Spilling the Beans: 10 Practical Steps to Improve Your Whistleblowing Framework

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The whistleblowing landscape has changed substantially over recent years, with high-profile cases accelerating new whistleblower protection regulations and intensified regulatory environments driving companies to re-evaluate their reporting systems. There is also growing recognition of the significant business benefits of a robust and effective "speak-up" program, offering organisations the best early warning sign against isolated misconduct incidents developing into devastating financial and reputational damage.

Now is the time for companies to assess what improvements need to be made to their internal reporting frameworks to meet not only the ongoing expectations of regulators, but also the needs of their business and potential whistleblowers.

Snapshot of Recent Worldwide Whistleblowing Initiatives

To set the backdrop for our 10 practical steps to improve a whistleblowing framework, we briefly outline some recent worldwide regulatory initiatives below.

Europe: EU Directive on Whistleblowing

The European Union Whistleblower Directive (the "Directive"), a significant new piece of legislation which is due to be implemented by member states before December 2021, marks a significant regulatory step forward for whistleblowing in Europe. As well as driving standardisation for whistleblowing systems and reporting across Europe, the Directive enhances the status of whistleblowers and increases the responsibility that organisations have when responding to reports.

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The Directive requires that all companies with more than 50 employees establish an internal reporting framework for whistleblower claims.

The Directive also enhances the status of whistleblowers and extends both the scope of who a whistleblower is and the protection afforded to whistleblowers (e.g., protection is offered to "facilitators" or persons connected with them, such as colleagues or relatives who could also suffer potential retaliation). One of the Directive's main aims is to protect whistleblowers against retaliatory behaviours, by outlining an extensive, non-exhaustive list of prohibited behaviours and putting the burden of proof on employers. The Directive also drives standardisation for whistleblowing systems and reporting across Europe.

United Kingdom: Financial Conduct Authority's "In Confidence, With Confidence" Campaign

While the Directive will not be enacted into UK legislation, the UK has had its own legislation protecting whistleblowers for well over a decade via the Public Interest Disclosure Act. Nevertheless, the Directive will impact any UK company that has European operations. It will also, very helpfully, provide another market standard UK organisations can use in benchmarking their current programme.

In addition, the FCA's "In Confidence, With Confidence" campaign, announced in March 2021, encourages people to report wrongdoing in the financial services sector. Many industry experts anticipate this campaign will come with increased FCA scrutiny on internal whistleblowing systems, not least because a 2018 FCA study found many firms had not fully implemented or sufficiently considered the SYSC18 requirements on whistleblowing (per the FCA Handbook). The latest FCA campaign also takes a new and interesting direction of travel, by

encouraging people to speak-up about neighbours and family members, and not just their employers.

United States: Anti-Money Laundering Act 2020 & Enhanced AML Whistleblower Program

The Anti-Money Laundering Act (AMLA) was passed in January 2021 and aims to incentivise individuals to blow the whistle on money laundering to the U.S. Treasury Department. Under the AMLA, individuals who voluntarily provide original information to the Treasury Department or the Justice Department about violations of the Bank Secrecy Act can receive monetary awards of up to 30 percent of funds. The funds are recovered by the government in a successful enforcement action stemming from the disclosure.

No equivalent whistleblower reward program exists in the EU and UK and so there is now scope for non-U.S. persons to benefit from blowing the whistle on AML issues in the U.S. The enticement of a generous reward by U.S. government agencies may increase the number of non-U.S. based persons reporting on U.S. companies operating internationally.

International: Global Standard ISO37002 for Whistleblowing Management System

Although there are a number of existing and useful reference points available, there is currently no single, internationally recognised standard on whistleblowing. The International Organization for Standardization's ISO 37002 aims to be a new global best practice guidance for implementing, managing, evaluating, and improving whistleblowing management systems and is scheduled to be published by the end of 2021. The ISO standard is an important step-forward in creating an accepted benchmark on how to build a system that earns the trust of would-be whistleblowers.

The developments outlined above should go a long way towards assuring potential whistleblowers

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that their concerns will be responded to and that they will receive protection from retaliation. The onus is now on organisations to ensure that their whistleblowing procedures and policies are sufficiently robust to withstand not only regulatory scrutiny, but also any upsurge of whistleblower reports that could accompany the new regulations.

Below, we set out ten practical steps that companies can take to improve their whistleblowing frameworks and ensure they are best prepared to navigate the new whistleblowing landscape.

Ten Practical Steps to Improve Your Whistleblower Framework

1 **Encourage speak-up through all channels (not just the whistleblower system)**

First and foremost, organisations need to encourage speaking-up through all channels, not just the official whistleblowing system. To some, "blowing the whistle" may sound too frightening a prospect and overly promoting the whistleblowing system as the sole means of raising concerns can have a contradictory effect on speak-up culture within an organisation. Rather, organisations should focus on the general encouragement of raising concerns or speaking up, with the whistleblower system serving as just one of the channels to do this.

The first point of sharing concerns for employees will usually be their direct manager. But in instances where employees do not feel this is an appropriate avenue for their concern, there should be other channels they can turn to, such as senior level managers or support functions like HR, Legal and Compliance. If an organisation has no informal speak-up channels, it may consider setting up a Share Your Thoughts inbox, a landing page on the company intranet, or a physical feedback box.

When promoting formal and informal speak-up channels, organisations should make sure the individuals on the receiving end of the channel are appropriately trained to deal with those concerns. These individuals should be able to identify when a concern is being raised, know who to involve, direct the concern in a means that maintains confidentiality (and anonymity if required) of the whistleblower, and also safeguard a swift and effective investigation of the concern raised. Training managers and promoting awareness of the whistleblower program is vital in closing this gap.

As more and more countries specifically give whistleblowers the choice to escalate a concern internally or reach out to regulators directly (without needing to first raise a concern with management), organisations are well advised to promote all internal channels to prevent reputational damage or additional scrutiny.

2 **Choose an approachable name for the system or program**

As "whistleblowing" can often conjure bad connotations, it's important to consider the naming convention of a whistleblowing program and whether it's appropriate to use the term "whistleblowing" to describe a confidential reporting system. Instead, many organisations have adopted names such as the "Speak-Up Portal," "the Do Right Website" or "Share Your Concerns Hub" for their systems.

"Speak-Up" is generally the most common branding used by large organisations for their whistleblowing program. In its broadest context, "Speak-Up" means informing an employer of any issues an employee is aware of – this helps keeps the message simple. The key consideration for organisations is to be clear on what the whistleblowing program's scope is, no matter what terminology an organisation decides to use. An organisation can design a fantastic

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framework that's perfectly compliant but no one will use it if it is not understood.

3 Elect an appropriate framework gatekeeper

When establishing a whistleblower framework, careful consideration needs be given to system ownership and who will have ultimate responsibility for the Speak-Up program. There are various places a whistleblower function can live in an organisation, such as Compliance, Risk, Internal Audit, and HR. Most often, whistleblowing functions in large organisations tend to land in either Risk or Compliance functions. Where a whistleblower function sits will likely depend on the structure of an organisation; however, there is consensus that one area the function should definitely not sit is in the First Line of Defence (1st LoD).

As best practice, large organisations should also avoid placing the whistleblowing function in HR. Having the function within HR can cause employees confusion, as this is the same escalation point for grievances and personal issues. The optics of whistleblowing sitting in HR can also potentially prevent would-be whistleblowers from coming forward. Given HR's role in bonus, salary, and promotion decisions, employees may want to avoid HR when sharing their concerns and can specifically request "please don't share this with HR."

The most important issue in choosing where to place your whistleblower function is the function's accessibility to the Board of Directors. Also, no matter where your function resides, having clear conflicts of interest procedures is critical as it is inevitable conflicts will arise no matter where the function ultimately lives.

4 Use a blended team

The investigations team is without doubt absolutely key to the whistleblowing framework. Investigators need to be competent, skilled, and have the ability to engage with whistleblowers, while also having critical analytical skills. However, for a truly successful whistleblowing framework, organisations should use a blend of people in the whistleblowing team.

Besides high-quality investigators, the team should also include or have access to experts in:

Data: include data personnel to analyse trends and themes coming out of the systems;

Controls: include system controls personnel to ensure data privacy, confidentiality and GDPR are being sufficiently maintained.

Creativity: include team members on the visual and communications side that bring the creativity and engagement element into the framework;

5 Provide system and policy access to third parties

There is an ongoing, global trend of broadening the scope of who a whistleblower is. Previously, only current employees were typically perceived as whistleblowers; however, amendments to whistleblowing laws in places such as Europe, Australia and Japan are now extending protections and reporting capacity to others, including former and retired employees and their family members, directors, contractors and vendors. Organisations should consider making their whistleblowing system externally available to third parties, accompanied by an external statement explaining the organisation's approach towards whistleblowing.

Highlighting the importance of non-employee whistleblowers,[1] the U.S. Securities and Exchange Commission recently awarded more than $28 million to a non-employee whistleblower whose tip led to bribery charges against a U.S. subsidiary of

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Japanese electronics company Panasonic Corp. and its former executives.

Organisations should regularly communicate, both internally and externally, the clear, positive objectives of the whistleblowing system. This will help demonstrate to would-be whistleblowers that the organisation will act on concerns raised and that the system is not just a "tick-box" exercise.

6 Build confidence through well-resourced and transparent processes

There is no quicker way to kill a whistleblower program than to ignore those who are trying to provide information. Responding to and investigating the concerns and allegations that employees bring to an organisation is key to showing employees that their concerns are important and are taken seriously. If months go by without an indication of action or resolution, the credibility of the program can be lost. According to Navex Global's 2020 Risk & Compliance Hotline benchmark report, global whistleblower case closure times are now back up to near-record levels.

The new EU Directive acknowledges this by requiring both internal and external reports to be acknowledged within seven days of receipt and a response must be issued within a reasonable amount of time (three months for internal reports and up to six months for more complex external reports).

At a minimum, organisations should ensure their system is a live channel that is sufficiently staffed at all times - whistleblowers will likely never leave a voicemail if the hotline telephone is left unanswered. Organisations should provide whistleblowers clear timelines for response and action, and offer regular progress updates throughout the course of the investigation. To provide extra comfort to users, organisations should also consider educating employees on how the whistleblower system works—

including how it is confidential, what happens after reporting, timing and discipline. This can be done via a simple how-it-works video on the landing page of the system.

7 Motivate with stories of encouragement and reward whistleblowers with non-monetary incentives

Publishing results of non-confidential whistleblowing investigations to the broader organisation, such as describing disciplines (where legally permissible) or improvements to processes, demonstrates to employees or third parties that an organisation is both listening and acting on concerns. This can further incentivise use of the system.

Organisations should also highlight employees who have had the courage to expose misconduct (in non-confidential situations and only for employees who are happy to have their actions advertised more widely). Acting as subliminal advertising for an organisation's whistleblower system, communicating courage-based stories is a persuasion technique that can drive future reporting.

Managers also play a key role. If managers exhibit genuine gratitude to employees raising concerns, it can excite a trend that encourages others to speak-up. When management praise employees for doing the right thing, it reduces employee fear of being labelled negatively for speaking out.

8 Report on whistleblowing metrics holistically

There is no one metric an organisation can give to a regulator to say "look, we are doing this really well." Many quantitative metrics exist across an organisation - the key success factor is what organisations do with all this information. Organisations need to maximise the multiple data points available to them to gain the

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most valuable insights into organisational Speak-Up culture and whistleblowing trends.

Whistleblowing call volumes in isolation need to be looked at with a degree of caution. High volumes aren't necessarily good or bad, nor are low volumes. Organisations need additional context to go with these metrics, including understanding what their "normal" baseline is.

Organisations should link their whistleblowing and speak-up data into other data points. What are the behaviours the audit team is seeing? What about HR data, such as the results of employee surveys? The real value of all this data being analysed together is the possible identification of a lead indicator of an underlying trend in the organisation. Therefore, whistleblowing data needs to be seen as part of the bigger organisational data jigsaw puzzle.

Organisations should make sure the important data coming out of the whistleblowing system, such as metrics, hotspots and trends, is being reported to the Board of Directors holistically.

9   Incorporate whistleblowing into the employee exit process

Employees exiting an organisation are valuable sources of information. If conducted properly, exit interviews can provide organisations with much-needed information about what's working (or isn't working) in a company. Organisations should also include the whistleblowing team's details in employee exit packs to remind employees they are still welcome to speak up about their concerns after they have left their employment. Sometimes people will reflect on issues and want to raise a concern weeks or even months after they have left an organisation.

Some organisations also spend time educating their HR staff that issues may get raised during exit interviews that may amount to whistleblowing and

that such information should be escalated to the whistleblowing team.

10   Take additional steps to prevent unlawful detriment

Detriment (both to employee and non-employee whistleblowers) continues to be a difficult element for companies to manage effectively. In cases of alleged retaliation, the EU Directive on whistleblowing has taken a unique stance on retaliation by reversing the burden of proof onto the employer. EU employers must now show that measures taken against the employee did not arise as a result of the employee's disclosure.

In order to prevent retaliation, some organisations are introducing a detriment risk assessment at the point of triage for all whistleblowing cases so that early warning indicators of detriment can be identified and appropriate controls to mitigate or stop that detriment from happening can be put in place. This is also another way to reassure employees about the whistleblowing framework.

In Summary

Developing and maintaining an effective whistleblowing framework requires more than simply installing a hotline. While it is common to reflect upon confidentiality, whistleblower protection and GDPR when considering framework improvements (all of which are vital to a well-performing and regulatory compliant whistleblowing system), there are several more unassuming elements organisations can, and should, focus their attention on. The ten low-hanging fruits described above can significantly support organisations in achieving perhaps the most important and fundamental element of a successful whistleblower framework: creating an environment that encourages people to speak-up and share concerns.

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[1] https://www.wsj.com/articles/whistleblower-is-awarded-28-million-in-panasonic-avionics-case-11621443228

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