencies generally did not have an opinion about award levels as they were set by statute.[53] The SEC reports that it has received an

[47] The Government Accountability Project, which provides support to whistleblowers, states that whistleblowers and the lawyers who help them in seeking both remedies for retaliation under Sarbanes-Oxley and bounties can face 'very complex claims requiring sophisticated strategies and difficult decisions as to the timing of bringing multiple claims'. Government Accountability Project, *Banking Sector Accountability: Understanding and Handling the Complex 'SOX Plus One' Whistleblower Claim*, 6 (18 September 2013) <http://www.whistleblower.org/sites/default/files/BSA.pdf> accessed 7 August 2014.

[48] The SEC's Office of Inspector General has stated that: 'The implementation of the final rules made the SEC's whistleblower program clearly defined and user-friendly for users that have basic securities laws, rules, and regulations knowledge.' SEC OIG Report, supra note 31, at v. The Report notes that the user-friendliness of the system is improved by the website. Id. at 11.

[49] Cf. Kenny, supra note 9, at 16 (noting that 'Swiss whistleblower Rudolf Elmer, who spoke out against large-scale tax evasion in an offshore branch of Julius Baer bank' said 'there is no school for whistleblowers').

[50] See, e.g., Alison Frankel, 'Is SEC Whistleblower Program Underregulated?' (2 October 2013) <http://blogs.reuters.com/alison-frankel/2013/10/02/is-sec-whistleblower-program-under regulated/> accessed 8 August 2014.

[51] CFTC Press Release, 'CFTC Issues First Whistleblower Award' (PR 6933-14, 20 May 2014) <http://www.cftc.gov/PressRoom/PressReleases/pr6933-14> accessed 8 August 2014.

[52] See, e.g., SEC, *2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, 14 (SEC 2013 Annual Report) (noting that six awards had been paid to whistleblowers and that 'In each instance, the whistleblower provided high-quality original information that allowed the Commission to more quickly unearth and investigate the securities law violation, thereby better protecting investors from further financial injury and helping to conserve limited agency resources').

[53] SEC OIG Report, supra note 31, at 23.

increasing number of tips since the establishment of its whistleblower programme,[54] and has argued that whistleblowers have helped the SEC to stop frauds.[55]

3. UNCERTAINTIES ABOUT WHETHER REWARDING WHISTLEBLOWING IS EFFECTIVE: THE UK

Like other jurisdictions the UK has provided statutory protections from retaliation for whistleblowers.[56] In 2013 the Government worried that employees had too often taken advantage of the statutory protections in the Employment Rights Act 1996 to further their own private interests rather than the public interest,[57] and stated that in future whistleblowers would be required to act in the public interest.[58] In July 2013 the Government published a call for evidence on whistleblowing asking what changes (other than those in the Enterprise and Regulatory Reform Act 2013) should be made.[59] Respondents raised a number of concerns about the effectiveness of the existing rules. For example, the UK rules encourage employees to raise their concerns internally at first,[60] and respondents worried that whistleblowers might suffer from reprisals or might be deterred from making disclosures because the rules were unclear. Respondents also expressed concern that whistleblowers' disclosures were not acted on, and that some workers were excluded from the protections of the rules.[61] In 2014 the Government stated that it would include new provisions in the Small Business, Enterprise and Employment Bill,[62] including rules requiring prescribed persons (to whom disclosures may be made) to produce reports about whistleblowing.[63] However, some of the Government's responses to the call for evidence suggested that the necessary changes were cultural rather than legal.[64]

In the summer of 2013 the UK Parliamentary Commission on Banking Standards published its report on the culture of banking, expressing concern that employees of

---

[54] SEC 2013 Annual Report, supra note 52, at 8 (noting the receipt of 334 tips in fiscal year 2011, 3001 in 2012 and 3238 in 2013).

[55] SEC 2013 Annual Report, supra note 52, at 15.

[56] Employment Rights Act 1996, 1996 c. 18, Part IVA, as amended by the Public Interest Disclosure Act 1998,1998 c. 23 and the Enterprise and Regulatory Reform Act 2013, 2013 c. 24.

[57] Department for Business, Innovation and Skills, *Enterprise and Regulatory Reform Act 2013: Policy Paper*, 10 (June 2013).

[58] Id. at 11 ('In future, whistleblowing claims will only be valid where an employee blows the whistle in relation to a matter for which the disclosure is genuinely in the public interest. This will exclude breaches of individuals' employment contracts and breaches of other legal obligations which do not involve issues of a wider public interest').

[59] Department for Business, Innovation and Skills, *Whistleblowing Framework Call for Evidence* (July 2013) (BIS Call for Evidence).

[60] Department for Business, Innovation and Skills, *Whistleblowing Framework Call for Evidence: Government Response*, 9 (June 2014) (BIS Government Response).

[61] The Government proposes to add student nurses to the category of employees. Id. at 17.

[62] Department for Business, Innovation and Skills, *Whistleblowing Framework Call for Evidence: Government Response*, 7 (June 2014).

[63] Id. at 15.

[64] See, e.g., id. at 12, 18, 20.

financial institutions had failed to report wrongdoing,[65] and arguing that new measures were necessary to encourage whistleblowing.[66] The Government's call for evidence asked for evidence on the usefulness of financial incentives for whistleblowing,[67] noting that financial incentives were available in the US, but stating that it was unclear whether the financial incentives prompted disclosures.[68] A 'majority of respondents' opposed the introduction of financial incentives, suggesting that the introduction of a profit motive would corrupt the process, interfere with working relationships and have negative effects on the whistleblowing process.[69] Those who supported financial incentives seem to have been motivated by a desire to protect whistleblowers from adverse consequences of their actions rather than by wanting to pay them for disclosures.[70] The Government suggested that in due course it might consider financial incentives for specific circumstances or cases.[71]

The UK's FCA and PRA have agreed that whistleblowers should be encouraged and protected but have concluded that there is no empirical evidence to support paying financial incentives to whistleblowers.[72] They stated that research showed that most whistleblowers did not receive payments, that there was no empirical evidence that payments increased the number or quality of disclosures, that the governance structure for financial incentives was complex and costly, that whistleblowers incurred costs (although they could be limited by contingent fee arrangements) and that financial incentives might undermine effective internal whistleblowing systems.[73] In addition, the regulators said that financial incentives for whistleblowers would involve 'moral and other hazards' and that public policy norms in the UK were different from those in the US.[74] The conclusions were based on discussions with a number of US agencies and the secondment of an FCA staff member to the SEC,[75] and the note cites no academic literature on when payments might affect behaviour.[76] The 'British Bankers' Association and organisations representing whistleblowers' in the UK opposed financial incentives.[77] The regulators stated that they would develop plans to encourage

---

[65] Parliamentary Commission on Banking, supra note 19, at 45.

[66] Id. at 45–47. The Commission said that the FCA should research the impact of financial incentives in the US. Id. at 46–47.

[67] BIS Call for Evidence, supra note 59, at 16–17.

[68] Id. at 16.

[69] BIS Government Response, supra note 60, at 19.

[70] Id. ('Of those respondents who considered that the introduction of incentives would be appropriate as a form of reward, this view was formed mainly in light of the fact that the individuals are acting in the public interest not their own, yet suffer a personal detriment. Responses suggest individuals should be rewarded for any stress, loss or detrimental effects they have suffered as a result of blowing the whistle'). The Government thought such harms could be remediated through claims before an employment tribunal. Id. at 20.

[71] Id. at 20.

[72] PRA/FCA Note, supra note 20.

[73] Id. at 2.

[74] Id. at 3.

[75] Id. at 4.

[76] Cf. Uri Gneezy, Stephan Meier, and Pedro Rey-Biel, 'When and Why Incentives (Don't) Work to Modify Behavior' 25:4 Journal of Economic Perspectives 1–21 (2011).

[77] PRA/FCA Note, supra note 20, at 4.

whistleblowing,[78] and in early 2015 they published a consultation document recommending that UK banks, building societies, credit unions, PRA-designated investment firms and insurers with assets over £25 million be required to implement whistleblowing arrangements.[79] The consultation document stated that the regulators intended 'to encourage individuals to raise their concerns about wrongdoing by protecting them from unfair treatment, and in doing so, help firms manage their risks more efficiently by enabling alleged misconduct, dishonesty and illegal activity to be exposed at an early stage'.[80] Firms should designate a 'whistleblowers' champion', ensure that employment contracts and settlement agreements specify that whistleblowing would not involve a breach of contract, and inform employees about their rights to blow the whistle to the FCA or PRA, and that they would be protected if they did so.[81]

4. CONCLUSIONS

Financial incentives for whistleblowers are part of the regulatory tool-box in the US, but have not found the same acceptance elsewhere. Although the US False Claims Act qui tam action has its origins in English common law, the action was abandoned in England because it was perceived to encourage extortion and fraud.[82] This history may help to explain why the UK Government and regulators have been reluctant to reward whistleblowers. However, even in the US, where policy-makers have chosen to reward whistleblowing, whistleblowers are still vulnerable to employer retaliation, and the rules reflect some uncertainties about the employee's role, and about the appropriate balance between encouraging internal compliance and external enforcement.

---

[78] Id. at 6.

[79] Bank of England Prudential Regulation Authority and Financial Conduct Authority, *Whistleblowing in Deposit-Takers, PRA-Designated Investment Firms and Insurers*, Consultation Paper FCA CP15/4, PRA CP6/15 (February 2015)

[80] Id. at 5.

[81] Id. at 6.

[82] See, e.g., Beck, supra note 30 at 548 ('for centuries, qui tam legislation produced significant and recurring problems in England, such as widespread extortion of secret settlements and fraudulent or malicious prosecution of innocent defendants').