

This Guidance Note is for the information of UKGI staff. It is not to be circulated outside of UKGI

Guidance Note 21 Whistleblowing and Serious Allegations: Key Corporate Governance Issues Updated November 2023

1. **INTRODUCTION**

This guidance note aims to provide UKGI Shareholder NEDs and Shareholder Teams with the tools to assist them in supporting assets and their Boards in adopting a best practice approach to handling whistleblowing and other serious allegations / complaints.¹

This note is not intended to provide an overview of what whistleblowing is or the identification of complaints / allegations, but rather to assist Teams in identifying and mitigating the corporate governance issues which arise from such complaints / allegations once made. If you need a refresher on formal whistleblowing processes and the legal regime which applies, information on this can be found [here](#).

Whistleblowing complaints are subject to whistleblowing laws, and their handling requires the following of particular processes and specific procedures to protect the whistleblower. Shareholder Teams should be aware (and should be comfortable that their Board members are aware) of what types of complaints do and do not constitute 'whistleblowing'. However, where serious allegations are made which do not constitute formal 'whistleblowing' many of the same corporate governance issues arise, and it is likely that the Shareholder team will expect the same or very similar actions to be taken by the Board. Examples of issues which might tip into this space, regardless of whether they constitute formal whistleblowing, are:

- (i) repeated related complaints;
- (ii) instances where a criminal offence has been, is being or is likely to be committed;
- (iii) suspected fraud, corruption or bribery or malpractice;
- (iv) discrimination against / ill treatment of a stakeholder or stakeholder group.

Throughout this note, for ease we will reference whistleblowing, whistleblowers and whistleblowing issues, but this guidance should be read to also be applicable to other serious allegations which may be raised outside of the formal whistleblowing process.

UKGI Legal have a lot of experience advising Shareholder Teams and NEDs on complex whistleblowing issues, including where these are, or have the potential to become, litigious. 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 guidance note should not act as a substitute for legal advice that UKGI assets may require on the topics explored below.

2. **OVERVIEW OF WHY WHISTLEBLOWING MATTERS TO ASSET BOARDS AND UKGI**

Why should whistleblowing matter to Asset Boards and what should Assets Board be focused on?

At a high-level, ensuring robustness in whistleblowing frameworks is key to promoting a culture of transparency and accountability with an organisation – as well as providing a protective framework for workers. The 2018

¹ **IMPORTANT NOTE TO READER:** This guidance note is not, however, designed to address the employment law aspects in connection with assets' grievance etc. policies. Concerns in connection with such issues will require specialist employment law advice

This Guidance Note is for the information of UKGI staff. It is not to be circulated outside of UKGI

Corporate Governance Code requires the entire Board to take a more direct 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. The best and simplest way to address the requirements of the 2018 Corporate Governance Code is to have a policy which is easy for the workforce to access, understand and is easy for both workers and the employer to follow and robust procedures that are followed.

With the above in mind, at a practical level, the boards of assets in our portfolio should be able to satisfy themselves that the asset has appropriate policies and procedures to:

- (i) Receive and assess whistleblowing claims
- (ii) Conduct appropriate investigations – with appropriate independence and oversight
- (iii) Provide visibility to the Board on significant whistleblowing claims particularly where there were materials financial, reputations and/or political risks.

Section 3 and 4 below provide some further detail on whistleblowing policies and procedures and the issues that our assets' boards and UKGI's Shareholder Teams should be considering on this topic.

Why does this matter to UKGI?

The Shareholder NED and Shareholder Team will need to satisfy itself on an ongoing basis that the asset's policies and procedures and that this topic is receiving appropriate attention at Board level. However, where serious or high-profile allegations are raised, given the financial, reputational, and political impact this could have on the asset, the Shareholder NED and Shareholder team may need to do more to assure themselves that the issue is being taken seriously. Section 5 explores how UKGI can do this in practice.

3. **REVIEWING WHISTLEBLOWING POLICIES**

All assets within the UKGI portfolio should have existing whistleblowing policies with corresponding hotlines or methods for complaints/concerns to be raised, which should be fit for purpose. In accordance with Principle C of POPs, the Shareholder team and Shareholder NED should ensure they are satisfied that the asset has in place an appropriate whistleblowing policy.

In order to ascertain the robustness of an asset's whistleblowing policy, some questions Shareholder Teams and their respective Shareholder NEDs may want to consider encouraging Boards to ask are:

- **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? How frequently should the comparison exercise be refreshed?
- 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.

This Guidance Note is for the information of UKGI staff. It is not to be circulated outside of UKGI

- 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 (both for new joiners and to refresh existing workers)?

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

If Shareholder Teams and Shareholder NEDs are not satisfied that the Board has an appropriate attitude towards whistleblowing, serious considerations should be given as to whether this is an issue which requires escalation.

4. HANDLING WHISTLEBLOWING COMPLAINTS – ACTIONS FOR ASSETS

Provision 1.6 of 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 appropriately consider such complaint, or adhere to the procedures set out in the whistleblowing policy. Common errors include failing to protect the anonymity of the whistleblower, inadvertently creating a culture of intimidation when seeking to understand and resolve a complaint and prejudging the outcome of any investigation into such issues (i.e. starting from a 'prove it to be false' mentality). Such errors pose a significant risk to the business and can result in employee litigation and significant reputational damage. The risk of these errors occurring can be mitigated by having a well written policy which reflects best practice, making it easily accessible to all workers and providing appropriate periodic training on the policy, operating in tandem with an open and transparent culture promoted from senior management and the Board, down through the organisation.

When dealing with whistleblowing complaints, the Shareholder Teams and their respective Shareholder NEDs should be should consider whether Boards are – and if not encourage them to be – cognisant of the following issues.

This Guidance Note is for the information of UKGI staff. It is not to be circulated outside of UKGI

(i) Information flow

- The asset's Board will need to consider whether information flow into the Board is appropriate and sufficient. Often, the instinct as a Board member is to want to know all the facts relating to a whistleblowing case that has been flagged to the Board. However, it is often better for the wider Board not to know all of the intimate details, but rather have enough to be able to assess from an objective and arm's length 'perspective.
- When considering whether information flow is sufficient the Board should consider:
 - o the seriousness of the issues raised (independent of their impact on the business);
 - o the potential impact on the business of the issues raised (not limited to financial impact, but also reputational risk, potential misfeasance, legal risk and people risk, including whether senior management are implicated); and
 - o whether appropriate processes have been put in place to investigate / respond to the issues raised. In particular, 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 whistleblower, particularly in cases where the immediate line management relationship is damaged or where the disclosure involves the line manager.
 - o The Board should also give particular thought as to whether individual Board members should be more involved in the handling and investigation of the whistleblowing case. This is particularly important in cases involving senior management, where the Board will want to be assured that they are receiving appropriate updates on progress. In certain instances it may be that a Board Sub-Committee such as ARC, will need to be responsible for the conduct of the investigation.
- Boards should endeavour to set reporting thresholds (including the frequency of reporting) with respect to the progress of serious complaints. Thresholds may differ according to the nature and seriousness of the complaint.
- If using an external law firm or other specialist advisor, in certain cases (in particular those concerning senior management) assets may wish to consider using a different firm from the regular / retained legal adviser, in order to be able to demonstrate the advisor has no pre-existing relationship with the company and /or individuals involved.
- If a Board member is implicated in connection with the whistleblowing complaint it would be appropriate for that Board member to be recused from any discussion regarding that specific whistle blowing complaint.
- It is important to remember that the formal whistleblowing process is designed to protect the identity of the whistleblower. Even in cases outside of the formal process, the source of the relevant complaint may need to be taken into account while designing the process for investigation / response.

(ii) 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 and if so, when to make such statement. 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.

(iii) Victimisation and unlawful detriment

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

This Guidance Note is for the information of UKGI staff. It is not to be circulated outside of UKGI

5. LEANING INTO SERIOUS ALLEGATIONS AS SHAREHOLDER

Where Shareholder NEDs or Shareholder Teams become aware of serious whistleblowing complaints, they will need to consider whether a more proactive approach is required and should be prepared to take further action.

As UKGI observed to the Post Office Horizon IT Inquiry in its Opening Statement dated October 2022 *“Particularly where significant or high-profile whistleblowing matters are brought to an asset’s attention, UKGI (via the Shareholder Team and/or Shareholder NED), should take steps to ensure it is properly sighted on how an asset is handling its response, and if it considers the handling to be inadequate, it should be prepared to intervene.”* In essence, where significant and/or high-profile allegations arise in a public forum, the Shareholder team must satisfy itself that the asset’s Board is alive to the risk that the issue might present and that the allegations are being addressed in an appropriate manner.

When might the Shareholder NED/Shareholder Team need to further engage and lean into issue?

There is no prescriptive list. However, examples of the types of serious issue that may require increased attention from UKGI include:

- where the Shareholder NED/Shareholder Team considers issues are not being considered by the Board with an appropriate level of seriousness, e.g. where Board appear to be unsighted on detail or too deferential to assurances being provided by management;
- where the issue represents a significant reputational risk to the asset and – directly or indirectly – the Shareholder;
- where Board members or significant number of senior management are implicated in the issue;
- where the Shareholder NED/Shareholder team considers the process to investigate the issue may be flawed;
- where the Shareholder NED/Shareholder team do not feel they have access to sufficient information to assess whether the complaint is being dealt with appropriately.

What does further action look like?

Ensuring UKGI is able to understand and fully consider allegations being made in connection with assets in the portfolio, and the risks associated with them, is a key part of UKGI’s stewardship responsibilities in connection with the portfolio, and the Shareholder team and Shareholder NED should lean in to ensure they understand the relevant whistleblowing complaint / allegation, and the risks it presents to the organisation, Shareholder and UKGI as agent of the Shareholder. What are they ways in which this might be done?

- (i) **Challenge the Board:** In almost all cases, the first lever which would be deployed would be for the Shareholder NED to raise the relevant concern with the Board / Chair as appropriate to ensure that the asset’s board are fully alive to the risks that the issue might present.
- (ii) **Challenge the executive:** Review assurances being provided by an asset’s executive team to a Board to test whether it is sufficiently independent and objective. In particular, the Shareholder NED must be willing to challenge the asset’s management team if she/he has any concerns about the way such allegations are being addressed, including where there is a sufficient degree of independence/objectivity in the assessment of the allegations and the asset’s response

This Guidance Note is for the information of UKGI staff. It is not to be circulated outside of UKGI

- (iii) **Commission third party assurance:** In certain (exceptional) instances UKGI may want to consider commissioning third party assurance. As HMG is the ultimate Shareholder of UKGI's portfolio of assets, it is subject to greater scrutiny than a traditional Shareholder. The Shareholder NED and Shareholder team should consider whether it needs to take a closer examination of the conduct/output of any investigation into significant/ high-profile allegations an independent third-party review may be needed
- (iv) **Encourage further Board engagement:** Where for example, allegations are raised by investigative journalists and have been subject to a degree of fact checking before broadcast or print, it would be prudent for the Board to consider the significance of the information being aired, independently of the view of the executive, who may not be able to examine the issues objectively. This is also the type of circumstance in which, from a Shareholder perspective, the third-party assurance referenced in (iii) above may become a useful tool.
- (v) **Consider alerting the Department/Departmental Involvement:** Often given the sensitive and confidential nature of whistleblowing claims and investigations, it is understandable why the asset and correspondingly the Shareholder NED may wish to keep details of the issue within a tight group. However, depending on the nature of the claim, ensuring that Departmental policy officials and/or Perm Sec are sighted is important, particularly where reputational, governance or financial risk are engaged
- (vi) **Review ToR:** Where serious allegations have been raised, particularly where senior management and/or board members are implicated, the Shareholder NED and Shareholder Team may want to consider providing a formal Shareholder view (in conjunction with the Department) on the adequacy of any ToR for an investigation. We have a recent example of this in the portfolio
- (vii) **Critical self-reflection:** The Shareholder NED and Shareholder team must periodically reflect on its own assumptions and biases in relation to the issue in question, challenge itself as to whether it is in danger of being involved in "group" think and reflect on whether it is providing strong and effective challenge.

It is possible that the whistleblowing complaint will be concerned with information of a sensitive nature, which the company suggests would be inappropriate to share with a wider group. UKGI Legal can assist Teams in navigating this situation and would reassure Shareholder Teams and Shareholder NEDs that it is both appropriate and necessary that the existence and subject matter of the whistleblowing complaint is shared with UKGI Legal and members of the Shareholder team to assist the Shareholder NED in performing their duties as a Board member in connection with the relevant issue.

If the team and Shareholder NED feel further steps are required, there are a variety of options available, the application of which will depend on the circumstances. UKGI Legal are available to assist Teams in considering how to appropriately escalate concerns.

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

¹ <https://www.simmons-simmons.com/en/publications/ck8ke4onf1yst0a16lvadq04j/ten-points-for-nonexecutive-directors-on-whistleblowing>

This Guidance Note is for the information of UKGI staff. It is not to be circulated outside of UKGI

circulated to assets as required. The NAO has also published *Assessment criteria for whistleblowing policies*¹ which may be useful if an asset is looking to review the robustness of its existing whistleblowing policies. There has been recent parliamentary discussion regarding strengthening the UK's audit and corporate governance framework, including amendment of the 2018 Corporate Governance Code and the introduction of a new regulator, the Audit, Reporting and Governance Authority (ARGA) having been previously mooted for 2023. The introduction of the ARGA is likely to inform best practice for whistleblowing policies. Until further guidance comes through from that regulator or the Financial Reporting Counsel, the *Whistleblowing Guidance for Employers and Code of Practice March 2015*² remains the current BEIS guidance on whistleblowing.

¹ <https://www.nao.org.uk/wp-content/uploads/2014/01/Assessment-criteria-for-whistleblowing-policies.pdf>

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415175/bis-15-200-whistleblowing-guidance-for-employers-and-code-of-practice.pdf