

---

## Money talks: should the UK introduce financial incentives for whistleblowers?

NOVEMBER 14, 2016

In the years since the financial crisis, the topic of whistleblowing has been high on the public agenda. At the 2016 Anti-Corruption Summit earlier this year, the UK government committed to “*providing effective protections for whistleblowers*”, and reviewing the effectiveness of recent legislative changes in this area. For firms regulated by the Financial Conduct Authority (“FCA”) and the Prudential Regulation Authority (“PRA”), new rules relating to whistleblowers came into force in September which include requirements for certain firms to appoint a “whistleblowers’ champion”, and put in place internal whistleblowing arrangements to deal with disclosures at every level within an organisation.

We have yet to see whether the government’s promise of greater transparency and protection for whistleblowers will come to fruition, or whether the new FCA and PRA rules will aid those efforts. Certainly it is important to reassure employees that they will be provided with sufficient protection should they choose to blow the whistle on suspicious activity. However, in terms of actively encouraging individuals to come forward and make disclosures, the *status quo* may not go far enough. If the government intends to move beyond simply protecting whistleblowers from unjust treatment and actively encourage the practice and culture of whistleblowing, they may need to sweeten the deal.

### *Whistleblowing: the US model*

Enforcement agencies in the US have been especially vocal in recent years about the need to provide robust protection for whistleblowers. In September 2016, the US Securities and Exchange Commission (“SEC”) brought its first enforcement action based solely on retaliation against a whistleblower. Casino-gaming company International Game Technology agreed to pay a half-a-million dollar penalty after firing an employee for making a report to the SEC. Jane A. Norberg, Chief of the SEC’s Office of the Whistleblower stated that this case “*illustrate[d] the high priority we place on ensuring a safe environment for whistleblowers*”.

In addition, in a very public show of support for whistleblowing action, several US agencies have gone a step further by providing financial incentives for employees to blow the whistle. Under the

SEC's "Whistleblower Program", eligible whistleblowers can receive an award of between 10% and 30% of the financial sanctions brought in by the SEC for their information. The success of the SEC's programme is apparent: on August 30 2016, the agency announced that it had awarded more than \$100 million to whistleblowers since the inception of the programme in 2011. In return, the agency has received more than 14,000 whistle blower tips from individuals in the US, and in 95 other countries around the globe, and the tips have resulted in orders of more than \$500 million in financial remedies. Mary Jo White, Chair of the SEC, described the programme as *"a game changer for the agency...providing a source of valuable information to the SEC to further its mission of protecting investors, while providing whistleblowers with protections and financial rewards"*.

*How successful would a US-style model be in the UK?*

The numbers coming out of the US are certainly persuasive, both in terms of revenue generated for government agencies from whistleblowing tips, and payouts for individuals. The apparent triumph of the SEC's Whistleblower Program has led some to call for similar arrangements to be put in place here in the UK.

In the criminal sphere, there are clear drawbacks. There is a fundamental public policy issue of how to treat a whistleblower who has himself been implicated in criminal wrongdoing. This was clearly demonstrated in the US in the case of Bradley C. Birkenfeld, a former banker-turned-informant at UBS who served two and a half years in prison for his role in income tax evasion, after which he received a \$104 million whistleblower award from the US Internal Revenue Service. Even in a jurisdiction with an established system of financial rewards for whistleblowers, this decision was a controversial one. In addition, leaving aside the Bribery Act 2010, the threshold for convicting a company of an economic offence in the UK remains high. As such, companies are far more likely to contest any criminal allegations, potentially leaving the whistleblower vulnerable to cross examination and jury scrutiny.

By contrast, for UK regulators taking enforcement action on a civil standard of proof, the case for financial incentives for whistleblowers is stronger. In addition, the associated costs are dependent on useful information and tangible financial victories, agencies would benefit from first-hand information across a variety of organisations and industries that might otherwise be difficult to access, and it promotes a culture within organisations of transparency, particularly when it comes to junior staff reporting on misconduct at more senior levels of a business. The UK Competition and Markets Authority already offers rewards of up to £100,000 for information on cartel activity, although this is discretionary and reserved for exceptional circumstances. However, careful thought would need to be given to how to implement such a scheme more widely. Given the emphasis that is now placed on firms having robust compliance procedures and controls in place, it would be contradictory to encourage financially motivated whistleblowers to bypass those procedures, leaving firms with no opportunity to correct or manage issues.