Compliance & Ethics PROFESSIONAL

Vol. 8 / No. 6
12 / 2011

TOP STORIES INSIDE

4 Attacking third-party bribery risks

9 Risk management: What's a (smaller) public company board to do?

30 How does your compliance & ethics program measure up?

36 "It's your professionalism I respect"

44 From pawn shops to Facebook: A look back at the 2011 Compliance and Ethics Institute

34 In the Spotlight: Melissa Grandal Administrator of International Corporate Regulatory Compliance at IEEE

Meet Patrick W. Kelley

Assistant Director, FBI Office of Integrity and Compliance

Society of Corporate Compliance and Ethics

This article, published in Compliance & Ethics Professional, appears here with permission from the Society of Corporate Compliance & Ethics. Call SCCE at +1 952 277-4977 or 888/277-4977 with all reprint requests.

Is whistleblowing effective for an organization?

By Amy Block Joy, PhD

AMY BLOCK JOY

Intending to encourage and protect whistleblowers, Congress created the Sarbanes-Oxley Act in 2002. The Act defines whistleblowing procedures, provides for anonymous reporting, and establishes penalties for retaliation, thus giving the illusion of protecting the whistleblower.[1] In 2008, eight out of ten companies had a whistleblower policy in place, but only half of them reported that their policy was effective.[2]

Society benefits from whistleblowing. Stopping fraud saves money and increases trust that wrong-doers will be detected and punished. In fact, the cost of undetected fraud, based on the opinions of 1,843 anti-fraud experts, was estimated to be, on average, about 5% of an organization's annual revenues. In addition, "tips" by employees were a significant source of fraud detection, accounting for more than three times more than any other form of detection.[3] Whistleblowers uncovered and detected more fraud within their companies than the paid professionals.[4]

So, if programs are in place and the benefits of these programs have been documented, why are employees so reluctant to sound the alarm? Clearly, blowing the whistle is complex and people fear retribution, job loss, and damage to career and reputations. Even with laws, regulations, and anti-retaliation programs in almost every state, speaking out is just too dangerous. In addition, potential whistleblowers may not know exactly how or when to do it.

Whistleblower definition

The definition of a whistleblower is complicated. Most definitions include these elements: "An employee who discloses information that s/he reasonably believes is evidence of illegality, gross waste or fraud, mismanagement, abuse of power, general wrongdoing, or a substantial and specific danger to public health and safety."[5]

Although the congressional provisions of Sarbanes-Oxley Act (SOX) of 2002 were written to protect whistleblowers, many argue that they are inadequate. Section 86 of SOX specifies that internal whistleblowing is an appropriate channel which allows the organization to rectify misconduct confidentially within the organization, but many organizations do not have a mechanism for such in place. In addition, there are numerous hurdles, including who is covered and who is not (e.g., some organizations cover "applicants" and some do not); the numerous and brief timeline requirements; and the notification process (e.g., who, specifically, needs to receive the report). It is also significant to note that SOX does not protect workers who go to the media.[1]

Although motivations of whistleblowers are frequently scrutinized, published studies have reported whistleblowers to be motivated by strong ethical principles and integrity.[4,6,7]

Still, getting employees to report wrongdoing has a long way to go. Results of a 2007 business ethics survey demonstrated that unethical behavior is common.[8] The 93 employees who responded to the survey reported:

- 25% said they had observed unethical behavior within the organization.
- 11% said they had felt pressured to participate in unethical behavior.
- 13% said that they did not feel that they could report unethical behavior without fear of reprisal.
- Only 66% said they believe that unethical behavior in the company would be detected and punished.

There is some good news. The 2009 Business Ethics Survey found that trust in leadership and a strong ethical culture from the top management to the workforce reduced misconduct and increased the reporting of wrongdoing by employees.[9]

Whistleblowing policy

To try to determine the effectiveness of whistleblowing in an educational setting, a preliminary survey of 61 public and privately funded universities across the United States was conducted by the author. This purpose of this review of whistleblowing policies was (1) to identify resources available to university employees; and (2) to find ways to encourage the reporting wrongdoing by the workforce.

One limitation of this preliminary whistleblower policy survey was its small sample size (approximately 1.4% of university and colleges across the United States), so caution must be used in interpreting the results. The university websites were reviewed over ten consecutive days in June 2011. The sites were selected quasi-randomly using Google to identify a university in each state and territory of the United States.

The survey was conducted in two phases. Phase I was the identification of resources by reviewing websites at 55 publicly funded institutions, one per state and territory, and six well-known private institutions. An hour was spent on each site looking for information on:

- Written whistleblower policy
- Hotline
- Anonymous reporting procedure
- Written whistleblower retaliation policy
- Information on ethics
- Written ethics policies
- Ethics tutorials, classes, and manual
- Ombuds or Compliance/ Ethics Office
- Resources for staff and students
- Contact person

After 61 websites were reviewed, an e-mail was sent to the contact person identified on the site, requesting them to complete a brief 10-question survey (Phase II). The purpose of this questionnaire was to compile additional information and comments on resources and best practices. Respondents were given four weeks to reply, and those who did not reply were sent a reminder during week three.

The majority of contacts listed on websites were from Internal Auditing (65.7%) and Compliance Offices (28.6%). The remaining 5.7% were from an Ethics or General Counsels Office.

Of the 61 questionnaires sent by e-mail, six institutions' questionnaires were returned with the message "failure to deliver." Of the 55 delivered, 21 people responded to the brief questionnaire. This calculates to a 34.4% response rate for the original sample (N=61).

The number of websites that had written whistleblower policies posted on the site was the same as the number of sites that had hotlines or some other process to report wrongdoing. In the 61 sites reviewed, 47.5% of the institutions had posted policies and a whistleblower hotline. The remaining 52.5% did not have a hotline or any identifiable policy on their websites.

All institutions with a hotline also had a process for anonymous reporting and a whistleblower protection policy against retaliation, which was posted on the website. Of the surveyed institutions with hotlines, 4.9% have the information available in English and Spanish (or had multi-lingual staff available at the help-line). Clearly, many states do not have the information or the process available in other languages.

CONTINUED ON PAGE 22

Looking only at the sites with hotlines, the majority (72.4%) used a third party for anonymous reporting. Of those, 51.7% used Ethics Point, 20.7% used Global Compliance, 7.0% used Network, 17.2% used an internal process, and 3.4% used an "other" process, which commonly was to post the 800 number of the state auditor's hotline.

The review also looked for posted ethics policies. Almost one-third (32.8%) of the websites had clearly identified and written ethics policies posted. The remaining 67.2% did not appear to have an identifiable ethics policy. Of those with ethics policies on their website, about one-third had an ethics tutorial, class, or online education process in place. Another 7.7% indicated that these resources were "in development."

It is quite possible that sites did have an ethics policy available, but that it was not clearly identifiable. Of the sites that did, most institutions used a unique and distinctive name, such as:

- Code of Conduct
- Campus Ethics
- Code of Ethics
- Compliance Corner
- Code of Ethical Conduct
- E-Policy
- Standards of Ethical Conduct
- Doing What's Right
- Code of Business and Fiduciary Conduct
- Institutional Compliance
- Principles of Responsible Conduct
- Compliance Resource Center
- Business Conduct Policy
- Center for Ethics
- Code of Business Conduct
- Principles of Reasonable Conduct
- Commitment to Honest and Lawful Conduct
- Auditors as Educators

Questionnaire responses

Twenty-one contacts responded to the author's brief questionnaire with comments on resources and ideas on ways to encourage the reporting of wrongdoing. They also provided information on whistleblower "tips." The annual average total number of tips was 27.5, with a range of 0 to 148 and a median of 18. The respondents said they received tips from the hotline as well as tips called or e-mailed directly to the contact person.

The respondents reported that, on average, 90%-100% of tips were investigated. Of those, 32% were substantiated with a range of 0%-70% and a median of 16%. Survey respondents reported that some tips were not investigated because they were not specific enough, were not verified, were unfounded and/or frivolous, or the caller was unwilling to participate further.

In addition, the survey respondents reported that those not investigated were handled by the following processes: referred to management, elevated to Human Resources, procedural changes identified and corrected, or closed after preliminary investigation.

Initially, the idea of collecting information on the number of tips was for the purpose of attempting to get a measure of the effectiveness of having a whistleblower program. However, none of the respondents provided any indication that they believed that the number of tips was a useful measure of either wrongdoing or reporting. For example, interpreting the result of zero tips in a year may not indicate zero wrongdoing. Instead the zero may be a reflection of the unwillingness (or inability) of employees to report wrongdoing.

Are employees willing to report fraud?

The statement "Studies show that only 3% of risk events are being captured by traditional whistleblower hotlines," is posted on the EthicsPoint website (www.ethicspoint.com). Encouraging the reporting of wrongdoing has a number of associated risks, including fear, retaliation, intimidation, threats, gossip, alienation, isolation, job loss, demotion, career risk, and reputational risk, as well as a personal toll on health and finances.[6,7,10]

In addition, there are a number of unknown and unpredictable events that can take place, including the institution's response. Questions such as: Will the institution investigate? Will they prosecute?

Will the whistleblower be investigated? Trust in the institutional response is an important issue that is often unaddressed. And if the whistleblower expects others to come forward, then they might want to consider the statistics that show this to be unlikely.[4,7,10]

The 2009 National Business Survey reported an increase in whistleblowing. However, they also found an increase in retaliation against those who reported misconduct.[9]

Respondents to the brief whistleblower policy survey provided insight into the possible use of resources to encourage employees to report wrongdoing. In addressing the question, "Can resources encourage employees to report wrongdoing?" 61.5% reported a "Yes, with constant messages"; another 7.7% reported "Yes, but limited"; 7.7% reported that they "hope so"; and 23.1% reported "No."

Resources can assist institutions only when employees know about and use them. Educating employees on policies, procedures, and expectations is a good step toward improving the detection and reporting of wrongdoing. In addition, trusting that a senior manager with a sense of shared ethical values will investigate and prosecute wrongdoers sends a powerful message.

Many institutions had extensive resources to explain and clearly define categories of wrongdoing (e.g., fraud, embezzlement, conflict of interest, scientific misconduct, misappropriation, theft of government property, and unethical behavior.). One useful way to help employees through the maze of anonymous hotline reporting was a Frequently Asked Questions (FAQ) to explain the step-by-step process. Using the FAQ to explain and clarify the types of information needed by an organization helps provide a better response for investigative purposes.

Comments made by respondents identified other useful ideas, including having a policy that requires employees to report misconduct; increasing employee awareness by constant messages (e.g., brochures, newsletters, and reminders on magnets); policy directives sent via e-mails; and using a tutorial to educate employees on the institution's ethical standards.

Resources on ethics

Only 32.8% of institutions reviewed had a written ethics policy on their website. These higher-education institutions had extensive resources, including guidelines, handbooks, classes, tutorials, and articles on ethical standards. Clearly these institutions spent time developing ethical tools for employees, students, and others on the expectations of the organization. In addition, three institutions also had links to an Ombuds Office and an official authority to provide guidance before reporting. Having someone who is independent, confidential, neutral, informal, provides explanation of policies and services, reports to a high-level official, and can help to resolve conflict is an important asset to any institution that wants to deter wrongdoing.[11]

Conclusion

Education is needed to improve effectiveness. To get employees to report wrongdoing, the workforce must know what it looks like. Educating employees in the policies, procedures, and ethical standards of the institution is a significant step toward improving the detection and reporting of wrongdoing.

The author's preliminary survey identified many important educational tools available in higher-education settings, including written and posted ethical standards, whistleblower policies and procedures, clear written and posted definitions of wrongdoing, and ways to increase the marketing of the message. In addition, having resources available is not enough—training of employees is essential for them to be able to step forward and "do the right thing."

Takeaway Lessons

- Organizations save money when fraud is deterred and detected.
- Society benefits from organizations that have a strong ethical environment.
- The workforce is a powerful ally that needs education and training.
- Organizational ethics must be consistently communicated.

CONTINUED ON PAGE 25

- Employees are motivated to do what's right and want to work for ethical organizations.
- Ethically minded organizations are more credible to employees and society.
- Having a tangible ethics program provides evidence of a culture of integrity. ✳

Notes:

1. T.M. Dworkin: "Sox and Whistleblowing." *Michigan Law Review*; 105(8):1757, 2007
2. N. Baker: "See no evil, hear no evil, speak no evil: Effective whistleblower programs encourage employees who witness company wrongdoing to speak out rather than look the other way." *Internal Auditor*; 65(2):38, April 2008)
3. Association of Certified Fraud Examiners: Report to the Nations on Occupational Fraud and Abuse: 2010 Global Fraud Study.
4. S.M. Kohn: *The Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself*. Lyons Press, 2011
5. Government Accountability Project, 2001. Available at http://www.whistleblower.org/
6. A.S. Kesselheim, D.M. Studdert and M.M. Mello: "Whistle-Blowers' experiences in fraud litigation against pharmaceutical companies." *New England Journal of Medicine*; 362:1832, May 13, 2010.
7. C.F. Alford: *Whistleblower: Broken Lives and Organizational Power*. Cornell University Press, 2001
8. S.S. Lightle, J.F. Castellano, and B.T. Cutting: "Assessing the Control Environment." *Internal Auditing*; 64(6):51, December 2007
9. Ethics Resource Center survey report is available at http://ethicspoint.com/Upload/Articles/NBES_2009.pdf
10. A.B. Joy: *Whistleblower*. Bay Tree Publishing, 2010.
11. "An Informal Approach to Solving Problems," Connecticut Law Tribune, February 22, 2010. ctlawtribune.com

Editor's note: Amy Block Joy is a Faculty/Specialist in the College of Agricultural & Environmental Sciences at the University of California, Davis. She may be contacted by e-mail at ABJoy@ucdavis.edu or by phone at 530-400-7032.

BE SURE TO GET YOUR CCEP CEUS

Complete the *Compliance & Ethics Professional* quiz related to the articles below:

Risk management: What's a (smaller) public company board to do?—By Jeffrey M. Tilton and Nancy D. Lieberman, page 9

How does your compliance & ethics program measure up?—By Danielle Herrick, page 30

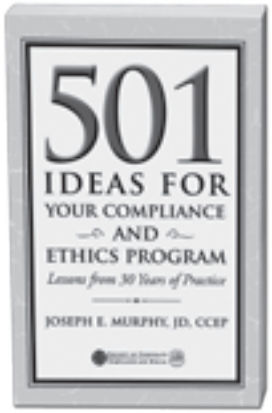
Ignore the Sentencing Guidelines: Everyone else does!—By Josh Howard, page 50

CEU Credit Procedure

Visit www.corporatecompliance.org/quiz. Select a quiz, fill in your contact information, and answer the questions. The online quiz is self-scoring and you will see your results immediately. Or, you may FAX or MAIL the completed quiz to CCB at SCCE. Questions? Please call CCB at +1 952 933 4977 or 888 277 4977.

Please note that credit will be given only for quizzes received before the expiration date indicated on the quiz. One (1) CEU is earned for a passing score.

501 Ideas for Your Compliance and Ethics Program



Jump-start your program with SCCE's best-selling idea guide! Author Joe Murphy has spent his career collecting great ideas for building an effective compliance and ethics program. These practical tips can have an immediate, lasting impact on your organization's program.

Visit the HCCA store at www.hcca-info.org, or call 888-580-8373.