

Anonymous Reporting – Expectations and Representative Practices

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Vera H. Powell
King & Spalding LLP
Atlanta, Georgia
vpowell@kslaw.com
404.572.3557

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Agenda

1	IMPORTANCE OF EFFECTIVE REPORTING PROCESSES
2	ANONYMOUS REPORTING EXPECTATIONS
3	EXAMPLES OF REPORTING MECHANISMS

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Importance of Effective Reporting Processes

- Companies have the opportunity to
 - Meet government requirements (*e.g.*, heavily regulated industries)
 - Detect and prevent fraud, thereby minimizing financial losses
 - Fraud losses are 50% smaller at organizations with hotlines than those without hotlines. Organizations with hotlines are more likely to detect fraud by tip.”¹
 - Address potential compliance issues internally, rather than risking potentially damaging government investigations
 - Take advantage of reductions in fines and declinations to prosecute as a result of effective compliance programs

¹ Ass’n of Certified Fraud Examiners, *Report to the Nations: 2018 Global Study on Occupational Fraud and Abuse* 16-19 (2018), <https://cf-us-west-2.amazonaws.com/acfepublic/2018-report-to-the-nations.pdf>.

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Importance of Effective Reporting Processes

- Additional benefits:
 - Reputational benefits
 - Increased trust employees have in the organization
- As Deputy Attorney General Rod Rosenstein recently remarked: “[E]thical conduct is a good investment. [. . .] [I]n the long run, companies with a culture of integrity usually prevail in the marketplace. Good people want to work for honest businesses. Investors trust them. Customers like to do business with them.”¹

¹ Rod J. Rosenstein, Deputy Attorney Gen., U.S. Dep’t of Justice, *Remarks at the 34th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rostenstein-delivers-remarks-34th-international-conference-foreign>.

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Regulatory Guidance

- Regulators generally mandate that companies set up reporting mechanisms to comply with code of conduct and anti-corruption obligations.
- Regulators generally have not provided very specific guidance regarding the individual elements or features of an effective compliance reporting system.
- Companies operating in a heavily regulated space, such as healthcare and finance, may need to comply with more specific requirements.

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DOJ/SEC's FCPA Resource Guide

- Guidance of the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") in the Resource Guide to the U.S. Foreign Corrupt Practices Act ("FCPA") regarding reporting of suspected corruption misconduct.
 - "An effective compliance program should include a mechanism for an organization's **employees** and **others** to report suspected or actual misconduct or violations of the company's policies on a **confidential basis without fear of retaliation**. Companies may employ, for example, **anonymous hotlines** or **ombudsmen**." (emphasis added)¹

¹ Criminal Div., U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 61 (2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.

DOJ's Expectations

- In its *Evaluation of Corporate Compliance Programs* guidance, DOJ issued a list of questions it considers in evaluating the effectiveness of a company's reporting mechanism.
 - How has the company collected, analyzed, and used information from its reporting mechanisms?
 - How has the company assessed the seriousness of the allegation it received?
 - Has the compliance function had full access to reporting and investigative information?¹

¹ Criminal Div. of the U.S. Dep't of Justice, *Evaluation of Corporate Compliance Programs* 5 (2017), <https://www.justice.gov/criminal-fraud/pagefile/937501/download>.

U.S. Sentencing Guidelines

- The U.S. Sentencing Guidelines require organizations to periodically evaluate the effectiveness of their compliance programs.
 - At a minimum, a commitment to compliance requires that "[t]he organization shall take reasonable steps" to, among other things, "have and publicize a system, which may include mechanisms that allow for **anonymity** or **confidentiality**, whereby the organization's **employees** and **agents** may **report or seek guidance** regarding potential or actual criminal conduct **without fear of retaliation**."¹ (emphasis added)

¹ U.S. Sentencing Guidelines Manual, § 8B2.1(b)(5)(C) (U.S. Sentencing Comm'n 2016), <https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-80NaN>.

DOJ Opinion Procedure Releases

- In a 2004 opinion procedure release, DOJ approved of an investment group's compliance program, which included a "Helpline; for **directors, officers, employees, Agents, and Business Partners** to report suspected violations of the Compliance Code or suspected criminal conduct."¹ (emphasis added)

¹ Criminal Div., U.S. Dep't of Justice, Foreign Corrupt Practices Act Review Op. Release 04-02 at 2 (July 12, 2004), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0402.pdf>.

DOJ/SEC Public Statements

- Select DOJ and SEC public statements highlighting the importance of a confidential reporting mechanism:
 - One of the "hallmarks of effective compliance programs" is "an effective system for confidential, internal reporting of compliance violations."¹
 - Harris Corporation was praised for implementing an "anonymous complaint hotline" which, among other things, contributed to the SEC's decision not to charge the company with FCPA violations.²

¹ Leslie R. Caldwell, Assistant Attorney Gen., U.S. Dep't of Justice, Remarks at the Compliance Work Conference (May 19, 2015), <https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-compliance-work-conference>.

² Andrew Ceresny, Director, Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Keynote Speech, ACT's 33rd International Conference on the FCPA (Nov. 30, 2016), <https://www.sec.gov/news/speech/speech-ceresny-113016.html>.

DOJ Settlements

- 40 of the approximately 65 DOJ settlements between 2011 and 2018 simply note that an "effective system" for reporting must be established, but do not speak to any specific reporting feature.
- The following requirement is discernible from these 40 settlements:
 - "The Company will maintain, or where necessary establish, an effective system for internal and, where possible, **confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, agents and business partners** concerning violations of the anti-corruption laws or the Company's anti-corruption compliance code, policies, and procedures."¹ (emphasis added)

¹ See, e.g., *United States v. Telia Company AB, et al.*, Deferred Prosecution Agreement (S.D.N.Y. Sept 21, 2017); *In Re Las Vegas Sands Corp.*, Non-Prosecution Agreement (Jan. 29, 2017).

DOJ Settlements

- SBM Offshore N.V. Deferred Prosecution Agreement (Nov. 30, 2017)
 - DPA cited various features of SBM’s compliance program with approval, including “creating a **whistleblower hotline**.”¹ (emphasis added)
- Pfizer Deferred Prosecution Agreement (Aug. 7, 2012)
 - “Pfizer shall maintain its mechanisms for making and handling reports and complaints related to potential violations of anti-corruption laws and regulations . . . and will ensure that **reasonable access** is provided to an **anonymous, toll-free hotline** as well as to an **anonymous electronic complaint form**, where anonymous reporting is legally permissible.”² (emphasis added)

¹ *United States v. SBM Offshore N.V.*, Deferred Prosecution Agreement, No. 17-cr-686, at 6 (S.D. Tex. Nov. 30, 2017).

² *United States v. Pfizer H.C.P. Corp.*, Deferred Prosecution Agreement, No. 12-cr-00169, at C-2 - 4 (D.D.C. Aug. 7, 2012).

Other DOJ Guidance

- The Government also has cited with approval features of reporting mechanisms that it viewed outside the settlement context:
 - Creating a corporate Ombudsman’s office;¹
 - Providing 24/7 access to the reporting hotline; and
 - Equipping the hotline to handle calls in every major language. Criminal Information, *United States v. Garth Peterson*, No. 12-cr-224, at 6 (E.D.N.Y. 2012) (citing Morgan Stanley’s compliance program with approval, DOJ stated that “Morgan Stanley provided its employees with a **toll free compliance hotline** that was available **24 hours a day, 7 days a week**. The hotline was staffed to field calls in every **major language**, including Chinese.”).

¹ See *SEC v. Tyco International Ltd.*, No. 12-cv-01583-RIL (D.D.C. 2012).

Other Guidance by the U.S. Government

- Section 301 of the Sarbanes-Oxley Act requires the audit committees of publicly traded companies to establish procedures for receiving and retaining “complaints . . . regarding accounting, internal accounting controls or auditing matters” and for the “**confidential, anonymous submission** by employees of the issuer of concerns regarding questionable accounting or auditing matters.”¹ (emphasis added)
- The Office of Inspector General (“OIG”) within the U.S. Department of Health and Human Services has stressed that in most healthcare segments a **confidential** reporting hotline is an important part of an effective compliance program.² (emphasis added)

¹ Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-110(a) (2012).

² See, e.g., Draft OIG Compliance Program guidance for Recipients of PHS Research Awards, 70 Fed. Reg. 71316 (Nov. 28, 2015).

U.S. Compliance and Industry Groups

- U.S. compliance organizations and industry groups have noted that most effective hotlines generally should
 - (1) allow for a variety of ways to report a suspected violation;
 - (2) accommodate anonymous reporting;
 - (3) be available 24 hours a day, 7 days a week; and
 - (4) allow for a two-way conversation (*e.g.*, a live telephone hotline).

U.S. Compliance and Industry Groups

- Additional considerations highlighted by U.S. compliance organizations and industry groups include:
 - Use a third-party service to manage the hotline;
 - Pair the reporting function of the hotline with a training function¹; and
 - Have a single hotline for all ethics and compliance matters².

¹ See, e.g., Bill Libit et al., Harv. L. Sch. F. on Corp. Governance & Fin. Reg., *Elements of an Effective Whistleblower Hotline* (Oct. 25, 2014), <http://corpgov.law.harvard.edu/2014/10/25/elements-of-an-effective-whistleblower-hotline>.

² See, e.g., Jimmy Lin, Soc’y Corp. Compliance & Ethics: Compliance & Ethics Blog, *Four Whistleblower Hotline Best Practices* (July 20, 2015), <http://complianceandethics.org/four-whistleblower-hotline-best-practices>.

U.K. Serious Fraud Office (“SFO”)

- Guidance from the SFO regarding bribery reporting favors
 - “‘speak up’ or ‘whistle blowing’ procedures [that are]
 - **secure, confidential and accessible means for internal or external parties** to raise concerns about bribery on the part of associated persons
 - If these procedures are to be effective there must be **adequate protection** for those reporting concerns.”¹ (emphasis added)

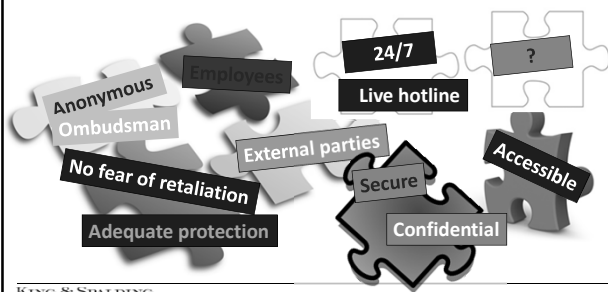
¹ U.K. Ministry of Justice, *The Bribery Act 2010—Guidance* 22, 29 (2011).

Hotlines in the European Union

- Anonymous reporting in Europe is complicated by relevant data privacy restrictions and work council rules.
- The EU-wide General Data Protection Regulation (“GDPR”), which came into effect on May 25, 2018, generally is aimed at the protection of EU citizens in relation to the processing of data in an increasingly data-driven world.¹
- Under the GDPR’s stringent accountability principles, companies must be able to articulate how and why they collect personal data.
- The GDPR applies, among others, to any business with operations in the EU or doing business in the EU that processes personal data.

¹ General Data Protection Regulation (GDPR) (EU) 2016/679 (effective May 25, 2018).

Anonymous Reporting Mechanisms



Effective Reporting Processes

- Designing and implementing a compliance hotline with state of the art features is only the first step.
- Companies also must ensure, among others, that
 - Information about compliance hotline is disseminated to both internal (employees) and external parties (e.g., business partners);
 - Management sets a tone at the top of the company that emphasizes the value of reporting;
 - Complaints and inquiries processed through the hotline are handled in a competent and prompt manner; and
 - The reporting (and post-reporting) processes evolve, which includes tests, audits, and benchmarking against peers.

Group Discussion



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Select Anonymous Reporting Practices

- Publicly available information regarding the compliance hotlines of 13 U.S. and non-U.S. companies shows:
 - All of these companies employ telephone reporting hotlines;
 - Over 60% employ live operators 24/7, including third party operators; and
 - Almost 80% offer an electronic reporting tool with some limitations (e.g., some limited to particular geographies, some available only via the company intranet).
- There may be other features available through the companies' intranet or which are not immediately apparent.

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Select U.S. Companies: Caterpillar

- U.S. entity:
 - A telephone hotline is provided by a third party.
 - It is staffed by live operators 24 hours a day, 7 days a week.
 - Calls may be anonymous, reports are sent electronically to the office of Business Practices.
- Other jurisdictions:
 - Telephone hotlines, a confidential fax number, email contact, and mailing address are available.
 - An online electronic reporting system allows for anonymous reporting in certain jurisdictions.

See <https://www.caterpillar.com/c/company/code-of-conduct/office-of-business-practices.html>; <http://i7d2.scene7.com/is/content/Caterpillar/C10398712>

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Select U.S. Companies: Ford

- There is a free mobile application, “The Right Way,” which is publicly available, in seven languages, for ethics-related inquiries and advice, as well as for reporting of suspected policy violations.
- A U.S. compliance phone hotline available through “The Right Way”.
- The “tipline” is manned by a live operator.
- Email addresses to report violations in various geographies are provided through the app.
- Per Ford, anonymous reports may be submitted in a variety of ways via the Intranet.

See <https://corporate.ford.com/microsites/sustainability-report-2016-17/strategy-governance/governance/ethics.html#ccv>; *Ford The Right Way App*

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Select U.S. Companies: General Electric

- There is a Corporate Ombudsperson telephone message system.
 - “GE has approximately 620 ombudspersons around the globe to encourage the reporting of concerns without fear of retaliation.”
- The hotline is directed to a voicemail where reports may be made anonymously.
- Additional resources are available via the Intranet.

See <https://corporate.ford.com/microsites/sustainability-report-2016-17/strategy-governance/governance/ethics.html#ccv>; <http://www.geosustainability.com/how-ge-works/integrity-compliance/>; http://dkg-files.s3.amazonaws.com/geosustainability/wp-content/uploads/2016/12/18205334/16-0020_GE_SPIRIT_LETTER-2_r10v3_11x8.5_PRINT_ENGLISH.pdf

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Select Non-U.S. Companies: Siemens

- “Tell Us” web portal is available 24 hours a day, seven days a week for submitting anonymous reports electronically or by telephone.
- The “Tell Us” hotline is multilingual.
- The external ombudsman can be contacted confidentially and anonymously.

See <https://www.siemens.com/global/en/home/company/sustainability/compliance/reporting-channels.html>

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Select Non-U.S. Companies: Adidas

- Through the “Fair Play” hotline and free mobile application, employees and external parties can either email the compliance department or make a telephone hotline call.
- The hotline uses a third party operator (which is also used by British Airways and Michelin, according to Adidas) to submit reports.
- Reports may remain anonymous; per Adidas, they will be forwarded to the Chief Compliance Officer within 24 hours.
- There are numbers for different geographies, as part of the “app”, to “get advice from a compliance officer.”

See https://www.adidas-group.com/media/ff8/41/8841b2e-f538-43dc-80cc-1d8f2219d1b1/180405_adidas_coc_complete_en.pdf
Adidas FairPlay App

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Questions?

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Thank You!
