

Whistleblower Complaints and Rewards Explode ;Worldwide

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What you need to know

Since the onset of the COVID-19 pandemic, the number of whistleblower complaints received by regulators has exploded on both sides of the Atlantic. On November 15, 2021, the US Securities and Exchange Commission (SEC) reported that it paid out more in whistleblower awards in fiscal year 2021 than in all prior years combined since the whistleblower program began in 2011. The agency announced that it paid out approximately \$564 million to 108 individuals based on over 12,200 whistleblower tips – an approximately 76% increase in tips from fiscal year 2020. This comes after the agency reported a historic increase in the number of tips received in fiscal year 2020, including 6,900 whistleblower tips, which was the most it had ever received in a single fiscal year until that time. The trend is similar in Europe, with two notable whistleblower protection charities (Protect and WhistleB.) reporting an increase of up to 40% in the number of whistleblowing complaints in 2020-21 when compared to previous years.

COVID-19 itself is a major contributor to these growing whistleblower numbers. With many employees working from home, they may feel less connected to their employers and colleagues and more inclined to reach out to the authorities without first raising allegations to their employer (for example, by way of the confidential whistleblowing hotline maintained by the Financial Conduct Authority in the UK). In addition, whistleblowers may also find it easier to anonymously collect information relevant to their complaints when they have access to these materials from home.

Another factor is the exponentially growing size of financial incentives to blowing the whistle. In the past two years, for example, the SEC paid a \$114 million award to a single whistleblower in October 2020 and a \$110 million award to a whistleblower in September 2021, as well as two \$50 million awards paid out since the onset of the pandemic. With these awards, the program has now awarded more than \$1.1 billion to whistleblowers since it began in 2011.

Expectations are that this trend will only accelerate in light of the new harmonized protection environment for whistleblowers in the European Union (see the EU Whistleblowing Directive due to be fully implemented by December 17, 2021). The legislation introduces new, broader protections to whistleblowers, not only during their working relationship with their employer, but also before they begin working and after they have left. While the UK is under no obligation to implement this new legislation, it is facing internal political pressure to pass legislation that broadly mirrors the rights and obligations contained within the directive.

In this environment of increased whistleblower complaints, it is vital that companies do two things well:

1. Be on the alert for whistleblowers and make sure they have an internal outlet for their complaints.
2. Have in place sound corporate governance policies and practices for handling complaints when they do arise.

Whistleblower hotlines

Well-designed whistleblower hotlines are critical for two reasons: Regulators in the US and the UK focus on them, and they encourage employees to report issues internally first, before reporting to a regulator. And the US Department of Justice (DOJ) corporate compliance program guidelines, the UK Bribery Act 2010 and the EU Whistleblowing Directive all make clear that regulators now expect companies to have strong whistleblower policies in place (with potentially serious inferences being drawn during an investigation in the absence of such policies). As such, effective whistleblower hotlines not only encourage internal reporting first – but may also help protect a company's position vis-à-vis regulators in the long run.

In evaluating a company's corporate governance framework, the DOJ considers an "efficient and trusted" whistleblower channel to be a "hallmark of a well-designed compliance program." In assessing the adequacy of a company's whistleblower channel, the first thing the agency asks is whether the company has an anonymous reporting mechanism such as a whistleblower hotline that is publicized to employees and which they feel comfortable using. Similarly, in the UK, the Department for Business, Energy & Industrial Strategy maintains a Code of Practice on whistleblowing, which notes that it is "good practice" for employers to "create an open, transparent and safe working environment where workers feel able to speak up" with "a facility for anonymous reporting." This is particularly important in the context of the Bribery Act 2010, under which it is a defense to an allegation of a failure to prevent bribery for an organization to demonstrate that it had "adequate procedures" in place designed to prevent such conduct. The UK Ministry of Justice's guidance makes it clear that whistleblowing policies and practice will be key elements to be assessed when determining whether a company has such "adequate procedures."

These days, the term "hotline" should be understood to refer to multiple avenues for submitting whistleblower complaints, including phone, email, text, mail and/or through a website, often managed by independent third-party providers. While there is no one-size-fits-all model for whistleblowing hotlines, a whistleblowing hotline should have several key features in order to promote good corporate governance. Among other things, a whistleblowing hotline should be:

- Toll-free, well publicized and accessible 24/7.
- Available with multilanguage support (as applicable).
- Anonymous, confidential and secure.
- Capable of escalating urgent matters to the executive level quickly (to the extent necessary).

Strategies for managing companies and other best practices

In addition to establishing and publicizing an anonymous whistleblower hotline, there are other best practices (outlined below) that companies should follow to handle whistleblower complaints to investigate properly, mitigate fall-out and be prepared for regulator inquiries.

Take whistleblower allegations seriously

All allegations should be appropriately investigated in order to determine what (if any) further action is required to correct the alleged misconduct. Resist the instinct to immediately question the veracity of the report or the motive of the whistleblower, and instead focus on the substance and seriousness of the complaint.

Whistleblowers who are not taken seriously are more likely to report the allegations to regulators first without taking part in a company's internal investigation. In addition, while there are of course instances in which whistleblower complaints are ill-informed or conceived from bad motives, many are not. And an investigation that is compromised by skepticism about the whistleblower may not be objective and may compromise the company's ability to effectively respond, both internally and to regulators. To ensure that the allegations are viewed without skepticism, it will often be best practice for compliance, human resources or similarly situated departments – as opposed to the business chain of command – to bear principal responsibility for the investigation.

Know when to hire outside counsel and when to raise issues with auditors, the audit committee and/or board

Consulting with outside counsel early can ensure that the design of your whistleblower complaint investigation is sound, and the investigation is appropriately thorough. Depending on the significance of the matter, regulators may expect a thorough investigation conducted by external counsel, and may not view an internal investigation as independent. For example, complaints that rise to the level of misconduct by executives within the company, or relate to a company's financial reporting, may require external counsel and are best escalated quickly. Of course, retaining outside counsel can be particularly helpful when allegations relate to fraud or bribery. Not all whistleblower complaints will require the assistance of outside counsel, but an early assessment and consultation with counsel typically should be conducted.

Treat whistleblowers thoughtfully and respectfully, and stay in contact where possible

Treating whistleblowers with respect is not only key to a corporate culture that fosters openness and encourages

those with complaints to report internally first, but it is also sound practice from an investigative standpoint, as it will encourage whistleblowers to remain communicative and provide as much detail and information about the allegation as possible.

Don't do anything that could be construed as retaliation or limiting communications between the whistleblower and regulators

In the US, the UK and the EU, whistleblower protections prohibit retaliation of any kind against a whistleblower. This includes explicit retaliation such as firing or demoting a whistleblower, as well as less-explicit retaliation such as changing a whistleblower's hours, excluding a whistleblower from training meetings that affect prospects for promotion, or even isolating or ostracizing the whistleblower.

Keep the whistleblower's identity confidential to the extent practicable

Knowing that confidentiality will be maintained to the maximum extent will encourage whistleblower use of a company's hotline and help avoid reporting outside of the company before first raising concerns internally. In addition, the fewer company officials and employees who know the whistleblower's identity or even the existence of the whistleblower's complaint, the fewer opportunities for retaliation. Of course, there will be times that investigations require counsel and key company contacts to know the identity of the whistleblower in order to conduct an effective investigation.

Stay in contact with the whistleblower

If the whistleblower hasn't obtained outside counsel who won't allow such contact, interview and speak with the whistleblower as much as possible – and maintain ongoing contact throughout the investigation. This should include setting expectations with the whistleblower regarding how long an investigation might take, so that the time it takes to make a thorough inquiry isn't perceived as inattention to the complaint. While it won't be possible to share certain information with the whistleblower, keeping the whistleblower as informed as possible may prevent the whistleblower from reporting to the government out of a sense that the company is not taking the allegations seriously. This will better position the company to self-report if and when the time is right.

Consider whether – and when – to self-report whistleblower allegations

If the company uncovers potential wrongdoing while investigating a whistleblower allegation, it should consider with its attorneys whether and when to self-report the allegations to the relevant regulatory agency. Self-reporting – particularly if done early – may result in reduced penalties for wrongdoing. In many instances, if the above steps are followed, a whistleblower may feel heard and not inclined to report the alleged misconduct to the authorities at all.

Conclusion

In this environment of increased whistleblower complaints and scrutiny from regulators, all companies – even those that have not yet received whistleblower complaints – would benefit from conducting an internal review of their whistleblowing procedures and internal investigation capabilities to ensure they are appropriate for the size of the company and in line with current standards set by regulators. This will help the company be ready to respond appropriately if and when whistleblower complaints arise.

Notes

1. US Securities and Exchange Commission, "2021 Annual Report to Congress: Whistleblower Program," available at <https://www.sec.gov/files/owb-2021-annual-report.pdf>.
2. US Securities and Exchange Commission, "2020 Annual Report to Congress: Whistleblower Program," available at https://www.sec.gov/files/2020%20Annual%20Report_0.pdf.
3. Protect. "Our 2020 Impact Report – Record Number of Whistleblowers Supported," available at <https://protect-advice.org.uk/our-2020-impact-report-record-number-of-whistleblowers-supported>.
4. WhistleB. "Sharp Increase in Whistleblowers During Corona," available at <https://whistleb.com/blog-news/sharp-increase-in-number-of-whistleblowers-during-corona>.
5. US Securities and Exchange Commission, "Whistleblower Awards," available at <https://www.sec.gov/page/whistleblower-100million>.
6. US Securities and Exchange Commission, "2021 Annual Report to Congress: Whistleblower Program."

7. Directive (EU) 2019/1937. European Union, EUR-LEX, available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937>
8. US Department of Justice (Criminal Division), "Evaluation of Corporate Compliance Programs"(updated June 2020), available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.
9. *Id.*
10. Department for Business, Energy & Industrial Strategy, "Whistleblowing: Guidance for Employers and Code of Practice," available at <https://www.gov.uk/government/publications/whistleblowing-guidance-and-code-of-practice-for-employers>.
11. See <https://www.legislation.gov.uk/ukpga/2010/23/crossheading/failure-of-commercial-organisations-to-prevent-bribery>.
12. Ministry of Justice, "The Bribery Act 2010 Guidance," available at <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.
13. See US Department of Labor, "Whistleblower Laws Enforced by OSHA," available at <https://www.whistleblowers.gov>; and the Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998), available at <https://www.legislation.gov.uk/ukpga/1996/18/contents> and <https://www.legislation.gov.uk/ukpga/1998/23/contents>.

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