Whistleblowing

No-one is exempt

As events at Barclays have illustrated, where the CEO became entangled in a whistleblowing debacle, there’s no doubt that sound and effective whistleblowing procedures are a key tenet of good corporate governance and a reflection of a firm’s culture.

It’s no accident that there is a whole chapter (chapter 18) devoted to the subject of whistleblowing in the FCA handbook. And, if that’s not enough to reinforce the significance placed on whistleblowing by regulators, rules can also be found in a range of other regulatory requirements and EU Directives including MiFID II, the Market Abuse Regulation, CRD IV and UCITS V to name a few.

There are charities devoted to supporting whistleblowers, numerous books have been written on the subject and Hollywood films have been made about it. Then there is the wealth of press coverage regarding high profile cases such as that of Paul Moore, aka ‘The HBoS Whistleblower’, who exposed the excessive exposure to risk that ultimately led to the bank’s collapse.

As the strands of regulation become ever more entwined, the path cleared by robust whistleblowing rules, combined with factors such as the increased accountability brought by the Senior Managers and Certification Regime, leave board members and other senior managers nowhere to hide. And surely this is a good thing – if those working at the coalface feel both empowered to raise the alarm and safe to be able to do so with impunity when they smell a rat – shouldn’t we all be sleeping that little bit sounder at night?

The trouble is that even robust rules are, invariably, imperfect. That is not to say that the regulators have it wrong, rather we live in a complicated world, a world with shades of grey, a world where best intentions do not always equate to the best outcomes. The rules are there to protect the whistleblower as, in reality, how many people are selfless enough to jeopardise their entire careers, reputations and livelihoods by accusing their colleague, boss or their CEO of impropriety? Even Paul Moore, who has subsequently been vindicated by the findings of the UK regulators, said that he wouldn’t do it again. On the other hand, what of the accused – who decides whether a complaint is a genuine well intended red flag of wrongdoing, a misunderstanding or a vindictive act to settle a personal grudge?
Take the example of Barclays CEO Jes Staley, who tried to identify the anonymous source of letters sent to the Barclays board pertaining to one of the bank’s senior executives. Mr Staley considered the letters to be an unfair personal attack on a senior employee whilst his compliance function had treated the letters as whistleblowing. The letters raised concerns of a personal nature about a senior employee, Mr Staley’s knowledge and management of those issues at a previous employer and the appropriateness of the bank’s recruitment process. In the first instance Mr Staley’s request to find the letters’ author was stopped on the grounds of such action being inappropriate. However, a month later, acting on the basis that the whistleblowing case was now closed, Mr Staley tried again to track down the author of the letters, albeit unsuccessfully, despite this time involving the services of a US law enforcement agency. Interestingly, it was as a direct result of an employee raising concerns that the Board was alerted to the full extent of Mr Staley’s actions some six months later.

Following this, Barclays launched an investigation into the matter and also alerted both the FCA and the PRA who are each running investigations of their own. Barclays’ findings were that Mr Staley acted ‘honestly, but mistakenly’ and despite a formal written reprimand and cuts being made to Mr Staley’s bonus, the board has reiterated its unanimous support for Mr Staley’s reappointment as CEO in May 2017. It is worth noting that, under the Senior Managers and Certification Regime, the written reprimand will follow Mr Staley, as part of his Regulatory Reference, for six years even if he moves on from Barclays.

Let’s consider the Board’s support for Mr Staley. The Board has accepted his explanation that he was trying to protect a colleague who had experienced personal difficulties in the past from what he believed to be an unfair attack, and has accepted Mr Staley’s apology. This combined with Mr Staley’s record with Barclays has resulted in the Board continuing to support his reappointment at the next AGM. However this still leaves unanswered the question of whether Mr Staley was personally culpable for his mistake or whether it was a failure in the Barclays whistleblowing process, or maybe it was a mixture of both?

Mr Staley honestly, but mistakenly, believed it was acceptable to identify the author of the letters. Possibly because he believed that the author of the letters was either no longer deemed a whistleblower or that their right to anonymity expired once the case was closed by compliance. Either way, this does raise the cultural question of whether Mr Staley should have sought to identify an anonymous whistleblower, especially when the bank has a compliance function to determine the most appropriate way to deal with such matters - something which Mr Staley understands because he has openly stated that “Our whistleblowing process is one of the most important means by which we protect our culture and values at Barclays”, a culture which is probably now a little battered and bruised.
So what mistakes were actually made – is it fair to point the finger solely at Mr Staley and his actions or was he let down by the procedures put in place by his compliance function? The regulatory requirements set out in Chapter 18 of SYSC (the Senior Management Arrangements, Systems and Controls Sourcebook) state that:

Firms must establish, implement and maintain effective arrangements for the disclosure of reportable concerns by whistleblowers

- These arrangements must be able to handle disclosures of reportable concerns including where the whistleblower has requested confidentiality or has chosen not to reveal their identity

Arguably, Barclays’ arrangements in this regard have been exonerated since the letters were identified as whistleblowing and attempts to undermine the anonymity of the whistleblower were thwarted initially. In addition, the rules state that:

- The whistleblowing arrangements must include appropriate training for [...] employees responsible for operating the firms’ internal arrangements.

As CEO, it seems reasonable to classify Mr Staley as being responsible for the firm’s internal arrangements, including the arrangements for staff training on whistleblowing. The irony being that the internal arrangements in respect of whistleblowing procedures appear to have fallen short in Mr Staley’s case. The FCA Handbook also provides guidance that, for all managers of UK-based employees (e.g. the CEO), this training should include:

- How to recognise when there has been a disclosure of a reportable concern by a whistleblower
- How to protect whistleblowers and ensure their confidentiality is preserved
- Steps to ensure fair treatment of any person accused of wrongdoing by a whistleblower

This is not the complete list included in SYSC 18, nevertheless these three points alone might have saved Mr Staley from the consequences he now faces since his training would arguably have helped him act in a more appropriate manner.

Clearly, despite the prominence of whistleblowing in the media and its significance within the governance framework, even large financial institutions and their highly experienced leaders can sometimes fall foul of the rules.

Bovill has both the expertise and the experience to help you ensure that your whistleblowing procedures are compliant and fit for purpose. We can also advise you on all aspects of the Senior Managers and Certification Regime. Why not speak to us about how we can support you and your organisation find the easy way to meet all your regulatory compliance needs.