King & Spalding: transatlantic business crime and investigations November 2021 column

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King & Spalding's Special Matters and Government Investigations team shares its views on developments in transatlantic business crime and investigations.

Prospect of reforming UK whistleblower laws and best practices learned from the US

Introduction

Recent developments and calls for whistleblower reform across the globe evidence that protections and incentives for whistleblowers are more important now than ever. Most significantly, both sides of the Atlantic have seen a rise in fraud cases coming out of the COVID-19 pandemic. In the UK, the National Audit Office indicated that over £3 billon in furlough-related payments made by the government may have been stolen and

that the full extent of fraud against the government's furlough scheme will not become evident until at least 2023. Furthermore, the British Business Bank also identified at least £1 billion of fraudulent loan requests linked to the government's Coronavirus Business Interruption Loan Scheme and the Bounce Back Loan Scheme.

It is unclear how well the UK government is equipped to deal with the fast-rising level of fraud, particularly fraud perpetrated against the government. This is potentially exacerbated by the lack of whistleblower incentives built into UK legislation, in contrast to the US. Since the enactment of the False Claims Act in 1863, the US has not only authorised, but financially incentivised, whistleblowers to report violations of federal law. The US has dozens of whistleblower laws, but the most widely used protections and financial incentives are contained in the False Claims Act, the Sarbanes-Oxley Act (SOX), and the Dodd-Frank Act Wall Street Reform and Consumer Protection Act (Dodd-Frank). Key features of the US statutory framework include awarding whistleblowers a percentage (typically 10 to 30%) of total recovery and, in the case of retaliation against a whistleblower, awarding reinstatement, backpay, and other damages. Given these remedies, it's no surprise that international whistleblowers have taken notice, leading to a rise in whistleblower claims across the globe, with the UK being a consistent source of tips.

In contrast, UK legislation lacks whistleblower incentive provisions. Instead, whistleblowers rely on protections (but not incentives) under the Public Interest Disclosure Act 1998 (PIDA), which provides workers with protection against dismissal or victimisation for reporting malpractices by their employers or third parties.

The European Union (EU), in connection with the recent Whistleblower Protection Directive (*(EU) 2019/1937*), identified the UK as one of ten member states which has a comprehensive whistleblowing law in place. The aim of the Directive, which requires its member states to transpose the Directive into national law by 17 December 2021, is to provide employees across Europe with a minimum set of tools and level of protections to assist effective whistleblowing. These measures include:

- Introducing internal channels and procedures to ensure a whistleblower's identity is kept confidential.
- Prohibiting all forms of retaliation against whistleblowers.
- Identifying competent authorities to receive whistleblowing reports.
- Implementing effective penalties for employers which retaliate against whistleblowers or obstruct reports being made.

The Directive does not impose on member states the requirement to offer incentives, financial or otherwise, to whistleblowers. Given that the UK received this approval from the EU and is no longer obliged to implement the Directive following Brexit, it seems unlikely that any amendments will be made to PIDA.

Nonetheless, although the UK may have the **minimum** needed to assist effective whistleblowing and protect workers, this article explores whether the UK would be well

advised to adopt certain key features of US whistleblower laws that have been particularly successful, to better thwart fraud against the UK government and similar cases.

Overview of US whistleblower laws

False Claims Act

The False Claims Act, 31 USC §§ 3729-33, empowers individuals and entities to sue, on the government's behalf, any person who knowingly submits or causes to be submitted a false claim to the government, including overcharging the government for more than the services actually provided, submitting a false application for a government loan, or falsely certifying that work was performed according to contract terms. A violation of the False Claims Act can result in liability up to three times the amount that the government is defrauded and civil penalties of $11,665 to $23,331 for each false claim.

The False Claims Act incentivises and protects whistleblowers (known as *qui tam* relators) who report False Claims Act violations and initiate a civil suit. If the government recovers money as a result of a False Claims Act suit, the whistleblower can receive between 15 and 30% of the total recovery. An employee who experiences retaliation for reporting a violation of the False Claims Act is entitled to relief, including reinstatement, double back pay, and compensation for special damages.

The success of the False Claims Act can be attributed, in part, to the bounty-like system it established for the prosecution of fraudulent schemes. *Qui tam* lawsuits have resulted in some of the most significant recoveries to date under the False Claims Act. Indeed, so long as a civil case is not based on publicly available information, nearly any person can file a suit and share in the proceeds if the case is successful. Additionally, a person can remain anonymous because a False Claims suit is filed under seal and remains so while the government determines whether to pursue the claim itself.

A suit, however, must be filed within six years of the violation and must comply with a higher pleading standard; that is, the pleading must state with particularity the fraud that was committed. This requires a claim to specify who committed the fraud, the specific fraudulent conduct, where the fraud took place and when. One benefit of this higher pleading standard is that it prevents individuals from filing frivolous claims.

Once a claim moves to trial, it is judged on a "preponderance of the evidence" standard, which roughly translates to greater than 50% certainty that the claim is true.

Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Act, 12 USC § 5301, et seq, allows individuals to file a complaint with the SEC or the Commodity Futures Trading Commission (CFTC) if they know of a violation of US securities or commodities law. Under Dodd-Frank, an individual may file a civil suit on behalf of the US government for a violation of the FCPA, but also violations of the Securities and Exchange Act and the Commodity Exchange Act.

The whistleblower programs under Dodd-Frank contain similar incentives and protections to the False Claims Act and FCPA. Under Dodd-Frank, the Securities and Exchange Commission (SEC) or CFTC must first determine whether to investigate allegations arising from a whistleblower's suit. If the SEC or CFTC ultimately issues sanctions of $1 million or more, the whistleblower is entitled to 10 to 30% of any recovery made by the SEC or CFTC. Here too, whistleblowers are protected from retaliation. A whistleblower who experiences retaliation may be entitled to double back pay, reinstatement, reasonable attorneys' fees, and reimbursement for certain costs in connection with any litigation.

Dodd-Frank contains the same elements that make the False Claims Act and FCPA successful. Under Dodd-Frank, a whistleblower can hire an attorney to file their claim anonymously. Whistleblowers also share in the proceeds of a successful monetary sanction. Like under the False Claims Act, claims must be based on independent knowledge (that is, not publicly available information).

Foreign Corrupt Practices Act

The FCPA, 15 USC §§ 78dd-1, et seq, is a wide-reaching anti-corruption law that prohibits the payment of any bribe to a foreign official in order to influence an official act. The FCPA also requires companies whose securities are listed in the US to adhere to certain accounting provisions, including instituting adequate internal controls to prevent bribery and keeping accurate books and records.

US law provides incentives and protections to persons who report violations of the FCPA. While there are no specific whistleblower provisions within the FCPA itself, the whistleblower provisions introduced by SOX and Dodd Frank apply to persons who report FCPA violations. Under Dodd-Frank, a whistleblower who reports an FCPA violation to the SEC is entitled to the same monetary incentives and protections referred to above.

These mechanisms are especially successful abroad because the law's procedures provide whistleblowers the opportunity to remain anonymous. As noted above, whistleblowers can hire a US attorney to file an FCPA claim on an anonymous basis. The procedures allow the attorney to receive the whistleblower's information and redact any personally identifiable information before submitting the information to the FCPA while certifying its contents under oath. This protection is extremely important especially in situations where corruption is alleged to have occurred in countries where whistleblowers face danger from their governments or corrupt public officials.

US trends

Examining the trends of investigations and cases brought under the False Claims Act, the FCPA, and the Dodd-Frank, it is clear that the whistleblower provisions have been crucial to the success of those statutes, and have been most effective across industries such as healthcare and government-procurement fraud.

The volume of lawsuits filed under the *qui tam* provisions of the False Claims Act has remained significant, with 672 *qui tam* suits filed in 2020; an average of nearly 13 new cases every week, and a slight increase compared to FY 2018 (645) and FY 2019 (633).

As reported by the Department of Justice (DOJ), from 2017 to 2020, the government recovered approximately $11.4 billion under the False Claims Act across 993 settlements and judgments. *Qui tam* cases continued to serve as the predominant source of False Claims Act recoveries, accounting for approximately 80% of the DOJ's collections from 2017 to 2020, with *qui tam* relators receiving more than $1.54 billion as their share of these returns.

One of the more striking and persistent trends is the success of *qui tam* claims in the healthcare industry. The vast majority of settlements and judgments recovered by the DOJ between 2017 to 2020 related to matters involving the healthcare industry, including drug and medical device manufacturers, managed care providers, hospitals, and pharmacies. These cases included several high-profile settlements involving *qui tam* lawsuits. For example, in 2019, as part of a criminal resolution, Insys Therapeutics agreed to enter into a deferred prosecution agreement (DPA), pay a $2 million fine and $28 million in forfeiture, and have its subsidiary plead guilty to five counts of mail fraud. As part of a related civil resolution to settle allegations that it violated the False Claims Act (which also resolved five *qui tam* lawsuits), Insys agreed to pay $195 million. Both the criminal and civil investigations stemmed from Insys's payment of kickbacks and other unlawful marketing practices in connection with the sales, marketing and reimbursement of a sublingual fentanyl spray. The kickbacks allegedly took the form of jobs for the prescribers' relatives and friends, improper speaker programs and lavish meals and entertainment.

With such large recoveries for whistleblowers, it is no surprise that as the number of whistleblower claims in general has risen, so too has the number of international tips. For example, in 2013, a former executive made news when he received $48.6 million for providing information under the False Claims Act that his employer Ranbaxy Laboratories, one of India's largest pharmaceutical companies, failed to conduct proper safety and quality tests on certain adulterated drugs made at the company's manufacturing facilities in India and lied to regulators about its procedures. Similarly, in 2014, the SEC announced an award of $30 million to an international whistleblower, noting:

"This award of more than $30 million shows the international breadth of our whistleblower program as we effectively utilize valuable tips from anyone, anywhere to bring wrongdoers to justice. Whistleblowers from all over the world should feel similarly incentivized to come forward with credible information about potential violations of the U.S. securities laws." (*SEC: SEC Announces Largest-Ever Whistleblower Award (22 September 2014)*.)
And indeed they do feel incentivised. In 2015, the SEC received 421 international tips (or 10% of total claims) and by 2020, the SEC had received 751 whistleblower tips from abroad (or 11% of total tips). Notably, the UK has been a consistent source of international tips, with 84 tips submitted in 2020. These numbers confirm the strength of US whistleblower incentives, both locally and abroad.

UK system

Unlike the US, the UK's primary tools for combatting fraud against the government are contained within a patchwork of legislation that are frequently used together to bring

charges: the Fraud Act 2006 , the Theft Act 1968, and the Theft Act 1978. None of the three pieces of legislation contains specific whistleblower protections or incentives.

Fraud and Theft Acts

The Fraud Act came into force on 15 January 2007 and repealed several offences within the Theft Act 1968 and the Theft Act 1978. The Theft Acts define "theft" as dishonestly appropriating property belonging to another with the intention of permanently depriving the other of it (*section 1, Theft Act 1968*).

The wide interpretation of the elements of theft means there is a large overlap between theft and various offences within the Fraud Act, such as:

- Fraud by false representation (*section 2*).
- Fraud by failure to disclose information when there is a legal duty to do so (*section 3*).
- Fraud by abuse of position (*section 4*).

Other relevant offences of the Fraud Act include:

- Possession of articles for use in fraud (*section 6*).
- Making of supplying articles for use in fraud (*section 7*).
- Obtaining services dishonestly (*section 11*).

For further details on the elements of fraud by false representation, see *Practice note, Fraud by false representation.*

While there is overlap among the statutes, certain key differences impact a prosecutor's analysis when choosing the charging offence, including:

- The *actus reus* requirement for fraud is less than for theft.
- It is not necessary to prove or demonstrate the consequences (if any) of the fraud.
- There is no requirement to prove intent to permanently deprive within Fraud Act offences.
- Theft carries a lower minimum sentence than fraud.

Nonetheless, theft is not the only relevant offence within the Theft Act 1968. That Act also includes:

- False accounting (*section 17*).

- Liability of company officers for certain offences by the company (*section 18*).
- False statements by company directors (*section 19*).
- Suppression of documents (*section 20*).

It is therefore common for prosecutors to charge an actor under provisions in both the Fraud Act and the Theft Act 1968, for example, using section 2 of the Fraud Act (fraud by false representation) and section 17 of the Theft Act 1986 (false accounting) in relation to fraud against the government. For further details regarding the elements of theft, see *Practice note, Theft: basic offence*, and for false accounting, see *Practice note, False accounting*.

There are four possible bodies that can prosecute fraud:

- The Serious Fraud Office (SFO).
- The Police.
- HM Revenue & Customs (HMRC). However, this only covers tax fraud which is excluded from the scope of the US False Claims Act.
- The Financial Conduct Authority (FCA). However, the FCA does not act on behalf of the Crown; if the fraud falls within the remit of the FCA, it may still choose to prosecute where the UK government may be the victim.

Public Interest Disclosure Act

While the foregoing fraud statutes lack whistleblower protections or incentives, PIDA provides workers with protection against dismissal or victimisation for reporting malpractices by their employers or third parties.

Protections include the ability to claim unfair dismissal if their contracts are terminated as a result of the disclosure, as well as the ability to claim detrimental treatment for actions such as refusal to offer promotion, facilities or training opportunities.

A whistleblower must have made a qualifying disclosure in order to gain protection under PIDA. For more information see *Practice note, Whistleblower protection*.

Private prosecutions

Notably, unlike the False Claims Act, there is no *qui tam* provision allowing a whistleblower to bring a case on behalf of the government. Instead, an individual may commence prosecution by means of private prosecution, under section 6(1) of the Prosecution of Offences Act 1985. The first such private prosecution under the Fraud Act was brought fairly recently in 2016 by the Architects Registration Board against an individual intentionally attempting to register as an architect by fraudulently creating and

then using false documents (see *Architect's Journal: Architect fraudster reprimanded by court (4 April 2016)*).

Private prosecutions are rising in the UK but are still not commonplace, nor do they bring the benefits enjoyed by those bringing a *qui tam* case in the United States, such as whistleblower protections and the possibility of receiving up to 30% of any damages recovered.

Instead, private prosecutions are primarily brought by a victim of crime or fraud, and although providing control and autonomy of the proceedings, the process can be extremely costly. Private claimants do not enjoy the powers that prosecuting authorities do, such as the power to obtain documents and compel interviews.

A private prosecution may result in a custodial sentence, a confiscation order or a compensation order. A confiscation order may be used to deprive a defendant of unlawful gains. A compensation order may be ordered if there has been personal injury, loss or damage to the victim. A successful private prosecutor may also be entitled to recover costs from either the state or the defendant.

Private prosecutions are ultimately an unsuitable option because, in order to instruct a private prosecutor to serve and commence proceedings, the person initiating the proceedings is normally the victim of crime or the victim of fraud. In some special circumstances, a body, such as a charity, that has a direct interest in pursuing the case and which may have specialist expertise, may also commence proceedings.

Incentives to report

While PIDA contains whistleblower protections, it does not financially incentivise whistleblowers in the same way that the US mechanisms do, such as allowing a successful whistleblower to recover up to 30% of the damages recovered following prosecution. Indeed, the only current whistleblowing incentive within the UK system sits with the Competition and Markets Authority, which may reward individuals with up to £100,000 (in exceptional circumstances) for information about cartel activity. The SFO, FCA, and the Police do not offer rewards for whistleblowing in relation to fraudulent activity.

Arguably, there is little to incentivise corporates (whose case may be prosecuted by the Crown Prosecution Service (CPS) or SFO) to self-report fraud. A DPA may be available to companies who have committed the most serious of offences if they self-report and co-operate with the ensuing investigation, but this incentive is not guaranteed, and unlike in the US requires court approval.

A DPA is also not available to individuals. Furthermore, the recent succession of failings by the SFO to successfully prosecute individuals after reaching a DPA with a corporate may discourage corporates from co-operating so readily. A recent example is the DPA entered into by Serco Geografix Ltd whereby it admitted to three offences of fraud contrary to section 2 of the Fraud Act and two offences of false accounting contrary to section 17 of the Theft Act. Under the DPA, Serco Geografix paid £19.2 million but, in April 2021, a trial against two former directors collapsed when a judge directed the jury to return a not guilty verdict.

Corporates may start to question whether the prosecutor can successfully demonstrate that the identification principle (the requirement to identify and establish a directing mind and will of the company and prove corporate criminal liability through their conduct and state of mind) has been satisfied and whether they might fare better at trial than by agreeing to a settlement.

Is it time for a False Claims Act in the UK?

Recent studies and reports suggest that economic crime, in particular fraud, is on the rise. KPMG noted that procurement fraud rose by 200% from 2019 to 2020 and that misappropriation of assets was another rising crime (*KPMG: Only £724 million of fraud hit UK Courts in 2020 despite lockdown fraudsters taking advantage of consumer uncertainty (19 January 2021)*). Despite this, the number of fraud cases the courts heard in 2020 dropped by 51%, indicating a backlog.

Roy Waligora, Head of UK Investigations at KPMG, commented that:

"the value and volume of fraud cases is not reflective of a downturn in economic crime, but rather a fallout following the COVID-19 lockdown restrictions on the courts."
It is unclear how well the UK government is equipped to deal with the fast-rising level of fraud, particularly fraud perpetrated against the government. There are a number of reasons for this, including:

- **Scarcity of resources.** The CPS alone has had its budget cut by 25% since 2010, with reductions also seen in the number of CPS lawyers employed.
- **Complexity of fraud.** The complexity of some frauds can often mean a significant investigation cost, particularly if those investigating lack sufficient knowledge to investigate efficiently.
- **Limited remit of the SFO.** The SFO only focuses on very large, complex fraud cases which usually have a multinational element. It leaves room for less-valuable, purely domestic fraud cases to slip through the net where the police do not have the resources to investigate.
- **Evidentiary Hurdles to Prosecuting Fraud.** The requirement for the prosecution to demonstrate the guilt of a "directing mind and will" of a company in order to secure convictions committed by corporates is difficult. Lisa Osofsky, the Director of the Serious Fraud Office, has criticised "antiquated fraud laws". In 2020 she said: "I wish we had some of the lower [evidential] standards for fraud because we have a very antiquated system... In fraud cases I've got to have the controlling mind of a company before I can get a corporate in the dock. That's a standard from the 1800s, when Mom and Pop ran companies. That's not at all reflective of today's world." (*'Antiquated' fraud laws thwarting justice, says SFO director, Law Gazette, 5 February 2020*.)
- **Inadequacy of Action Fraud.** Action Fraud is the tool used by the government for victims and interested parties to report fraud. The City of London Police oversee Action Fraud, but there have been criticisms about the training and suitability of

those who review potential cases. In addition, it is routine for the Action Fraud team to refer potential fraud cases back to local police forces, which means there is no specialised fraud team investigating these matters.

Some or all of these obstacles could be alleviated by adopting provisions similar to US whistleblowing mechanisms. The success of the US statutes, particularly the False Claims Act, is attributable to a number of factors, including:

- **Options for pursuing a claim.** There are multiple routes through which an action under the False Claims Act may be brought. The government itself may bring a civil claim, a private party may initiate the action through filing a civil complaint, which the government has the option of taking over. If the government declines to intervene, then the private party may choose to pursue the case itself.
- **Approach to damages.** The US courts award large damages, such as mandatory treble damages (that is, three times actual damages) for violating the False Claims Act, which is reduced to double if the company has self-disclosed. The fact that the False Claims Act has such sharp teeth raises the stakes for companies, ensuring a claim is taken seriously and the opportunity to self-report is carefully considered.
- **Civil penalties.** Civil penalties reach up to $11,803 for each false claim. This may amount to a significant penalty in the case of federal reimbursements where each individual invoice is considered a separate claim.
- **Whistleblower or *qui tam* relator incentives.** A *qui tam* relator may receive up to 30% of a recovery either from a settlement or a judgment. The amount depends on whether the government intervenes: if the government intervenes, a *qui tam* relator stands to recover up to 25% of the recovery; if the government does not intervene, the *qui tam* relator may receive between 25 to 30% of the proceeds.
- **The permissive knowledge requisite.** Knowledge under the False Claims Act includes: actual knowledge, deliberate ignorance, or a reckless disregard. This bar is significantly lower than that which is required in England and Wales.
- **Exposure to contractor liability.** An entity or individual may be liable for causing the submission of a false claim, even if the fraud was not directly perpetrated by that entity or individual. This incentivises general contractors to ensure that subcontractors are not carrying out fraudulent activities on their behalf and that claims submitted to them for reimbursement are accurate.
- **Particular industries.** There are particular industries (such as healthcare) that have faced a disproportionate number of claims under the False Claims Act, which has created a deterrent effect in those industries.

The UK currently operates on piecemeal legislation, with arguably outdated legal concepts such as the identification principle, and with serious underfunding of enforcement agencies. The success of the False Claims Act, FCPA, and Dodd-Frank goes hand in hand with the United States' attitude to whistleblowers, affording them both protections and incentives. While a law similar to the False Claims Act could be a huge success in the UK, whistleblowing laws would also need to be revised to ensure that entities or individuals

were sufficiently incentivised to make reports or even bring an action on behalf of the government.

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