

SINGAPORE INSTITUTE OF DIRECTORS

STATEMENT OF GOOD PRACTICE

WHISTLEBLOWING POLICY

1. Introduction

An organisations' Board of Directors (BoD) and its Audit Committee (AC) have overall governance responsibility for programs such as anti-fraud programs. It is Senior Management's responsibility to develop, implement and monitor these programs, systems and controls, the objective of which should be to prevent and detect serious misconduct, such as fraud and corruption; or any other conduct that may lead to financial loss and reputational damage.

Some of the world's largest financial misstatement frauds, such as the well-known Enron and WorldCom cases in the United States, were detected through the intervention of whistleblowers disclosing the misconduct to regulators. These and other cases led to the implementation of the Sarbanes Oxley Act, which mandates that organisations should have a confidential, anonymous complaint procedure that is capable of receiving and acting on complaints and provides for the protection of whistleblowers as well as remedies for whistleblowers who are retaliated against.

There is strong support for the notion that serious misconduct such as fraud is most often detected by whistleblowing or tips¹. Other studies show that there is a very strong link between ethics and the willingness of employees to report serious misconduct. A study undertaken by the University of Michigan² found that the two most important factors preventing employees from misconduct were a feeling of futility, i.e. the belief that nothing would be done to address the issue being reported, and a fear of retaliation, e.g. being fired, demoted or ostracised. However, it was found that when an employee believed that his co-workers and supervisors were highly ethical, respondents then stated that they would be more likely to report misconduct.

Based on all the evidence, whistleblowing is a fundamental corporate governance mechanism that provides stakeholders with a means by which they can raise serious issues to Senior Management and the BoD so that effective action can be taken to deal with the issue reported.

¹ Association of Certified Fraud Examiners Report to the Nations 2012

² <http://www.ns.umich.edu/new/releases/21431-blowing-the-whistle-on-bad-behaviour-takes-more-than-guts>

2. Responsibility and Policy Structure

As mentioned above, the BoD has overall governance responsibility and this includes ensuring that Senior Management develops processes and controls to protect the organisation. The revised Singapore Code of Corporate Governance recommends at paragraph 12.7 that the AC [Audit Committee] *'...should review the policy and arrangements by which staff of the company and any other persons may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. The AC's objective should be to ensure that arrangements are in place for such concerns to be raised and independently investigated, and for appropriate follow-up action to be taken. The existence of a whistleblowing policy should be disclosed in the company's Annual Report, and procedures for raising such concerns should be publicly disclosed as appropriate.'*

A whistleblowing policy is different from a whistleblowing reporting mechanism. The policy provides stakeholders with guidance relating to the organisation's approach and stance on whistleblowing and the reporting mechanism is the means by which stakeholders can report misconduct.

A whistleblowing policy should not be viewed in isolation. Reference to it should be included in other policies such as the Code of Ethics, Fraud Control and Incident Response (investigation) policies and vice versa. At a minimum, it should clearly articulate:

- i. The company's stance in relation to whistleblowing, i.e. provide the reasons why the policy is in place or is to be implemented
- ii. The company's commitment to objectively and fairly investigate reports of serious misconduct to establish whether there is evidence to support the matter reported
- iii. A definition of serious misconduct that includes specific reference to the misconduct to be captured by the reporting mechanism, e.g. fraud, bribery and corruption, undisclosed conflicts of interest, serious safety breaches and serious HR policy breaches such as sexual harassment and discrimination
- iv. A clear explanation as to how reports or disclosures should be made. The policy might state that where possible, any issues of serious misconduct should be reported to an immediate supervisor or Senior Manager who is able to take appropriate action, but also that if the employee for whatever reason, does not feel comfortable doing so, they can anonymously report the serious misconduct via alternative whistleblowing reporting channels provided by the organisation, e.g. hotline or web based reporting channel
- v. A firm commitment that whistleblowers who report serious misconduct in good faith will be protected from unfair treatment and adverse consequences such as termination of employment, demotion, harassment or discrimination
- vi. Whether financial incentives will be offered to whistleblowers for information that leads to the prosecution of serious matters such as fraud and corruption. Whilst not generally

encouraged by most companies, regulators in the US such as the Securities Exchange Commission (SEC) and the Department of Justice (DOJ), under the Dodd Frank Act offer financial incentives to whistleblowers who provide original information³ to the SEC and this information leads to a successful SEC enforcement proceeding

- vii. In the event that a whistleblower is treated unfairly, the means or process by which recourse can be sought against the individual or individuals who are treating the whistleblower unfairly.

There should be reference to this in the company's disciplinary policy.

2.1 Statement of Commitment

It is vitally important that a key member of Senior Management such as the Chief Executive Officer or even the Chairman of the BoD, issue a statement that enunciates organisational and leadership commitment to establishing and maintaining a culture of integrity and ethical conduct in business dealings as well as a culture of two way communication between the BoD, Senior Management and other stakeholders. It should also state that the whistleblowing reporting mechanism is a key element of the organisation's willingness to receive information that may protect its interests. This statement of commitment should be the starting point or introduction to the company's whistleblowing policy.

2.2 Resources and Accountability

Adequate resources should be allocated to the administration and maintenance of the whistleblowing program, particularly if the reporting mechanism is an in-house system. Often, the responsibility for administering an in-house whistleblowing mechanism rests with the Internal Audit Department or a combination of Internal Audit and Legal Department.

Responsibility for drafting the whistleblowing policy will most often reside with the Legal Department, if one exists, due to the legal considerations to be covered in the policy such as privacy, confidentiality, applicable whistleblowing legislation, including whistleblower protection laws and disciplinary procedures to be adopted in respect of the harassment of whistleblowers.

Regardless of whether the reporting mechanism is an in-house or outsourced solution, internal responsibility has to be assigned to suitable management employees to receive and deal with whistleblower reports.

³ "Original information" is generally defined to include information that is derived from the independent knowledge or analysis of a whistleblower, and is not otherwise known to the SEC or derived from media reports, governmental documents, or administrative hearings.

Some companies, at departmental or divisional level, allocate responsibility to individuals to be the contact person for important initiatives such as ethics, e.g. 'Ethics Champions'. The role of these employees is to be accessible to provide advice and guidance to other employees who may be confronted with ethical issues or dilemmas as well as to be the liaison point between Senior Management and staff in respect of communications regarding ethics. Likewise, an organisation may assign responsibility to individuals in the company to assist other employees who need to seek guidance about issues relating to whistleblowing. This could be a standalone role or incorporated into the role of the Ethics Champion or similar role.

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3. Operations

As mentioned above, the operation of a whistleblowing mechanism can be undertaken and administered solely by in-house resources or outsourced to a third party provider.

3.1 Reporting Mechanism

Both in-house and outsourced mechanisms can be effective ways in which to manage whistleblowing reports. Regardless of the solution, what is important is that medium to large companies, whether public, private or government linked, have a whistleblowing reporting mechanism in place that allows for anonymous reporting. As mentioned above, this is important because employees are often reluctant to report serious misconduct due to the fear of reprisals.

Best practices in whistleblowing suggest that the elements of an effective reporting mechanism are:

- i. 24 hour access, 365 days per year
- ii. Multi-lingual capability, particularly for operations in foreign locations
- iii. Multiple communication channels, e.g. hotline, web, email, facsimile and post
- iv. Ability or mechanism to provide feedback to the whistleblower even if they are anonymous

Best practices also suggest that an outsourced solution is often the most effective as the mechanism is independent of management. Stakeholders often feel that independence provides a greater sense of transparency and commitment to do something about the matters reported.

3.2 What Should be Reported to the Board/Audit Committee?

As mentioned above, it is important to clearly define the types of serious misconduct that a company's whistleblowing mechanism should capture often referred to as 'in-scope' types of conduct. Regardless, of whether a whistleblowing disclosure is in-scope, the BoD or AC does not need to know the detail of all whistleblowing reports made.

Matters that should be brought to the attention of the BoD or AC are matters of significance, i.e. matters that have significant financial and reputational implications. It may be necessary to provide written guidance in the whistleblowing policy about the types of conduct that should be brought to the attention of the BoD or AC. Some issues may not have apparent and immediate financial implications, such as the leaking of confidential information, but certainly attract publicity and will most likely have significant negative implications for a company's reputation.

A degree of judgment is required by Senior Management to determine the significance of certain issues and the potential consequences should be assessed on their merits. If there is any doubt, it is always best to err on the side of caution and report the issue to the BoD and AC. From their perspective, and that of Senior Management, it is always better to know than not to know!

3.3 Monthly reports

Senior Management should ensure that statistical data relating to whistleblower activity is compiled on the monthly basis. These monthly reports should include the number and type of whistleblower complaints made and, if possible, in which divisions of the company or locations the issues are occurring. At a high level, this provides invaluable insights into the types of issues confronting the organisation and can be used by Senior Management to formulate strategies to deal with those issues. These reports should be made available to the BoD and AC, with an indication of what action is being taken to address the issues.

3.4 Designated investigation personnel

An investigations committee, made up of representatives of relevant departments such as Finance, in-house Legal and external counsel, IT, Internal Audit, Human Resources and other stakeholders, should be established so that when serious issues such as fraud are reported, all the relevant considerations are taken into account, agreement about approach is reached, appropriate and detailed planning is undertaken and that appropriately skilled and experienced resources are engaged to objectively and effectively deal with the issue.

Ultimately, the responsibility for conducting preliminary and more extensive, detailed investigations of whistleblower allegations will depend on the organisation's capability in terms of the availability of appropriately skilled and experienced investigators as well as the need, in some cases, to exhibit greater transparency through engaging independent investigation resources. This is particularly important where the issue being reported is one that may attract the attention of a regulator. Under these circumstances, engaging an independent, specialist third party forensic investigation provider may be the best option.

3.5 Confidentiality and anonymity

Confidentiality and anonymity are the foundations upon which a whistleblowing policy and mechanism are built. Regardless of whether a whistleblower wishes to remain anonymous, measures to ensure the confidentiality of the information provided by whistleblower and their identity must be implemented and adhered to.

3.6 Investigation

Often, whistleblower allegations may lack sufficient detail to warrant a full investigation or may even be false information, e.g. an offending employee making allegations against another employee in order to divert suspicion from themselves, or just to be

plain vexatious or mischievous.

As such, any investigation, but more so in the case of the investigation of allegations made by a whistleblower, must be carried out with the utmost objectivity and be based on the principles of fairness and natural justice.

Preliminary and where possible, confidential investigations must first be carried out to establish whether there is any evidence to support the whistleblower allegations. Where this is not possible, then the specific issue reported can be monitored. In the case where evidence to support the allegations is identified, then more extensive and detailed investigations should be undertaken.

An Incident Response or Investigation Policy should also be formulated to provide guidance about matters such as, but not limited to, how internal investigations should be conducted, by whom and when to seek the assistance of third parties.

3.7 Immunity

Immunity, in the context of a criminal investigation or prosecution, is something that is usually offered to a person implicated in the conduct, but as a means to obtain testimony against others deemed more criminally culpable. This scenario suggests that the identity of the whistleblower is known.

There have been many cases where whistleblowers have been culpable in the conduct being reported. However, the ability to provide immunity to such a whistleblower, unless specifically provided for in legislation, is generally not within the power of a private organisation, particularly where the matter will be the subject of a criminal investigation.

Whilst not recommended, if management and the BoD decide not to report the matter to the police, offering conditional immunity to persons who come forward with information about certain types of conduct may be a means by which important information or evidence can be obtained. Conditional immunity means that a person coming forward with information about their and the involvement of others in a criminal act or other type of serious wrongdoing is made aware that it may not be possible to prevent their identity from being disclosed to a law enforcement agency.

Any immunity from prosecution is a matter for the Department of Public Prosecutions or similar Government Agency. In many locations, the best that an implicated whistleblower can hope for in providing assistance is that their assistance is taken into account as a mitigating factor in sentencing.

3.8 Reporting/Closure

Where possible, a whistleblowing mechanism should provide the ability to report back to the whistleblower the status or the outcome of any investigation. Where an investigation has been completed, it may not be prudent for confidentiality reasons, to

disclose the full details of the outcome. However, a general response that an investigation has been completed and disciplinary action was taken against the suspected person, may be sufficient.

4. Communication

To achieve the desired culture in terms of ethics and the reporting of serious misconduct, it is vital that there is regular ongoing communication. Responsibility for this ongoing communication can be shared between a number of stakeholders, e.g. HR and IA Departments, but must be supported by the BoD and Senior Management.

4.1 Communication plan

An annual communication plan should be devised in order to maintain a high level of awareness of the whistleblowing policy and reporting mechanism. Examples of periodic communications from the CEO or other senior management could consist of email blasts or town hall events where key aspects of whistleblowing, ethics and tone from the top are presented and discussed.

Communication materials such as posters, wallet cards or phone stickers could also be created and displayed in strategic locations within offices to remind employees of the program and the means by which reports can be made.

4.2 Education and Training

As mentioned above, ethics and the willingness to report serious misconduct are closely aligned. All organisations, but particularly publicly listed and medium to large private organisations, should conduct ethics training at least annually. This training could be in the form of class room or online training, but should provide adequate information about the organisation's code of ethics and whistleblowing policy and reporting mechanism. Regardless of the mode of delivery, but in order to increase learning outcomes, the training should provide ethical dilemma scenarios and an assessment component.

Records of attendance and successful completion of the training should be maintained on personnel files maintained by the Human Resources Department.

5. Monitor, review and update

The business landscape is ever changing and in order to maintain profitability and manage risk, businesses monitor markets and business trends, industry innovation, legislative changes and competition. Maintaining competitive advantage and managing risk often requires changes in business strategy and processes. These changes also apply to organisational policy and procedures. For them to remain current and relevant, responsibility for monitoring changes that may impact policy and procedure should be allocated to a specific function or individual. In most cases, this responsibility will rest with the Legal Department or Risk and Compliance Department. What is important is that organisations

monitor, review and update policies and procedures to maintain currency and effectiveness.

6. Conclusion

The incidence of serious misconduct such as fraud and corruption are growing global issues. According to the Association of Certified Fraud Examiners, a typical organisation loses approximately 5% of its revenues to fraud annually. At a global level, this represents losses of USD3.5 trillion annually.

Directors, as stewards of the strategic direction of the organisations over which they preside, must ensure that appropriate and effective processes, controls and programs are in place to protect their company's financial viability and reputation. The penalties for directors who fail to fulfill these obligations and the ramifications for companies and their stakeholders can be catastrophic.

Cultivating and maintaining an ethical culture and a culture of willingness to report serious misconduct are some of the most effective corporate governance initiatives and ways in which to prevent and detecting serious misconduct that may cause serious harm to an organisation.

Well written and often communicated policies such as a whistleblowing policy and the implementation of an anonymous reporting mechanism are key corporate governance measures that can be employed to help directors effectively perform their fiduciary duties.

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