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Bylined Article

7 Steps for Managing SEC Whistleblower Risk

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The US Securities and Exchange Commission's annual report to Congress on the Dodd-Frank whistleblower program was released this week, and it touted the nine whistleblower awards doled out in the 2014 fiscal year—more than in the previous two years combined. It included the largest payout to date—a $30 million award to an unnamed foreign individual. The number of tips made to the SEC increased by 10 percent from FY2013, and the SEC is continuing efforts to increase public awareness about the program. Separately, in recent speeches, the US Department of Justice leadership is highlighting whistleblower reporting as a significant law enforcement tool and strongly encouraging tipsters to come forward. DOJ also has publicly encouraged companies to cooperate in investigations of corporate wrongdoing and has warned them against retaliation. Other federal agencies also are joining the call: paying rewards, increasing incentives and strengthening antiretaliation prohibitions.

But what really incentivizes employees to become government whistleblowers? Is it the lure of a payout? Is it an instinct for self-protection? Is it anger that no one hears and acknowledges their concerns?

The truth is that, in addition to the potential for payment, most cases suggest that whistleblowers turn to alternative sounding boards when the right people in their companies aren't listening to them, or when they perceive adverse employment actions aimed their way. In fact, the SEC reported that 80 percent of tips from current or former company employees were originally reported internally to supervisors or compliance personnel before the tipsters went to the SEC. This statistic suggests that companies need to pay more attention to the effectiveness of their internal whistleblower programs and their responsiveness to internal complaints. Companies asleep at the switch pay a very steep price; when the whistleblower train starts moving, it can be a very expensive ride and extraordinarily difficult to stop or slow down.

What Drives External Whistleblower Reporting?

Companies should consider the possibility that whistleblowers report externally when they think no one else is listening. For example, an employee reports a problem internally but believes the report falls on deaf ears, is not taken seriously or the problem is not being fixed. When companies fail to "hear" the call of the whistle, employees are increasingly incentivized to turn to someone else, like the government or a sophisticated plaintiff's bar. And these offer not only an alternative forum but the lure of a financial return.

These days the SEC is not only soliciting tipsters, it's encouraging them to act with dispatch. It has gone so far as to reduce at least one whistleblower award and criticized whistleblowers who delayed before reporting their concerns to the commission. In this environment, if a company has a prior history of retaliation or does not promote a "speak up" culture, employees may consider alternative options sooner—to protect themselves against retaliation and to strategically preserve and maximize a monetary award.

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In short, companies need to get smarter. They need to make sure their reporting programs and their responses to complaints evolve to meet the growing risks of today's environment.

The Best Defense Is a Proactive Offense

Regardless of the motivations of individual whistleblowers and the deluge of press coverage that will result from the SEC's report, the key takeaways for companies trying to do the right thing are relatively simple. Here are seven steps to help companies focus:

1. **Be Prepared**: Recognize that the legal, financial, business and reputational costs to companies for defending against whistleblower complaints can be staggering. The era of omnipresent media (both mainstream and social) and proactive government reporting programs virtually guarantee that whistleblower reports will require companies to investigate and defend themselves. Understanding the increasing and evolving risks is the first step toward managing against them. Know the law, keep abreast of developments and make sure the company's internal policies prohibit retaliation.
2. **Foster a "speak up" culture that encourages employees to raise problems internally**: Putting in place strong internal reporting programs is a step in the right direction, but by itself it is not enough. Company management should encourage employees to speak freely about concerns without fear of punishment or retribution. Management should "talk the talk" and "walk the walk" from the top down—showing by example the importance of good corporate citizenship and high ethical standards. Missteps should be addressed swiftly so that employees understand that no one is above the company's code or the law.
3. **Establish an independent, unbiased committee with responsibility for oversight**: The committee should oversee the company's whistleblower program and coordinate its stakeholders on relevant issues. While some whistleblowers take advantage of internal

compliance reporting mechanisms and hotlines, others go straight to their bosses—who may be part of the problem.

Hotlines and compliance reporting is a must, but companies also should cast a broader net to cover other reporting as well to make sure that nothing falls through the cracks, or worse, gets buried. Employees from the top down and bottom up should be trained how to lodge internal complaints, even if they are not the original reporter. Bosses should not be responsible for investigating employee complaints themselves; they should be required to report them to appropriate personnel. The committee should include designated senior personnel from compliance, legal, human resources, management and public relations. The process should be independent and include clear instructions for addressing conflicts of interest to avoid potential retaliatory action or claims of bias. The process also should identify clear rules for alerting senior management and the board when serious problems are uncovered.

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4. **When reports are made, make sure there are processes in place**: These should spell out how issues will be investigated, and how reporting employees will be notified of the results. Silence may be golden in a movie theater, but it's not if you are addressing an employee complaint. If an employee is raising questions about potential problems, the company should investigate the concerns and help the employee understand the outcome—regardless of whether the complaint is determined to have merit. The lack of any response may lead to false assumptions by the employee that the company has ignored a potential problem and make external reporting much more appealing.
5. **Track and look for trends in reporting**: Be proactive in compliance. Find new ways to spot problems early. Are certain managers, departments, sales channels, functions or geographies the subject of multiple complaints with similar themes? If so, you may need to look at them more closely. Are certain managers receiving glowing reviews while the departments they manage experience high turnover, disgruntled employees and negative exit interviews? If red flags or potential warning signs are present, consider whether an audit or compliance review is appropriate to take a fresh, fair and independent look at the situation—before someone else does.
6. **Make sure the left hand is talking to the right hand**: Consider carefully the impact of negative employee reviews and terminations. Understand the circumstances of the action and whether the employee has lodged any recent complaints. Managing employee issues can be complex to navigate, but it is still surprising to see the number of cases in which companies walk into avoidable retaliation problems because of the "left hand/right hand" problem. Too often, internal functions fail to communicate on basic issues before employee action is taken.

Does this mean that an employee should escape a deserved poor performance evaluation or escape legitimate termination? No. But all the facts should be considered. Complaints may not always be resolved, but they should at least be understood. Litigation risks also should be evaluated so that a thoughtful and considered approach can be implemented and, if necessary, stakeholders can be prepared for potential backlash.

On the other hand, if the proposed employee action smacks of retaliation, the company can stop it. Document how the issues are handled to justify the company's actions and the remediation of any problems, as well as any steps taken to assess the effectiveness of the whistleblower program.

7. **Document your program's handling of complaints**: Companies need to document the effectiveness of their programs, including their track records for addressing reported employee concerns, prohibiting retaliation and protecting the confidentiality of whistleblowers who complain about compliance issues. Audit your process and document improvements made. The time to build a track record for success is now—before the government knocks at the door or you have a significant whistleblower problem.

Companies should try to identify sophisticated and coordinated proactive strategies to navigate the changing whistleblower landscape. Where possible, they should use their compliance and auditing programs to understand where significant risks may lie, and to take steps to head problems off at the pass—before they spiral out of control.

Effective programs can significantly reduce or mitigate the possibility that your company will be subject to negative publicity—or become a statistic in next year's SEC report.

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