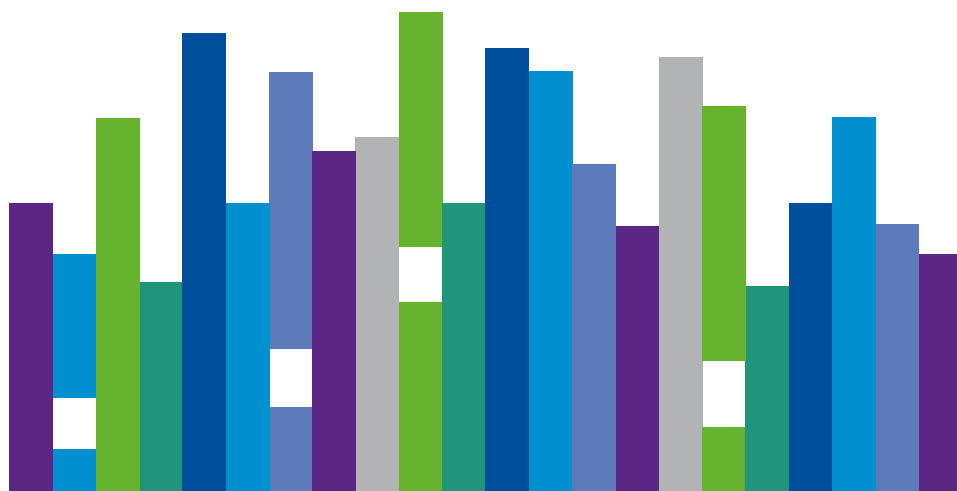


WHISTLEBLOWING

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Committee

Position paper
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WHISTLEBLOWING

This paper describes CFA UK's views on whistleblowing. Whistleblowing should be no different to reporting a crime, or a suspicion of crime, and calling the police. Normally in such cases there would be no negative consequences for the citizens reporting these incidents. Whistleblowing is different because of career risk; a risk not mitigated by the reality of legal protections available.

Whistleblowing is not a panacea. Had we more robust checks and balances in our financial system, the emphasis on whistleblowing would be decreased. CFA UK members have a duty to be good corporate citizens and should the need arise to report your concerns, the society will support you.

'Every organization faces the risk that something will go badly wrong and ought to welcome the opportunity to address it as early as possible... the first people to know of the risk will usually be those who work in or with the organization. Yet while these are the people best placed to raise the concern before damage is done, they often fear they have the most to lose if they do speak up.'

Public Concern At Work Report November 2013¹

Which scandals were exposed by the following whistleblowers?²

1. Sherron Watkins
2. Cynthia Cooper
3. Harry Markopolos
4. Michael Woodford

CFA UK appreciates the importance of whistleblowing; without the bravery of the type shown by the people mentioned above, some of the biggest financial scandals would have taken even longer to be uncovered. Ideally the act of whistleblowing should be akin to that of a person reporting suspicious activity in their neighbourhood to the police; a person reporting a suspected benefit cheat to the authorities or calling the fire brigade to report a fire. Unless intentionally done to waste the time of the emergency services, there would be no negative consequences for reporting these.

Either way there is little comeback for the person that made the report as long as they did so in good faith.

Where whistleblowing is different, is that there is considerable career risk. It is our view that the practice

does require special consideration given the difficulties and risks faced by those that speak. Good citizens have a duty to stand firm, and if necessary speak up, where inappropriate activity is suspected or detected. However, whistleblowing is not a panacea and had we more robust checks and balances in our financial system, the emphasis on whistleblowing would be decreased.

CFA UK members have a duty to be good corporate citizens and should the need arise to report your concerns, the society will support you.

LEGAL AND STATUTORY FRAMEWORK IS NOT ENOUGH

'I don't want any yes-men around me. I want everybody to tell me the truth even if it costs them their jobs.'

Samuel Goldwyn

The act of whistleblowing is in some ways similar to other situations where individuals can report actual or suspected inappropriate conduct. It is however, unique in that there are often competing duties (to the employer, to the client and to the public) and the employee is hardly independent of the employer. The close relationship between the employer and employee means that extraneous considerations may enter into the picture for both parties.

Ideally the act of whistleblowing should be akin to a person reporting suspicious activity in their neighbourhood to the police; a person reporting a suspected benefit cheat to the authorities or calling the fire brigade to report a fire. Unless intentionally done

¹Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK; Public Concern At Work, November 2013 <http://www.pcauw.org.uk/files/WBC%20Report%20Final.pdf>
² 1) Enron; 2) WorldCom; 3) Madoff; 4) Olympus

to waste the time of the emergency services, there would be no negative consequences for reporting in any of these instances and furthermore witnesses are protected from the perpetrators of crime. The relevant authorities should then investigate the report. If a crime has been committed they will take the matter further, otherwise the matter will be dropped. Either way there is little comeback for the person that made the report as long as they did so in good faith.

The issue with whistleblowing is that, although in our view it should be no different to the examples above, the fear of reprisal is very real, the career risk is significant and there is a lack of trust and confidence in the systems currently in place to investigate after the whistle has been blown. CFA UK is naturally concerned with the effectiveness of whistleblowing in the financial sector given our professional orientation. As the Public Concern At Work's (PCAW) own survey states³, the risks are acute in this sector. To encourage good corporate citizenship one has to assess the integrity of both the legal and statutory framework and the implementation, supervision and enforcement of that framework.

Some areas of the legal and statutory framework that may merit closer consideration include the following:

- » The Public Information Disclosure Act focuses on encouraging internal disclosure to employers at first instance, and creates a higher bar for external disclosure. There may be circumstances where a higher bar may not be warranted, such as disclosure to a regulator. It is also worth noting that the legislation does not include provisions requiring firms to compulsorily report whistleblowing claims or the outcome of the relevant internal investigations to a regulator.
- » The legislation focuses on actions that employers are prohibited from taking in response to whistleblowing claims from their employees. However, it does not impose obligations on firms to implement and monitor effective whistleblowing policies and procedures, or to ensure independence and authority of the compliance or appropriate department that is responsible for investigating and dealing with whistleblowing claims. It also does not incorporate mechanisms to provide positive incentives for firms to adopt appropriate whistleblowing procedures to encourage and protect whistleblowers (for

example requiring regulators to take into account a firm's prior treatment of past whistleblowers during an investigation).

- » The legislation does not clarify the extent to which confidentiality obligations can restrict the ability of employees to pass information to the relevant regulator, or any potential future liability of an employee who is unable to prove their claim. It is also currently not clear whether the act of gathering of information by an employee to substantiate their whistleblowing claims is protected.

IMPLEMENTATION, SUPERVISION AND ENFORCEMENT OF THE FRAMEWORK

The following quote highlights a point made above – there is no confidence that a whistleblower in financial services will be heard and that their career will not suffer:

'I realised the bank was moving too fast and I raised those challenges very strongly at board level. I also raised issues of cultural indisposition to challenge and inappropriate behaviours, and ultimately I was sacked... I raised and reported all of this whistle-blowing claim that I had with the FSA but they did nothing either.'

Paul Moore, former Head of Group Risk at Halifax Bank of Scotland

Any law or regulation needs to be supervised and enforced to be effective. It is vital that those affected by regulatory requirements for whistleblowing could be called upon to demonstrate that they act in the spirit and letter of the law.

It is both perception and reality that attempts at whistleblowing in the financial sector often create a disadvantage to those that made the reports. Within financial services all employees are bound by the money laundering requirements for individuals to report any suspicion (even without basis) of money laundering to the relevant officer which then has to take the matter further. Perhaps a similar duty on employees and a role of whistleblowing officer should be created for whistleblowing.

It may often be the case that there will be little confidence in the employer to handle a whistleblowing claim appropriately. The highest levels of management

³UK whistleblowing bankers 'ignored' and 'victimised' by employers', PCAW 20 May 2013 <http://fairwhistleblower.ca/content/whistleblowing-bankers-%E2%80%9Bignored%E2%80%99-and-%E2%80%9Bvictimised%E2%80%99-employers>

may be complicit in matters worthy of whistleblowing, and even where this is not the case, management may choose to bury, rather than deal with the issue. It is therefore essential that a whistleblower can turn to a regulator or their professional body or another representative. There are plenty of examples of individuals willing to act courageously to expose inappropriate conduct⁴ in all walks of life. However, the eventual resolution usually requires the intervention of external agencies. It is, then, of particular concern that, in the case of UK financial services, the regulator has a poor history of acting on claims made by whistleblowers. This is the case even when the whistleblowers are other regulators⁵.

In the wake of the financial crisis, more emphasis is being placed on whistleblowing by the new conduct regulator, the Financial Conduct Authority (FCA). The FCA is keen to break with the past and ensure that whistleblowing becomes a key part of its market intelligence. However, there are still some that believe that the new regulator's approach to whistleblowing may be more in word than in deed⁶.

There needs to be more clarity provided to potential whistleblowers surrounding the role of the regulator and other actors such as professional bodies, trades unions, charities and even the press. All of these might assist whistleblowers to expose inappropriate or illegal conduct but it is not always very clear when and how each should play its part. CFA UK is different and wants to support its members.

CFA UK MEMBERS DUTY WITH REGARD TO WHISTLEBLOWING⁷

Standard IV: Duties to Employers

(A) Loyalty

In matters related to their employment, members and candidates must act for the benefit of their employer and not deprive their employer of the advantage of their skills and abilities, divulge confidential information, or otherwise cause harm to their employer.

Guidance

Highlights:

- » Employer Responsibilities
- » Independent Practice
- » Leaving an Employer
- » Whistleblowing
- » Nature of Employment

Whistleblowing. A member's or candidate's personal interests, as well as the interests of his or her employer, are secondary to protecting the integrity of capital markets and the interests of clients. Therefore, circumstances may arise (e.g. when an employer is engaged in illegal or unethical activity) in which members and candidates must act contrary to their employer's interests in order to comply with their duties to the market and clients. In such instances, activities that would normally violate a member's or candidate's duty to his or her employer (such as contradicting employer instructions, violating certain policies and procedures, or preserving a record by copying employer records) may be justified. Such action would be permitted only if the intent is clearly aimed at protecting clients or the integrity of the market, not for personal gain.

Incident-reporting procedures. Members and candidates should be aware of their firm's policies related to whistleblowing and encourage their firms to adopt industry best practices in this area. Many firms are required by regulatory mandates to establish confidential and anonymous reporting procedures that allow employees to report potentially unethical and illegal activities in the firm.

Example (Whistleblowing Actions): Meredith Rasmussen works on a buy-side trading desk and concentrates on in-house trades for a hedge fund subsidiary managed by a team at the investment management firm. The hedge fund has been very successful and is marketed globally by the firm. From her experience as the trader for much of the activity of the fund, Rasmussen has become quite knowledgeable about the hedge fund's strategy, tactics, and performance. When a distinct break in the market occurs, however, and many of the securities

⁴ Top 10 whistleblowers <http://www.toptenz.net/top-10-whistle-blowers.php>
⁵ Bank Of England, Financial Services Authority Missed Warnings On Barclays Libor Scandal, Reuters, Posted: 07/02/2012 1:14 pm Updated: 07/03/2012 12:31 am http://www.huffingtonpost.com/2012/07/02/bank-of-england-fsa-barclays-libor_n_1643810.html
⁶ Split Caps: Regulators did know' by Paul Lewis, BBC Money Box <http://news.bbc.co.uk/1/hi/programmes/moneybox/2342631.stm>
⁷ The FCA's astonishing lack of MI on whistleblowing', Money Marketing, Paul McMillan, 30 May 2013 <http://www.moneymarketing.co.uk/regulation/the-fcas-astonishing-lack-of-mi-on-whistleblowing/071950.article>
⁸ Extracts from the Code and Standards, Tenth edition, 2010

involved in the hedge fund's strategy decline markedly in value, Rasmussen observes that the reported performance of the hedge fund does not reflect this decline. In her experience, the lack of any effect is a very unlikely occurrence. She approaches the head of trading about her concern and is told that she should not ask any questions, that the fund is big and successful and is not her concern. She is fairly sure something is not right, so she contacts the compliance officer, who also tells her to stay away from the issue of this hedge fund's reporting.

Comment: Rasmussen has clearly come upon an error in policies, procedures, and compliance practices in the firm's operations. Having been unsuccessful in finding a resolution with her supervisor and the compliance officer, Rasmussen should consult the firm's whistleblowing policy to determine the appropriate next step toward informing management of her concerns. The potentially unethical actions of the investment management division are appropriate grounds for further disclosure, so Rasmussen's whistleblowing would not represent a violation of Standard IV(A).

CALL TO CFA UK MEMBERS - THE WAY FORWARD

Of course in an ideal world there would be no need for whistleblowing. Whistleblowing is not a panacea but those that are courageous enough to do it should be protected. If they suffer they should be able to seek recourse, although linking detriment to whistleblowing is likely to be a challenge to prove. Without adequate protection whistleblowing will continue to be a limited source of intelligence about any firm's behaviour.

CFA UK members have a duty to be good corporate citizens. If members find themselves in a position where they detect or suspect inappropriate conduct please approach the society to seek support. By approaching CFA UK, you can at least mitigate some of the material risks involved with whistleblowing.



CFA Society
United Kingdom

INTEGRITY FIRST

We believe

- **Competence is critical**
- **Experience is valuable**
- **High professional and ethical standards are fundamental**

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shows you do too**

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