

Being a whistleblowing champion

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The last decade has not been a halcyon one for financial services. The collapse of Lehman Brothers and PPI misselling are two scandals that have contributed to one of the most turbulent periods in the industry's history.

It is not only the public and politicians who were aghast at these events. Those close to the FCA say that that the regulator was astonished at the lack of individuals raising

concerns about these matters before they erupted into highly publicised scandals.

It would be churlish to suggest that these scandals could have been averted by individuals “blowing the whistle” – but had employees close to the heart of these matters had been able to provide the regulator with valuable intelligence, the effect of the scandals may well have been mitigated.

It is to address exactly that problem that the FCA has introduced the Senior Managers Regime, which takes effect on 7 September 2016. Every deposit taker (banks, building societies and credit unions) with £250m or more in assets must implement a raft of changes designed to encourage accountability. Insurance firms are also affected. In a comment lifted straight from the pages of Game of Thrones, the FCA say that the new regime is not designed to achieve “heads on sticks”. That said, if processes are not implemented properly, the buck stops with the Senior Managers who have been appointed by the firms, with the 300-odd words each have agreed as their “Statement of Responsibilities” being the principles they will be held to if things go wrong. Even if the Senior Managers Regime does not directly apply to your firm, it indicates the good practice principles that the FCA want the financial services industry to live by.

The FCA’s desire to reform and implement a culture shift is clear. The regulator wants to see the days of whistleblowers suffering personally for speaking out (whether through marginalisation, dismissal, or the tried and tested method of zero bonuses) – consigned to the same scrapheap as smoking in the workplace. It is on that basis that the FCA require firms to appoint a “whistleblowers’ champion” to ensure that staff know that they can raise their concerns internally or approach the regulators directly and not suffer as a consequence.

What is whistleblowing?

The types of disclosures that the FCA want whistleblowers' champions to be concerned with are wide ranging. They will include concerns about breaches of regulatory rules, failures to comply with the firm's policies or procedures, or any behaviour that harms or is likely to harm the firm's reputation or financial wellbeing. This is actually a wider definition of "whistleblowing" than under the Public Interest Disclosure Act.

Accordingly, the matters falling under a whistleblowers' champion's remit could range from a complaint from a senior colleague that a major pension fund lacks liquidity to meet its long-term liabilities, to a summer intern complaining that their lunch expenses have not been paid. Whilst this wide approach to allow disclosure on all types of topic sounds alarming, the FCA have been keen to emphasise that everyday differences of opinion or customer complaints do not need to be escalated through the whistleblowing arrangements – your firm will already have well-established procedures to deal with these.

I've been appointed as a whistleblowers' champion – what should I expect?

You will be relieved to know that it is not your job to judge whether a particular whistleblowing disclosure is genuine or not. Your responsibility is to ensure and oversee the "integrity, independence and effectiveness" of your firm's procedures for whistleblowing. You will be the figurehead that whistleblowers look to for protection – as it is your job to ensure that there are procedures in place to ensure individual complainants are protected from detrimental treatment.

No-one will expect you to change your job description to describe yourself as the "whistleblowers' champion", but make no mistake, this is a heavy responsibility. The FCA recognises

this, saying that it will only be heavy-hitters like non-executive directors who can become the whistleblowers' champion, and only Senior Managers need apply.

What practical steps can I take to ensure compliance?

- If you work in a large firm, you won't be required to be open to direct approaches from would-be whistleblowers – but think carefully about turning anyone away who approaches you with a concern. Of course, you will delegate much of your day-to-day whistleblowers' champion functions to trusted colleagues. But retain oversight over those who you delegate to – whether that is through regular catch-up meetings with them or formalising the arrangements by establishing a direct reporting line over them.
- If you work in a smaller firm, you'll be expected to take a more "hands-on" role – not only receiving disclosures personally, but tracking their progress and reporting back to whistleblowers where appropriate.
- You should regularly check on internal processes to make sure that all colleagues' disclosures are being handled properly. Work closely with business units to implement the new regime. Make sure that colleagues are aware of the FCA's own Intelligence Department (a.k.a. the FCA whistleblowing hotline) – whistle@fca.org.uk.
- Consider becoming a "mystery shopper". The FCA are likely to be impressed if you issue a test complaint as an anonymous member of staff to stress-check that the procedures are being implemented effectively.
- Watch out for whistleblowers being treated badly. Your duty will be to ensure there are proper procedures in place that to deal with all such types of disclosures from all types of person (including secondees, interns, volunteers, contractors, customers, agency staff, suppliers and even employees of competitors). If you

find out that a whistleblower has been marginalised, you will be required to find out why. Every year you should consider asking why zero bonuses have been awarded to staff and taking steps to investigate that this is not because they have made a complaint.

- Get authority and a budget. The FCA will expect you to take legal advice where appropriate. The likelihood is that if you are concerned about a whistleblowing matter in your firm, the FCA would not be satisfied with you only speaking to your firm's in-house General Counsel. So make sure that you have sufficient authority to be able to quickly take independent legal advice, without needing to seek approval from layer after layer of management.
- Protect yourself. Make notes. In your fast-paced role you may not be used to this practice, but in order to show that you've discharged your duties, you'll need evidence. Keep a diary of the steps you take in your new role.
- Be prepared for annual inspections. Your firm will be required to prepare a yearly report for the board on how its whistleblowing procedures have operated that year. So your performance in the role will be annually monitored. What's more, you'll be entitled to oversee the preparation of that report as part of your role as the whistleblowers' champion.
- Keep learning and arranging training. Not only will it be your responsibility to oversee the provision of training for your firm's UK-based employees and their managers, the FCA will expect you to undertake the necessary training courses to stay up-to-date on whistle-blowing developments. Informative training sessions are regularly delivered by lawyers and the whistleblowing charity, Public Concern at Work. Make sure that you plug any gaps in your knowledge to show that you are able to discharge your duties.
- Monitor what happens to departing employees. Ask to see

samples of the severance agreements your firm enters into with departing employees. While you won't be required to oversee every one of these, you should ensure that your firm does not have a practice of putting gagging clauses in these agreements to prevent former employees from blowing the whistle after they leave. You will need to monitor that your firm is complying with its duty to inform the FCA if it loses an Employment Tribunal hearing for victimising a whistleblower. Consider if any lessons can be learned from the findings of an Employment Tribunal claim.

- Be ready to challenge. You're now entering a phase of your career where rather than nodding along to management's suggestions, you'll have a duty to question and, even, challenge and change your firm's practices.

There is no regulatory duty on general staff to blow the whistle or a regulatory duty to investigate whistleblowing disclosures, but the number of disclosures is on the up. The number received by the FCA more than quadrupled between 2009 and 2014 from a total of just 276 in 2009 to 1,376 in 2014. Why the increase? There are a few potential explanations. Perhaps your colleagues are becoming more confident at raising disclosures and challenging where they see wrongdoing. Perhaps your colleagues are using disclosures to the FCA as a negotiating tactic. Either way, the trend is that whistleblowing is on the increase and the FCA want to see more of it.

One thing is for sure as a whistleblowers' champion – life won't be a hoot!

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