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Whistleblowers: The Directors' Ally

By Mike Gray

Whether one likes it or not, misconduct by employees (including fraud) can happen in any company. It is difficult for directors to be on top of the problem areas, particularly when there is collusion. Help is at hand, in some circumstances, from those who are close to the action and report the irregularities - namely the whistleblowers.

Whistleblowing is the reporting of misconduct of an employee. The reporting could be made by another employee or other stakeholders of the organisation, such as suppliers and customers. Misconduct can range from minor issues to complex and major frauds.

The corporate financial scandals of Enron and WorldCom were respectively exposed by Sherron Watkins and Cynthia Cooper, two courageous employees who were both subsequently named Time's "Persons of the Year 2002". A more recent headline case is the exposure by chief executive officer Michael Woodford of Olympus' loss-hiding arrangements, one of the biggest and longest-running in Japanese corporate history.

Apart from these headline exposes, the fact is that a very large proportion of corporate irregularities are often brought to light by insiders. The KPMG and SMU Singapore Fraud Survey 2014 found that more than half of frauds detected were through notification by employees (37 per cent) or customers (17 per cent).

Role of the board

In the light of this, the board in supporting an effective whistleblowing policy and mechanism would be placing the company in the right environment to keep out or at least uncover breaches. The task of ensuring this usually falls on the audit committee (AC).

Indeed, the Code of Corporate Governance requires the AC to review the policy and arrangements by which staff and other persons may, in confidence, raise concerns about possible improprieties, and requires the existence of a whistleblowing policy and procedures to be disclosed in the company's annual report (Guideline 12.7).

The tone from the top on a strong ethical culture including clear expectations of acceptable conduct is important. Complementing this are the mechanisms to ensure ethical conduct, including a whistleblowing policy and procedures.

Key elements of a good whistleblowing policy and programme include:

- clarity on purpose and scope of the whistleblowing policy;
- appropriate ownership of the various governance and control mechanisms;
- reporting channels that will provide assurance of confidentiality and follow through;
- embedding of the programme at all levels in the organisation;
- ensuring that effective communication, guidance and training are in place;
- rigorous case management and follow-ups;
- regular monitoring, review and adaptation of the whistleblowing policy and mechanism by the AC.

Details of leading practices related to a whistleblowing policy and mechanism are contained in the MAS/SGX/ACRA Guidebook for Audit Committees in Singapore.

Encouraging whistleblowers

A whistleblowing process can be effective in reducing loss to a company but the process must be robust enough to encourage whistleblowers.

A key aspect of this is the assurance to whistleblowers that they will be protected from being victimised. Without such reassurance, they would be reluctant to blow the whistle for fear of becoming disadvantaged and so might decide to remain silent or, in the case of employees, just simply resign from the company.

Therefore, there should be a clear statement in a company's whistleblowing policy to the effect that the company's employees should be able to make reports without fear of reprisal, discrimination or adverse consequences, and that their reports will be treated with confidence with every effort made to ensure that confidentiality is maintained throughout the process.

In various jurisdictions, in particular the US, there are pieces of legislation in place to afford legal protection for whistleblowers.

In Singapore, although we do not have universal whistleblower protection legislation, there are several statutory provisions that offer some protection. Section 36 of the Prevention of Corruption Act ensures that a complainant's identity will not be disclosed even during court proceedings (unless he has wilfully made a false statement). Section 208 of the Companies Act offers protection to company auditors by ensuring that they will not be liable for defamation for any statement made in the course of their duties.

To further encourage whistleblowing, some government agencies and even companies pay a reward to whistleblowers to come forward. The US Securities and Exchange Commission makes awards ranging from 10 to 30 per cent of the monetary sanctions collected for securities law violations. In 2014, it announced that it paid out US\$30 million, its largest reward to date, to an anonymous tipster living outside the United States.

The Inland Revenue Authority of Singapore (IRAS) pays out a reward of 15 per cent of tax recovered to any whistleblower, up to a maximum of S\$100,000. Interestingly, IRAS recently reported that eight out of 10 people who tipped off on tax cheats did not want a reward.

The approach of having a reward that is linked to the sum exposed or recovered, attractive as it is, can also be a double-edged sword as a potential whistleblower may delay exposing the issue to increase the bonus.

While whistleblowing may not be the be-all and end-all to uncovering frauds or breaches of governance requirements, it is a necessary tool that no board can afford to be without.

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