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COVID19 Guidance Note Whistleblowing Policies and Complaints: Key Issues for Boards to Consider July 2020

1. INTRODUCTION

Given the recent press coverage about workers raising concerns about the government's Covid-19 guidelines not being observed in the workplace and the UK Corporate Governance Code identifying whistleblowing as a Board responsibility, this guidance note aims to provide a high-level overview of the key issues for Boards to consider in connection with reviewing whistleblowing policies and handling whistleblowing complaints. This guidance note should not act as a substitute for legal advice that UKGI assets may require on the topics explored below.

UKGI Legal have gathered a lot of know-how in this area, including from a previous NED forum and queries raised by various shareholder teams. If there is a specific issue highlighted in this note which NEDs or shareholders teams wish to explore in more detail, we can assist. In special instances, we can also call on our panel firms for specific advice.

This note focuses on whistleblowing complaints which are subject to whistleblowing laws rather than personal grievances. Boards should be aware that certain complaints do not constitute 'whistleblowing' – whistleblowing is an internal procedure that is designed to promote the public interest and a culture of openness. For example, whistleblowing complaints could cover instances where a criminal offence has been, is being or is likely to be committed, suspected fraud or malpractice/ ill treatment of a client. Complaints in relation to a personal grievance (including complaints of bullying, harassment and discrimination) would not necessarily constitute a protected disclosure subject to whistleblowing laws as it is a matter of personal interest and does not impact the wider public.

2. REVIEWING WHISTLEBLOWING POLICIES

All our assets should have existing whistleblowing polices with corresponding hotlines or methods for complaints/concerns to be raised, which should be fit for purpose.

The 2018 Corporate Governance Code now requires the entire Board to take a more vested interest in a company's whistleblowing policies and procedures (historically this was simply one of the functions reserved to the audit committee). The Code states that there should be a means for the workforce to raise concerns in confidence (and if they wish anonymously) and the Board should routinely review this and the reports arising from its operation.

In order to ascertain the robustness of an asset's whistleblowing policy, Boards should consider the following questions:

- **How often** is the whistleblowing policy reviewed by the Board?
- Has the policy been **compared against best practice** examples/ the asset's peers? What, if any, gaps were identified and what steps are being taken to resolve these gaps?
- Has the Board appointed a **Board level champion** with responsibility for whistleblowing?
- What are the **reporting thresholds** at Board level – does the Board receive information on the number and types of whistleblowing concerns being raised? In periods of crisis, it would be sensible to increase frequency of reporting to ensure the Board has barometer of employee's wellbeing.
- How does the Board **review the data** it receives in relation to whistleblowing complaints? Boards should look at trends in the data it receives, for example by asking how many whistle-blowers raised concerns anonymously, confidentially or openly. This will give Boards a better indication of the culture of the workplace rather than relying on the number of complaints alone.

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- What are the **metrics relating to the close out of complaints raised?** – The Board should consider the information that should be reported to it on this issue, including, for example, asking (i) how long does it take to resolve the concern raised (this gives an indication of the willingness of the asset to deal with whistleblowing complaints); and (ii) what are the outcomes (if virtually all complaints are deemed unfounded, this could be a warning signal with respect to underlying business practices).
- Are there any **concerns that weren't raised through whistleblowing** that might have been and why was this the case? If the Board hears about a concern first from customers or suppliers rather than its staff, what might this indicate in terms of the openness of company culture/other red flags?
- Are the **methods for logging a concern well communicated** to its workforce and employees at all levels? The Board should ask itself whether it is satisfied that the policy sets the right tone and helps to encourage and protect anyone speaking up in the workplace, not simply employees, but also NEDs, volunteers and contractors.
- Does the policy provide **multiple channels for raising concerns**? Has the asset considered using an **external independent source of advice** for their staff?
- Is there **adequate training for all employees** on the asset's whistleblowing policies and procedures? Is there **specific training for managers?** The training for managers should cover how to spot a protected disclosure, what the appropriate response should be, the appropriate reporting structure and what liability the asset and they may personally face for getting it wrong. How often is such training conducted?

3. HANDLING WHISTLEBLOWING COMPLAINTS

The 2018 Corporate Governance Code states that Boards should ensure that arrangements are in place for the proportionate and independent investigation of any concerns raised by the workforce and for the follow-up action.

There is a risk that despite having a robust whistleblowing policy in place, an asset and its Board may mishandle a whistleblowing complaint it receives by failing to adhere to the procedures set out in the whistleblowing policy. Common errors include failing to protect the anonymity of the whistle blower and inadvertently creating a culture of intimidation when seeking to understand and resolve a complaint. Such errors pose a significant risk to the business and can result in employee litigation and reputational damage.

Whistle blowers should be seen as a vital risk management tool and the tone from the Board about whistleblowing and how the asset treats whistle-blowers is important. Boards should seek to foster an open culture, where staff feel safe to speak up and where whistle-blowers who raise concerns are protected.

When dealing with whistleblowing complaints, Boards should be cognisant of the following:

Information flow

- Instinct as a Board member is to want to know all the facts. However, often better not to know all the details, but enough to be able to assess:
    - the seriousness of the issues raised; and
    - whether the designated person within the organisation is appropriate to lead the investigation /response and is free of conflicts. It is considered best practice that there is at least one senior member of staff as a point of contact for the whistle blower, particularly in cases where the immediate line management relationship is damaged or where the disclosure involves the manager. Particular thought should also be given to who from the Board should be involved in serious cases, especially those involving senior management.
- Boards should set reporting thresholds (including the frequency of reporting) with respect to the progress of a complaint. When determining what types of reporting thresholds to set, Boards should consider, not simply the potential monetary liability but also reputational risk, possible financial misfeasance, legal risk and whether senior management are implicated.
- If using an external law firm, assets should use a different firm from the regular/ retained adviser, in order to be able to demonstrate no pre-existing relationship to the company.

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- Important to remember that the whistleblowing process is designed to protect the identity of the whistle blower.

Communication and effectiveness

- Where a disclosure has been made externally, Boards should consider if the asset should respond to the disclosure with a statement of its own to protect its reputation. While an asset can make a statement to dispute any false or misleading statements made, it should take care when responding to disclosures which contain some truth and some inaccuracies and not issue a blanket denial.
- After an issue has been investigated and, if necessary, addressed, the Board should consider whether the company's whistleblowing policy is effective, or needs to be updated. Consider conducting regular surveys to ascertain the satisfaction of whistle-blowers.

Victimisation and unlawful detriment

- Boards should ensure adequate protections are in place to prevent the victimisation of any whistle-blowers. It is unlawful to subject a worker to any detriment and automatically unfair to dismiss an employee for whistleblowing. Common detrimental treatment of whistle blowers includes breaching their confidentiality, bullying by colleagues or managers, side-lining or demoting them, performance managing them, giving poor references or damaging their reputation.

Further resources

While this guidance note is not designed to be circulated outside UKGI, for those interested in this topic, there is a useful note produced by the law firm Simmons and Simmons entitled *Ten points for Non-Executive Directors on whistleblowing*[1] which covers many of the points raised in this guidance note and can be circulated to assets as required. The NAO has also published *Assessment criteria for whistleblowing policies*[2] which may be useful if an asset is looking to review the robustness of its existing whistleblowing policies.

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[1] https://www.simmons-simmons.com/en/publications/ck8ke4onf1yst0a16lvadq04j/ten-points-for-non-executive-directors-on-whistleblowing
[2] https://www.nao.org.uk/wp-content/uploads/2014/01/Assessment-criteria-for-whistleblowing-policies.pdf