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WHISTLEBLOWERS

Six Steps to Elevate Compliance Programs Above Whistleblower Types of Concerns



BY BILL IDE AND JOSEPH BLANCO

As noted in our prior article, “Implementing a Whistleblower Awards Program Without Diminishing the Role of Internal Compliance,” the Dodd-Frank mandated whistleblower awards program requires a new way of looking at how compliance systems should function. At the time, it was assumed that the SEC would soon be issuing regulations to enact this provision and there was great concern that employees and other potential whistleblowers would be enticed to report noncompliant behavior to the SEC, before notifying the company of the same. It appears that, for now, the SEC has delayed issuing regulations to implement

the provision. While this delay may provide a momentary reprieve for companies, the reality is that the regulations could come soon and, in any event, whistleblower challenges to compliance programs will exist for the foreseeable future. Even if Dodd-Frank whistleblower provisions remain tied up indefinitely in the regulatory process, the plaintiff’s bar and the enforcement community will find ways to capitalize on the perception that internal compliance programs fail to embrace the whistleblower. Therefore, regardless of the implementing regulations, the mantra of inadequate compliance programs that led to Congress mandating the SEC to implement a whistleblower program must be addressed. Too often today, compliance programs are not designed with the potential whistleblower in mind.

We suggest below steps that every compliance program should take to assure that employees with concerns are comfortable utilizing the company’s compliance process. For many companies, this will require a culture shift to empower employees to do the right thing, by eliminating even the optics of improper behavior. It will also require strengthening investigation capabilities so rapid evaluations can be made as to the seriousness of claims. By creating the right culture of trust and caring with high priority given to any issues raised, companies will encourage an attitude of employees wanting to help the company while also quickly exposing the few who might seek to manipulate the system for their personal gain. The following is a list of practical steps that companies can take to create a cul-

ture of high ethics and trust while mitigating the risk that a whistleblower will bypass the internal compliance system in favor of an external organization or the media.

1. Adopt a tone at the top that articulates the importance of compliance and empowers employees to report any noncompliant behavior.

Employees want to be part of an organization they can trust and embrace. If the compliance “tone at the top” is authentic and empowering, employees will trust and utilize the compliance system. From time to time, there will be actors that game the system, but overall if people trust their leaders to do the right thing, they will do the right thing. This reality has been borne out in the government contracts arena where employees have brought legitimate concerns to the attention of internal compliance systems instead of filing *qui tam* lawsuits. A strong and unequivocal tone at the top, which communicates that concerns will be appreciated, not punished, is critical to keep whistle blowing inside the company.

2. Remind employees (and other potential whistleblowers) of their obligation to report violations to the company.

As part of the culture of compliance empowerment, employees should be reminded often of their obligation to report noncompliant behavior internally. A company should regularly remind its employees of this obligation and require employees to formally recognize it at least annually, by including in the annual certification of code of conduct a certification that “I am not aware of any behavior that is in contravention of the Code of Conduct, including any violation of federal securities law, that I have not reported to the corporation. (Note: If you are aware of a contravention and have reported it to the hotline, even if anonymously, you should certify yes to this question. If you are aware of a violation and have not reported such matter, you are strongly encourage to do so at [HOTLINE], which provides an anonymous option, and then complete this certification.)” Companies should also consider including mandatory reporting obligations of noncompliant behavior in the employment agreements of senior level personnel. Further, since whistleblower awards can be made to third-parties, companies should also consider adding obligations to report and cooperate in any internal investigation to its third-party supplier and vendor agreements.

3. Educate managers on potential violations and whistleblower situations to ensure managers properly record and report such situations.

Whistleblowers will often first report noncompliant behavior to their immediate supervisor. Without proper education on those items that should be reported up the chain or to the compliance officer directly, supervisors may fail to report the tips received from their direct reports. To ensure that all tips are properly considered

and, if necessary, investigated by the appropriate resources, the company should create an expectation with its managers and senior personnel that all reported violations and other noncompliant behavior will be timely recorded and reported to the appropriate personnel. By implementing a structured reporting system with appropriate processes and documentation, the company will have a better opportunity to investigate noncompliant behavior before it is reported externally.

4. Organize investigative resources and engage standing independent counsel, so the company can move quickly to investigate credible tips.

A company should assume that any tip it receives soon will be or has already been reported to the enforcement community, the media or plaintiff’s lawyers. Thus, the company must move quickly to make an initial assessment of whether a reported concern has merit. Outside counsel that specializes in investigations and specialized inside investigation resources should be in place well before a tip is received. These resources should have previously dry run potential scenarios that could arise and should be prepared to make quick judgments on less than complete facts as to whether the matter involves a potential material violation of law or appears to be baseless. If it is determined that a potential violation is involved, outside counsel should quickly investigate in a manner that, if necessary, would lead to cooperation credit with the enforcement community, while not waiving the attorney-client privilege or work product protections.

5. Adopt investigative standards that will withstand criticism and litigation.

Some investigations will be conducted by outside counsel and others, by internal resources. To ensure that internal investigations are conducted thoroughly and consistently, the company should adopt uniform investigative standards to be used during every investigation. By employing meaningful and detailed standards, the company can demonstrate to potential whistleblowers and third parties, including the enforcement community and courts, if necessary, that it conducted a proper investigation of any noncompliant behavior.

6. Keep the internal whistleblower apprised of the investigation’s progress.

As discussed earlier in connection with the tone at the top, it is important that the company create an environment of compliance by embracing the role of “internal whistleblower” and ensuring that an internal whistleblower does not suffer any retaliation. Starting with the receipt of the tip, and throughout the investigation, the company should take steps to ensure that the internal whistleblower understands that his or her tip was taken seriously and is being investigated. Further, by communicating to the internal whistleblower the outcome of an investigation and implementing meaningful remediation activities, the company will set a tone of trust in its culture that may alleviate an inter-

nal whistleblower's inclination to report the violation outside the company.