

FEATURE

# EYES EVERYWHERE: WHISTLEBLOWING AND COMPLIANCE

BY **FRASER TENNANT**

**E**yes are everywhere and the world is watching, it can often seem. In the business world, the conduct of companies of all types and sizes, particularly those in highly regulated industries, is under increasing scrutiny and open to claims by whistleblowers.

As well as major transgressions, such as corruption, bribery, fraud, money laundering and theft of public funds, even the simplest of mistakes can trigger a whistleblower claim that quickly becomes headline news, with the potential to damage a company's stock market price and brand value, among other things.

One of the key drivers behind the increase in whistleblowing activity over the past couple of years

has been the devastating impact of coronavirus (COVID-19). "The global pandemic has created a surge in whistleblower complaints," says Mary Inman, a partner at Constantine Cannon. "From mid-March to mid-May 2020, the US Securities and Exchange Commission (SEC) observed a 35 percent increase in whistleblower claims from the previous year."

Furthermore, this increase held through the end of 2020, when, in its '2020 Annual Report to Congress', the SEC's Office of the Whistleblower received a total of 6911 tips from whistleblowers compared to 5212 in 2019, representing a 32.5 percent increase. A resounding success, to date the Office of the Whistleblower has paid \$1.1bn in rewards to 214

whistleblowers and helped the SEC impose over \$4bn in fines.

According to Ms Inman, a key factor behind the whistleblowing uptick is the rise in unemployment and remote working that accompanied the pandemic. “Physically isolated from their peers, whistleblowers may feel less connected to their employers and colleagues and more motivated to speak up about wrongdoing,” she says. “Unemployed whistleblowers also have less reason to fear retaliation by their former employers.”

Moreover, many whistleblowing claims were made against a backdrop of rapidly created and deployed government assistance programmes, such as HMRC’s furlough scheme in the UK and the US Paycheck Protection Program (PPP) loans, many of which were launched with little or no oversight. In many cases, claims made by whistleblowers were the best source of information as to the misappropriation of funds.

Further whistleblowing drivers include the #MeToo movement, which has led to an increase in reports both individually and collectively. “Whereas a lone whistleblower may be too intimidated to speak out against a powerful organisation, a group of whistleblowers has a ‘safety-in-numbers’ that diminishes the whistleblower stigma,” says Ms Inman. “This phenomenon applies beyond traditional #MeToo reports of sexual harassment and assault to include reports of sex, race and age discrimination, as well as corporate fraud.”

Others believe increases in whistleblowing may partially be cyclical. “In times of market volatility, historically there is an increase in whistleblower complaints as individuals seek reasons to explain a downturn in business performance,” explains David I. Kelch, a senior associate at Porter Wright Morris & Arthur LLP. “The 2008 financial crisis spurred an increase in whistleblower complaints, and the volatility that COVID-19 spurred may fall into the same category.”

### **In on the act**

With each quarter of 2021 having set a new record for whistleblower payouts in the US – the country long viewed as a safe haven for whistleblowers – other agencies, both within and outside the US, have been inspired to get in on the act and adopt similar programmes.

“There is increased legal pressure being placed on companies to implement effective and safe internal whistleblowing mechanisms,” says Marie Terracol, whistleblower protection lead at Transparency International. “This is illustrated by legislation such as the 2021 European Union (EU) Whistleblower Directive, which requires medium and big companies to establish internal whistleblowing procedures, to follow up on whistleblowing reports and to keep the whistleblower informed.”

Drilling down, the EU Directive places a number of legal obligations on companies, including: (i) putting in place channels (such as whistleblower

hotlines) for receiving reports, which are designed, established and operated in a secure manner that ensures the confidentiality of the identity of the reporting person and any third party; (ii) informing employees of the reporting options available to them; (iii) putting measures in place to protect whistleblowers from dismissal, demotion or other forms of retaliation; (iv) assigning a competent impartial person or team to receive and follow up on reports; and (v) responding to and following up on reports within three months.

“Public and private organisations and small and medium-sized enterprises with 50 or more employees will be subject to the law, although only those with 250 or more employees will need to be compliant from December 2021,” notes Karin Henriksson, co-founder of WhistleB. “Those with 50 to 249 employees will have a further two years to comply. Each local version of legislation is likely to differ in detail but should reflect the Directive’s overriding aim: to ensure a baseline level of protection of whistleblowers across the EU.”

That said, what makes an effective whistleblowing law will differ from country to country. “Each country’s history and culture will feed an individual’s willingness to be a whistleblower,” affirms Mr Kelch. “In the US, there is a strong focus on individualism and freedom of speech. These cultural touchpoints

drive US employees’ willingness to speak out when someone sees a compliance issue.

“Additionally, the US’s willingness to pay whistleblowers for information is a huge motivating factor for whistleblowers,” he continues. “While the

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EU directive does not require countries to provide a financial incentive to whistleblowers, EU companies could consider such a private financial incentive in light of the success of monetary incentives in the US.”

### **Programmes and strategies**

With the majority of high-profile fraudulent behaviour in recent years having been discovered as a result of whistleblowing, the importance of having an effective whistleblower programme in place is clear – a programme that balances the rights of both the whistleblower and the company.



“Whistleblowing programmes allow organisations to become aware of potential malpractice and to act rapidly to address it, long before it grows into legal, financial or reputation liabilities,” says Ms Terracol. “To be effective, whistleblowing programmes should actively encourage workers to speak up, provide accessible and confidential reporting channels, as well as effective response systems and robust user protection from retaliation.

“If a potential whistleblower feels it is not safe to report internally, or that their report might not be addressed properly, they might keep silent, or decide to turn to the authorities or even the public,” she continues. “Whistleblowers want to make things better, both for their companies and customers. It is thus important to keep the whistleblower informed about how their report is being addressed.

According to the Norton Rose Fulbright report ‘Are you really listening?: testing and assurance of whistleblowing programmes’, a truly effective whistleblowing programme

needs to combine the embedding of the necessary culture that actively encourages the raising of concerns with rigorous systems that investigate and respond appropriately.

“Effective whistleblowing programmes make the raising of concerns a normal activity,” states the report. “Successful whistleblowing programmes are designed by a multi-disciplinary team, supported by boards, reinforced by managers and promoted widely throughout the business, with employees trained on how to raise concerns and, where applicable, receive them. Appropriate measures are taken to support those who have the courage to raise concerns and to protect them from retaliation.”

That said, trust in internal systems remains a major issue. “Many employees skip over internal reporting procedures and report directly to the SEC or other governing bodies because they do not trust that the company will take their report seriously or they believe that internal reporting will lead to retaliation,” asserts Mr Kelch. “Simple steps, like training supervisors to effectively respond to an employee’s report, can foster an effective programme.”

In the view of Ms Inman, companies need to reimagine whistleblowers as corporate assets, not liabilities. “Instead of disloyal snitches, whistleblowers should be more properly viewed for what they truly are: among a company’s most loyal employees because they have the temerity to speak the hard truths to their employers and risk the

inevitable blowback of exposing wrongdoing,” she says.

### **Gauging effectiveness**

Once implemented and utilised, it is imperative that companies are able to gauge the effectiveness of their whistleblowing programme, incorporating the right checks and balances to ensure it is delivering results.

These checks and balances may include staff surveys about the awareness of and trust in reporting mechanisms, the number of reports received, the number of investigations and proceedings initiated as a result of such reports and their outcome, the time taken to process cases, as well as feedback from whistleblowers themselves.

“The collection of such data will be a primary source of information to evaluate the implementation and effectiveness of a whistleblowing programme,” contends Ms Terracol. “Regular publication of such data will provide potential whistleblowers, employees and other stakeholders, such as investors, with a sense of how much trust they can place in the company’s whistleblowing mechanism.”

In its analysis, Norton Rose Fulbright believes that by encouraging more regular, open communication at all levels, and allowing issues to be dealt with at an early stage before they have grown in severity, a successful whistleblowing programme will, over time, lead to a change in employee behaviour.

Equally important is to report on the outcomes of any investigations undertaken, which is fundamental in demonstrating a company's commitment to its programme.

### **An insider's roadmap to fraud**

With whistleblowing hitting the headlines on a regular basis in recent years, this is clearly an issue that companies are taking increasingly seriously. Moreover, with the new EU Whistleblower Directive ramping up regulation in this area, along with the ongoing success of the SEC's whistleblower programme, it behoves all companies to institute internal controls to prevent compliance violations before they happen.

"In the US and Canada, we can expect to see the continued success of the existing whistleblower reward programmes and expansion of such programmes to more government agencies," suggests Ms Inman. "As the existing US whistleblower reward programmes have shown, whistleblowers, properly protected and incentivised, serve as an incredibly powerful and effective tool for

helping the government detect and prosecute fraud and other types of wrongdoing.

"For understaffed government teams, who are frequently outgunned by the wealthy corporations they investigate, there is no substitute for a well-placed insider who can provide a roadmap to the fraud," she continues. "The financial reward serves to encourage whistleblowers to undertake the considerable professional and personal risks involved in whistleblowing by providing a financial safety net to catch whistleblowers caught in the grips of the inevitable blacklisting that accompanies most whistleblowing."

In Mr Kelch's view, the number and frequency of whistleblowing reports will likely keep increasing and emerge from a number of new sources. "Younger and shorter-tenured workers have begun to demand greater transparency and corporate accountability," he concludes. "While corporate whistleblowers were, perhaps, once thought of as traitors to the corporation, societal change has begun to celebrate the employee who, even at the lowest level, raised perceived corporate misconduct." **RC**