

## LOOKING AHEAD TO WHISTLEBLOWER PROTECTIONS IN 2019 - IS YOUR FINANCIAL INSTITUTION PREPARED FOR ANTICIPATED CHANGES TO WHISTLEBLOWER PROTECTIONS?

Focusing on developments and anticipated changes in the United States, United Kingdom, and the European Union to whistleblower protections, we consider the challenges in developing a global policy that will keep you from running afoul of whistleblower protections.

### The United States

There are a number of state and federal laws that protect employees who are whistleblowers from retaliation when they raise issues of wrongdoing. The laws are focused on a number of different industries and activities, including health care, the environment, and financial, but each includes the notion that someone who brings a claim of wrongdoing should be afforded protection.

An active area for whistleblowers is the financial services sector, and this is an area where the law continues to evolve.

#### *Digital Realty Trust – U.S. Supreme Court's View on Whistleblower Protections*

In February 2018, the U.S. Supreme Court issued its decision in *Digital Realty Trust, Inc. v. Somers* (No. 16-1276), and while it related to whistleblower reporting of violations of securities laws, it has been widely viewed as signaling a reduction in Whistleblower protections against retaliation. The U.S. Supreme Court took the position that an employee who reports violations of securities laws internally but not to the Securities and Exchange Commission is not protected from retaliation under the Dodd-Frank Act. Interestingly, the Dodd-Frank Act whistleblower provisions do not mandate that whistleblowers make their initial disclosure to the SEC, nor does the Sarbanes-Oxley Act. Generally, the position previously had been that whistleblowers who reported internally were protected. The decision, however, has been viewed somewhat negatively by those who see it as removing protections for whistleblowers who do not report outside their organization. In practice the decision does not remove any whistleblower protections but adds an

additional hurdle for whistleblowers in securing the protections afforded under the statutes.

#### *DFS Refocuses on Whistleblower Protections with 2019 Guidance*

On January 7, 2019, DFS issued its "Guidance on Whistleblowing Programs" to all institutions regulated by DFS.<sup>1</sup> The Guidance provides the "principles that all regulated institutions should account for when designing and implementing a whistleblowing program." DFS provides minimum considerations, many of which focus on protection for the whistleblower, including "(2) Strong protections for a whistleblower's anonymity," "(7) Protecting whistleblowers from retaliation," and "(8) Confidential treatment." DFS also notes the importance of having a "top-down culture" that supports whistleblowers coming forward as part of an overall approach to compliance. Financial institutions reexamining and enhancing their whistleblower policies and procedures would be wise to take into consideration the guidance provided by DFS. Those who do not are doing so at their own potential peril and at great financial cost. The one unknown is how the change in Superintendent at DFS may impact DFS' focus on whistleblower protections, but given the recent guidance issued, it seems unlikely that DFS would walk back from its current position and requirements for financial institutions.

### **The United Kingdom**

In November 2018, the Financial Conduct Authority ("**FCA**") issued its "Retail and Wholesale Banking: review of firms' whistleblowing arrangements,"<sup>2</sup> in which it identified areas of good practice and areas for improvement in relation to good practice generally, the whistleblowing champion's role, and training. In each of the "areas for improvement" the theme of inadequate protections or training/information about such protections for whistleblowers is apparent. The FCA encouraged firms to review its findings and consider the steps needed to improve their whistleblowing arrangements. Having reiterated its expectations and highlighted areas for improvement, the clear implication is that senior managers and firms can expect further enforcement action if they continue to fail to meet the necessary standards.

At the very end of 2018, the FCA signaled that it would be announcing details of its plans relating to how it deals with whistleblowers. The details of these whistleblower protections have not yet emerged; however, a *Financial Times* article suggests that there will be "significant improvements" with a focus on maintaining whistleblower confidentiality and improving senior oversight of investigations.<sup>3</sup>

A separate development in the UK in relation to the general whistleblowing legislation applicable to all employers is a judicial finding<sup>4</sup> that individual directors (and indeed any decision taking manager) can be found personally liable for the dismissal of a whistleblower, in addition to any liability on the part of the employing entity. Compensation in such cases is not subject to a cap, and in the case in question, the court ordered compensation in excess of £2m. Tactically it is

<sup>1</sup> [https://www.dfs.ny.gov/system/files/documents/2019/02/whistleblower\\_guidance.pdf](https://www.dfs.ny.gov/system/files/documents/2019/02/whistleblower_guidance.pdf).

<sup>2</sup> <https://www.fca.org.uk/publications/multi-firm-reviews/retail-and-wholesale-banking-review-firms-whistleblowing-arrangements>.

<sup>3</sup> <https://www.ft.com/content/3ebb9920-f4ae-11e8-ae55-df4bf40f9d0d>.

<sup>4</sup> Court of Appeal decision in *Timis v Osipov*.

anticipated that individuals will be joined with the employing entity in any whistleblowing detriment/dismissal claims as the legal threshold for establishing individual liability is lower than that for establishing corporate liability, and in addition, compensation for injury of feelings can be recovered, quite aside from the tactical pressure that this imposes.

## **The European Union**

Late last year also saw developments in the EU, with the European Parliament Legal Affairs Committee MEPs approving draft legislation<sup>5</sup> and early this year the European Council adopting a position on the directive on the protection of whistleblowers. The text of the proposed directive will be negotiated. Although in principle the final language of an EU directive designed to protect whistleblowers could be adopted by May 2019, experience suggests that the timetable is likely to be more protracted despite that a provisional agreement was reached between the European Parliament and the Member States on March 12, 2019.<sup>6</sup> The proposed directive provides that Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with the directive by May 15, 2021, at the latest.

Currently, only ten EU countries (France, Hungary, Ireland, Italy, Lithuania, Malta, Netherlands, Slovakia, Sweden, and United Kingdom) have a comprehensive law protecting whistleblowers, with Croatia enacting its Whistleblower Protection Act on July 1, 2019. Whistleblower protection in the remaining EU countries is more fragmented or provides for partial protection only, e.g., covering the financial services sector or a specific category of employees. An EU directive designed to protect whistleblowers across the EU should provide organizations with greater legal certainty regarding their relevant rights and obligations.

The EU's move toward protecting whistleblowers began in earnest in April 2018 with a focus on organizations with more than 50 employees (or of any size when operating in the area of financial services or vulnerable to money laundering or terrorist financing) being required to create "safe channels" for reporting wrongdoing with its "Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law."<sup>7</sup> The proposed Directive includes at Article 13, "Conditions for the protection of reporting persons," which recognizes the need for strong protections for individuals who seek to alert their organization and authorities to potential wrongdoing. Article 13 is likely a result of several instances widely reported in the press where whistleblowers were subject to retribution and court sanction, most notably in connection with the so-called "LuxLeaks."<sup>8</sup> The proposed Directive, furthermore, includes that Member States shall provide for effective, proportionate and dissuasive penalties applicable to natural or legal persons to ensure the effectiveness of the rules on whistleblower protection: "Penalties against those who take retaliatory or other adverse actions against reporting persons can discourage further such actions. Penalties against persons who make a report or disclosure demonstrated to be knowingly false are necessary to deter further

<sup>5</sup> <http://www.europarl.europa.eu/news/en/press-room/20181120IPR19504/eu-wide-protection-and-support-for-whistle-blowers>.

<sup>6</sup> [http://europa.eu/rapid/press-release\\_IP-19-1604\\_en.htm](http://europa.eu/rapid/press-release_IP-19-1604_en.htm).

<sup>7</sup> [https://eur-lex.europa.eu/resource.html?uri=cellar:a4e61a49-46d2-11e8-be1d-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:a4e61a49-46d2-11e8-be1d-01aa75ed71a1.0001.02/DOC_1&format=PDF).

<sup>8</sup> <https://ecpmf.eu/news/legal/luxleaks-appeal-fine-upheld-suspended-jail-sentence-reduced-for-key-whistleblower>.

malicious reporting and preserve the credibility of the system. The proportionality of such penalties should ensure that they do not have a dissuasive effect on potential whistleblowers."<sup>9</sup>

## **Looking Forward and Enhancing Whistleblower Policies and Procedures**

Regulators increasingly recognize the benefit that whistleblowers provide in uncovering wrongdoing, especially at financial institutions, and the expected developments in the United States, United Kingdom, and the European Union signal a trend toward greater protections for whistleblowers with serious and expensive repercussions for financial institutions, and individuals within those institutions, that fail to adopt and implement necessary protections.

---

<sup>9</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52018PC0218>.

## CONTACTS

### United States

**Michelle Williams**  
Counsel

**T** +1 202 912 5011  
**E** michelle.williams  
@cliffordchance.com

**Celeste Koeleveld**  
Partner

**T** +1 212 878 3051  
**E** celeste.koeleveld  
@cliffordchance.com

**Benjamin Berringer**  
Associate

**T** +1 212 878 3372  
**E** benjamin.berringer  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 2001 K Street NW,  
Washington, DC 20006-1001, USA

© Clifford Chance 2019

Clifford Chance US LLP

### Europe

**Floris van de Bult**  
Partner

**T** +31 20 711 9158  
**E** floris.vandebult  
@cliffordchance.com

**Sara Schermerhorn**  
Senior Advisor

**T** +31 20 711 9332  
**E** sara.schermerhorn  
@cliffordchance.com

**Ines Keitel**  
Partner

**T** +49 69 7199 1250  
**E** ines.keitel  
@cliffordchance.com

Abu Dhabi • Amsterdam • Barcelona • Beijing •  
Brussels • Bucharest • Casablanca • Dubai •  
Düsseldorf • Frankfurt • Hong Kong • Istanbul •  
London • Luxembourg • Madrid • Milan •  
Moscow • Munich • Newcastle • New York •  
Paris • Perth • Prague • Rome • São Paulo •  
Seoul • Shanghai • Singapore • Sydney •  
Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

### United Kingdom

**Alistair Woodland**  
Partner

**T** +44 207006 8936  
**E** alistair.woodland  
@cliffordchance.com

**Tania Stevenson**  
Knowledge Director

**T** +44 207006 8938  
**E** tania.stevenson  
@cliffordchance.com