FIRST TO KNOW

ROBUST INTERNAL REPORTING PROGRAMS

TRACE is an international non-profit business association. TRACE works with companies that seek innovative ways to protect their reputation, communicate their business ethics and meet their anti-bribery compliance obligations. TRACE also works with commercial intermediaries who commit voluntarily to greater transparency and ethical business practices. TRACE is the bridge between these companies and these intermediaries.

ISIS Asset Management is a London-based institutional investment manager with approximately £64 billion[1] (US$112 billion) under management. ISIS believes that attention to social responsibility and sustainable development is critical to long-term business success. In addition to considering governance practices and business ethics when assessing individual stocks, ISIS believes in active engagement with the companies in which it invests in order to bring about improved practices.

The International Business Leaders Forum is a non-governmental organization promoting socially responsible business practices through an association of 70 multinational companies committed to corporate social responsibility. With funding from the British Government, IBLF has developed a program to help companies develop and implement policies to combat bribery and corruption.

These three organizations have collaborated on this guidebook to provide information on the recent legal developments, voluntary initiatives, and emerging best practices in the areas of encouraging reporting, making disclosures and protecting staff who are prepared to speak up when malpractice occurs within a company. The term "whistleblowing" has been avoided in this publication as it has developed negative connotations in some countries and is associated with the act of reporting to external authorities or media, without prior warning given to senior management. The systems advocated in this booklet are designed to ensure that suspicions, complaints and violations can be investigated internally so that problems may be resolved before authorities need to be involved.

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The opinions expressed in this note are solely those of the authors.

FOREWORD

A company may go to great lengths to establish the best possible system for compliance with anti-bribery laws. It may work hard to create and propagate a strong culture of ethical business practice and may exercise great vigilance to ensure its standards are being upheld by all its employees. But no system is fool-proof and when it breaks down, how can management assure they are the first to know?

If no effective mechanism exists for staff to alert management to malfeasance, the best that can happen is that the wrongdoing simply will continue, costing the company money and breeding cynicism and poor morale. What is likelier, in the absence of a good reporting program, is that an employee will choose to take the news directly to the media or to enforcement agencies. This will lead to investigations, interruption of the company's operations, damage to its reputation and quite possibly depressed stock prices. It might ultimately mean a court order, fines and prison terms.

Far the best outcomes follow when an employee who becomes aware of wrongdoing uses an internal reporting mechanism. Management can then take swift remedial measures, minimizing public exposure or avoiding it altogether. Such reporting mechanisms are not costly to create or operate and their potential benefits are very great.

This guidebook is based on extensive interviews of thirty companies in ten countries. It is designed to help management establish programs to invite, investigate and resolve reports of compliance problems in their global operations. A properly designed, well-publicized, thoughtfully implemented internal reporting program is among the most cost-effective ways a company can manage risk.

I. The Setting:

Until recently, only a very few companies had formal internal reporting mechanisms. These were typically implemented by Human Resources departments for employees to voice concerns about office conditions, sexual harassment, discrimination or health, safety or environmental violations.

After the Enron and World Com scandals, the irregularities at Ahold and Parmalat and the introduction of the Sarbanes-Oxley Act, senior management in many companies realized they needed new ways to identify problems that, if left to fester, could shake a company to its foundations.

New laws and conventions offered an additional spur to action.

UK Public Interest Disclosure Act, July 1999

In the United Kingdom, the Public Interest Disclosure Act of 1999 provides explicit protection of employees from unfair dismissal or other punitive action for reporting wrongdoing in the workplace. UK employment law has similar provisions protecting employees who disclose information relating to a criminal offense or breach of a legal obligation.

UK Combined Code on Corporate Governance, July 2003

The Combined Code raised the stakes in the United Kingdom by requiring audit committees to review arrangements whereby employees "may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters." The Audit Committee is also required to ensure that these reports are investigated and pursued as appropriate.

US Sarbanes-Oxley Act of 2002

In the wake of the irregularities at Enron, the US embedded protections for employees reporting the wrongdoing of their colleagues in Section 301 of Sarbanes-Oxley. The law's stated purpose is "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws" and all companies registered with or having reporting requirements to the Securities and Exchange Commission are bound by the law.

Although Section 301 was drafted to address reports of accounting irregularities, Section 1107 goes further and imposes criminal penalties for retaliation against employees who provide information to law enforcement agents, provided the employee reported acts he or she reasonably believed to be a violation of a securities act.

US Federal Sentencing Guidelines

US companies get some relief from penalties for wrongdoing if they have an effective compliance plan in place. The sentencing guidelines state that an effective program includes a well-publicized "reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution".

US *Qui Tam* Suits

Only the US permits *qui tam* suits. These suits enable citizens to stand in for the government and bring an action for fraud or waste involving federal funds or otherwise depriving the government of funds to which it is entitled. The person who brings a *qui tam* suit is typically a current or former employee of the company against which the action is taken and may have had special access to facts or documents in support of the case. The law enables the citizen plaintiff to retain up to 30% of the amount recovered in the suit.

A few compliance officers and in-house counsel who were interviewed felt that valuable information might be gathered from employees with a financial incentive to report. Most, however, expressed disdain for a program that rewards employees financially for their reports.

The good news for companies with strong internal reporting programs is that, by disclosing the problem first, the additional expense and publicity of a *qui tam* suit can usually be avoided.

"We worry that an employee might use his time with the company to gather facts and documents in support of a *qui tam* case – that he'll actually work from the inside not to resolve a problem, but to document it."

Counsel for a US multinational.

The Proliferation of Anti-Bribery Conventions

Many companies operating internationally are or will shortly be affected by as many as four international anti-bribery conventions, as adopted by their own countries:

- The Inter-American Convention Against Corruption
- The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- The Council of Europe Criminal Law Convention on Corruption
- The United Nations Convention on Corruption

National laws typically carry a "knew or should have known" standard for bribery. That is, if an employee is aware of payment of a bribe, his knowledge is imputed to the company. The assumption is that if an employee knew that an irregularity may have occurred, a well-managed company would have asked the right questions or otherwise invited the information and so also would have known.

II. Components of a Robust Program:

An internal reporting mechanism need not be expensive. It must go far beyond a written policy, however, and it must be designed to reflect the practices, laws and cultures of the countries in which the company is operating. Any broken link in the reporting chain can interrupt the flow of information from the reporter to those who need to hear and act on it.

A sound program should include the following elements:

- **Communication:** make the program known to all levels of employees.
- **Accessibility:** make the program available to all employees around the world in various languages.
- **Cultural Appropriateness:** adapt the program to the constraints imposed by local culture, history and practice.
- **Universality:** make the reporting mechanism available to relevant third parties, e.g. suppliers, consultants, customers.
- **Confidentiality and Anonymity:** guarantee confidentiality and permit discreet or anonymous reports.
- **Screening:** provide safeguards against frivolous or malicious reports.
- **Collect Data:** monitor reports, track them over time, identify vulnerabilities and take corrective action.
- **Remedial Action and Feedback:** take action and provide feedback to the reporter as appropriate.
- **Management Visibility:** report to the audit committee or board of directors.
- **Employee Protection:** protect reporting employees both during employment and after departure from the company.
- **External Communication:** report to shareholders and other interested parties on actions taken and results achieved.

1. Communication: announce the program widely, provide a clear message and repeat it regularly.

Many employees polled did not know how to report a concern – or were unaware that a reporting mechanism was available – even at companies with otherwise robust reporting mechanisms.

■ The ethics officer at one French multinational told us that the company had no internal reporting program as the very idea was contrary to the company's culture. In fact, however, the company's law department did have a reporting system in place. The company's ethics officer was simply unaware of it.

While it may be an enormous task, informing all employees that reporting mechanisms exist and that those who would use them are protected by substantial safeguards is an initial investment likely to pay off. It sends the message that the program has support at the highest level, that the management believes the program is important and that they characterize use of the mechanism as an act of loyalty and not the opposite.

■ A 2003 survey by the US-based Ethics Officer Association indicated that 63.9% of the 121 companies surveyed had not yet implemented new training as a result of the Sarbanes-Oxley provisions.

■ French company Total holds an induction seminar for all new recruits every three months. All senior managers (i.e. the top 200 people in the company) always have an ethical module lasting one half day, which includes case studies covering bribery and corruption and the internal reporting system.

■ Diageo tells employees about its reporting program by email, newsletters, posters, and by distributing credit card-sized information cards.

2. Accessibility: make the program available to all employees in many languages, around the clock, in several formats.

Programs vary greatly on accessibility to employees located in overseas operations, most of whom are expected to report back through a regional office or headquarters.

■ BHP Billiton provides four regional hotlines in each region of the world with operators fluent in all relevant languages. Typically the lines are open during normal business hours. Another choice that seems to be used increasingly is the email option, where employees write to a Business Conduct email address. If preferred their submission can be made anonymous by using untrackable email accounts. Representatives of several companies we interviewed noted that people reporting serious wrongdoing tend to report late at night or while away from the office.

Several compliance officers interviewed stated that employees working in different time zones from a company's call center and so compelled to call at awkward hours, at personal expense or to communicate in a second or third language, are much less likely to make a report.

Programs with the greatest apparent success to date offer more than one option for people seeking to report wrongdoing. Giving the persons reporting many avenues appears to increase the likelihood that they will find a mechanism that provides them with the greatest comfort and security. This becomes increasingly important with increasing gravity of the wrongdoing alleged.

3. Cultural Appropriateness: The single greatest obstacle cited by companies to the effective implementation of an internal reporting system world-wide was "cultural resistance". In some countries, historical memories associate reporting to the authorities with being a traitor or a snitch. To combat this perception, companies need to be sensitive about both content and delivery. This means choosing carefully the terms by which the reporting program will be known. Respondents preferred "neutral" words to describe their program, such as "intervention", "signalement" in French, "segnalazione" in Italian. They deliberately avoided loaded or pejorative words, such as "denunciation", "informant" in English, "Informant", in German, "délateur", "informateur", "collaborateur", or "dénonciation" in French.

■ The manual that Standard Chartered distributes to its employees emphasizes that reporting employees will not be viewed as disloyal; their actions are encouraged as critical to the protection of the company's interests, safeguarding its reputation. The manual states: "Staff involved in wrongful behaviour are the ones being disloyal."

■ Despite efforts by companies to use culturally acceptable terminology, distrust abounds and the local media frequently reflect this. One Le Monde headline reads: "Les Etats Unis incitent les salariés à dénoncer les fraudes… Mais jusqu'à présent, ces «informateurs» ont payé leur vigilance au prix fort".[2] It continues: "L'Amérique veut donc sonder les entrailles de ses entreprises pour y débusquer les secrets inavouables. Une approche typiquement anglo-saxonne, difficilement exportable sur le Vieux Continent" and characterizes it as "un système de délation organisée"[3]. Another describes the reporting employee as "le mouchard d'entreprise" – the company snitch – "mais le remède peut s'avérer pire que le mal" [4].

■ French company Thales believes that the ends of an internal reporting system can largely be achieved in a more culturally-appropriate way by means of a Corporate Ethics Committee, chaired by a Secretary General Group which reports to the CEO. The group is supported by a network of country-based Ethics Officers (usually the Human Resources Manager or Company Secretary) and a telephone Ethics Line. The telephone line has been set up to give Thales employees the opportunity to log concerns directly with the Corporate Ethics Committee. The system is not compulsory, but it is made available on an as-needed basis. Moreover, each year the Corporate Ethics Committee submits a report to the Board of Directors describing the main issues encountered and the actions taken.

"I think the Thales approach is typically in line with a whistleblowing program, but it takes into account the particular constraints of French culture. To be effective, employee confidence in such a program is essential and it's the reason why these programs can't be designed around a single model. We need to create an organizational culture where free speech is encouraged, a kind of "intelligence collective", not one that is based on denunciation." Secretary General, Thales International.

■ French company Total emphasizes the "employee protection" aspect of its program, rather than positioning it as something that aims to "incite snitching". The program is part of the Ethics Committee's overall ethics training program. It is disseminated to staff through the general introduction to all senior managers of the company's ethics policies and programs, and is rooted in the functioning of the Ethics Committee, which serves as the in-house internal reporting service. Regular ethics seminars encourage people to talk about their concerns. The message is "It's not your problem, it's the company's problem".

"The reaction to the suggestion that staff should report wrongdoing is almost always one of bewilderment: "Délation?!" – "Est-ce que le Comité Ethique est là pour encourager la délation"[5]? Yet, in the Norwegian operation, it went down without a peep; ditto in South Africa, where it was perceived as entirely normal. In Latin countries, it was quite the contrary. Interestingly, it is in these very Latin countries that some people insist on being named, precisely because they believe they are doing the right thing and do not want to be seen as a traitor ("délateur")." – President of Ethics Committee, Total.

4. Universality: make the reporting mechanism available to relevent third parties.

Virtually none of the respondents make their reporting program available to third parties, e.g. consultants, sales representatives, suppliers, distributors, joint venture partners and even customers, although all acknowledged that this was a serious gap, given the frequent involvement of third parties in wrongdoing. The information held by these persons is rarely sought.

■ The legal record indicates that the great majority of bribery prosecutions involve a third party in some way. Making these reporting programs available to this group may not only reduce the incidence of bribery, but may help to expose kick-back schemes whereby rogue employees demand payment from key suppliers.

5. Confidentiality and Anonymity: guarantee confidentiality, within the constraints imposed by law, and permit confidential or anonymous reports.

In order to foster a climate of trust and open discussion, employees should always be encouraged to raise their concerns with their management as a preferred course of action. However, where this is not possible, e.g. where management is involved in, or knowingly tolerates, the wrongdoing, internal reporting programs must exist as a fail-safe. In these situations, it is essential that reporting lines be available outside of the normal management structure, thereby enabling employees to raise concerns about their immediate management without that person's involvement or knowledge.

Guaranteeing confidentiality is quite different from offering anonymity, whereby the reporting employee does not identify himself even to the entity conducting the investigation. Anonymity is sometimes necessary in cases where reporting employees feel seriously threatened, but it renders proper investigation more difficult and lends itself more easily to abusive or malicious use of the system.

For this reason, some companies interviewed were content to offer assurances of confidentiality to employees, but not to provide mechanisms for anonymous reporting. Anonymity is, in any case, quite difficult to guarantee in practice, since effective investigation will often lead to the trail of the reporting employee.

Employees in overseas offices with only one or two employees are even more vulnerable to being identified, and should be given opportunities to report locally, regionally or to headquarters in order to provide safeguards that will offer them adequate assurance of confidentiality.

One worrying trend is the unwillingness of the compliance officers interviewed to guarantee confidentiality in cases where the reporting employee's involvement would be required for prosecution. Employees of these companies hear the message that their interests (and possibly safety) will be protected until such time as the companies' interests take precedence. Companies offering confidential reporting mechanisms must assure that that confidentiality is absolute, or they will quickly lose the confidence of their employees.

■ Italian company Enel does not offer employees the chance to report anonymously on the grounds that anonymity undermines trust between management and employees. Many other European companies permit anonymous reporting, but express a clear preference that employees be open about their misgivings.

A European executive asked how the facts of a case can be investigated if the source of the information is not known. A Russian executive, by contrast, argued anonymous reporting must be an option as employees fear for their safety.

6 Screening: provide safeguards to detect frivolous or malicious reports.

If the single greatest source of resistance to introducing an internal reporting system was "cultural resistance", the single-greatest underlying cause of that resistance was a deep-rooted conviction that the process was vulnerable to misuse, particularly malicious use. This was especially apparent amongst companies based outside North America and the UK. To a lesser extent, respondents feared an avalanche of frivolous complaints – employees using these channels to complain about hurt feelings or bad coffee – clogging the system and wasting management time.

In fact, our research largely dispelled concerns about trivial reports. We found that most people who receive the information initially report very few frivolous or trivial claims. (A few companies told a very different story and stated that they had to sift through a high volume of trivial claims in order to find the valuable information.) On the whole, it seems, employees tend to fear that their concerns are too vague or speculative to report and much information is probably lost as a result. In these cases, employees should be encouraged to provide the information they have, and to describe whether it is based in fact or speculation. They should be assured that real schemes are often uncovered because there are multiple reports that, taken together, provide a more complete picture.

Of more serious concern are fears that reporting programs will be used to make malicious, false reports. Companies that do have internal reporting mechanisms report that they are reasonably confident that they can be properly investigated, but a company may expend considerable resources before determining that a complaint is malicious and baseless. In these cases, it is particularly important to maintain the confidentiality of the investigation to ensure that the reputation of the implicated employee is not damaged. In addition, reports that are made by those who know them to be false should carry penalties, but here again companies should be careful not to deter reporters who recount details with a good-faith belief in their accuracy. Penalties might include a letter to the employee's file the first time, with notice that a second abuse of the system could result in sanctions, including termination. It should also be made clear to employees that deliberate false reports may carry penalties if they amount to slander or libel.

■ Nokia has established an on-line discussion forum for employees. Employees can choose to identify themselves or to participate anonymously. The discussion forum is monitored and slanderous remarks, personal insults and abusive language are filtered.

Many companies predicted that fears of deliberate misuse on the part of staff would doom a reporting system to failure, or indeed was a reason not to have one altogether. However, no company representative interviewed could recall any serious incident of misuse.

7. **Collect Data**: monitor reports and track them over time.

It was surprising to learn that most companies with carefully designed and implemented programs do not collate the information gathered to track patterns and trends. In some very large companies there are multiple reporting centers that do not compare their reports to those of their sister organizations. Each entity may be receiving complaints about the same employees, but not sharing that information to get the fullest possible picture.

■ One European multinational does not want to encourage information to rise up the chain, because it wants to encourage local resolution of problems.

■ French company Total reports that there were 36 cases submitted to the Ethics Committee in 2002, of which 16 were asking for counsel rather than reporting wrongdoing, and 20 were to report matters considered "important" by the reporting employees. In 2003, the number was about 45. These reportedly included several instances of serious problems averted and in some cases led to dismissals.

8. Remedial Action and Feedback: take and report action as appropriate.

If it appears that no action is taken in response to reports of wrongdoing, the reporting mechanism will be thought hollow and meaningless and the flow of information will likely stop. One way to retain employee confidence in the process is to let the person reporting learn the outcome, when that is appropriate and can be balanced with the interests of all parties. It may be prudent to issue reports with names removed company-wide to demonstrate that the system is working. In addition, these reports can be a valuable training tool, providing employees with examples of an appropriate use of the system.

■ One European company said it would not publicize the number of sackings because it considers this to be "business as usual" and not worthy of special mention. Although it doesn't get reported officially, it still becomes known internally by word of mouth.

"What's new is to sack people for corruption, when in the past it was considered to be in the interest of the company to pay bribes".

General Counsel of European multinational.

9. Management Visibility: report to the audit committee or board of directors when appropriate.

Each board or audit committee must determine how much information it requires to assess the extent of compliance failures and must further determine how often it should be provided, how the information should be organized and who will make threshold decisions sorting frivolous reports from those about which they should be informed. In some countries, this will be governed by law. Where it is not, some companies interviewed recommended erring on the side of more information, especially in the early years of a new reporting system, since the overseeing body might find its assumptions tested by surprising patterns.

10. Employee Protection: protect reporting employees both during employment and after departure from the company.

From the perspective of the person making a report, this is the most important aspect of an internal reporting mechanism. Few employees will (or should have to) risk their livelihood, professional future, and in some case health or even security, to report wrongdoing. In practice, many feel extremely conflicted about taking action, especially in countries where feelings of loyalty to immediate colleagues are seen as taking precedence over the far more abstract concept of loyalty to the company or its shareholders. Some companies spoke of the need to provide psychological counseling in addition to professional career advice and support.

Most programs include a non-retaliation provision designed to assure employees that their jobs will remain secure and, in many cases, their identities unknown. Still, in some extreme instances, employees faced outright intimidation that precluded all but the bravest from acting.

Often, the problem is more subtle and insidious: many reporting employees point to inappropriate transfers that result in poor performance and ultimately dismissal.

Some companies have discussed the need to implement a follow-up mechanism to track the progress of employees for a period of time after they report serious wrongdoing, but none appears to have done this yet. Unless they are monitored and positively managed, companies should not be surprised if these programs remain where they began – a good idea on paper.

■ Where Are They Now? Companies appear not to be implementing any safeguards for reporting employees after their departure from the company. "Best practice" in this area should include a mechanism whereby the employee has an identified member of management to whom future requests for references can be directed without fear that the opportunity will be used to punish the employee for a report made earlier in his career.

11. External Communications: report to shareholders and other interested parties on actions taken and results achieved.

The primary goal of internal reporting mechanisms is early awareness of problems. By knowing first, management can protect the company from needless reputational damage and allocate resources for remedial action. This enables companies not only to do the right thing, but to be seen to do the right thing. One way that some companies communicate these steps to shareholders and other intersted parties is through periodic reports addressing problems uncovered and solutions implemented.

Out-Source or In-House?

Out-sourcing, we heard, is more expensive, but provides the benefit of a ready-made program.

> *"It's preferable to let the experts handle these issues."*
>
> *"Our employees might be more comfortable taking their issues to people outside the company."*
>
> *"We would receive more frivolous reports if the program were managed in-house; the external experts lend weight to the process."*

In-house programs, we heard, send the message that management considers this a priority, but many companies can't spare the staff for a 24/7 program.

> *"Our employees wouldn't trust outsiders."*
>
> *"This is a critical compliance function and we want to retain control of it."*
>
> *"We considered outsourcing, but decided against it because we didn't want to look as if we were distancing ourselves from internal problems."*
>
> *"It's contrary to our culture to involve strangers."*
>
> *"We would receive more frivolous reports if the program were out-sourced; employees would feel more removed from the process."*

■ "At BHP Billiton, we like to think that we can model the values internally that we espouse. Having an in-house system reflects confidence and trust in our systems; having an external system somehow would convey the impression that we rely on outsiders to tell us what the appropriate behavior is whereas we should really know ourselves."

If the program is out-sourced, care must be taken by management to send the message that the program nevertheless has the strong support of management and will be monitored closely within the company.

If the in-house option is chosen, there should be a clearly designated ombudsman, outside the management chain. For example, Total elected to manage its reporting system in-house, but has designated as its internal reporting officer the President of its Ethics Committee, who sits outside the normal management hierarchy and reports directly to the Chairman/CEO.

Polling employees on their preference might be a good way to communicate a company's commitment to the program while soliciting insight from the people who will ultimately use the system.

■ After widespread benchmarking, Rio Tinto decided to subcontract the management of its program to two independent organizations. The first is a professional call center with counselors, which prepares an initial report and forwards it to a second organization that manages the flow of information to senior management at Rio Tinto.

III. Challenges:

Even well-designed programs sometimes fail because the implementers are unable to dispel suspicion of management's "true motives" or to provide adequate assurances that those who report problems will not be ignored, silenced or punished for bearing bad news. Our central finding: internal reporting mechanisms will work if they are embedded in a company culture dedicated to transparency. Reporting systems will fail, or they will merely induce deeper cynicism, if they are perceived as mere window-dressing, or worse, devices deployed by untrustworthy management to flush out dissenters.

The following four concerns were reported by companies regardless of size or location:

1. Management Apathy or Resistance:

Programs will fail if senior management does not provide support, both through frequent and high-level public statements and through the commitment of staff and resources. In addition, mid-level management must find the balance between supporting the program and impeding access with too much involvement.

■ Too much management control over the process is likely to prevent its use. One employee recounted that the forms for reporting concerns were kept in a manager's office and had to be requested. In that case, the manager took pride in the fact that there had been no reports of any kind.

Doubts about management commitment can also arise if the reporting mechanism is housed in one part of the company, the law department for example, without any cooperation with other parts, including human resources, the most senior management and the board.

■ BASF has established a decentralized reporting program, with approximately 60 codes of comparable content worldwide. The key, they note, has been to combine compliance and ethics considerations to ensure that the program takes root. "The background is based in ethics, but the content is legal".

■ At one French multinational, the legal department had designed a new reporting program that would have looked entirely at home in a US company; it had been developed following a review of the Sarbanes-Oxley Act. However, when asked how this would be translated to staff so as to ensure take-up, particularly amongst deeply hesitant French colleagues, the general counsel replied: "HR will deal with that one, my job is done".

Finally, many companies make their internal reporting system available to staff who may wish to use it, but do not positively encourage its use. Only a very few seek to instill a sense of obligation by sending the message that staff who become aware of wrongdoing yet fail to sound the alarm are complicit by their apathy or indifference.

2. Cultural and historical obstacles:

Amongst respondents based outside the US, UK or Australia, the overwhelming majority expressed deep-seated concerns about promoting what they characterized as a "culture of denunciation". On the one hand, there was a general willingness to foster a culture grounded in strong ethical values, and recently, this has been given added impetus by the trauma of highly-public corruption scandals. On the other hand, the idea of positively promoting the use of an internal reporting system was very often a step too far – and this despite acknowledging that internal reports had often played a vital role in averting further scandal. In most countries where we conducted research for this guidebook, we were told that the business community was not ready to embrace internal reporting mechanisms.

This aversion to enlisting staff in the company's effort to detect wrongdoing has deep historical roots. Although the idea is beginning to gain broader acceptance, representatives of several French and Italian companies cited their countries' experiences with collaborators during World War II as a reason for discouraging anonymous reporting. Companies linked their concerns about anonymous reporting options to the cowardly denunciation of neighbors in the 1940s. In formerly communist Eastern European operations, where even fresher memories abound, staff is reportedly even more nervous at the prospect of resurrecting "Big Brother".

■ "We use the neutral term "intervention"[6] rather than "dénonciation" in our French literature. Otherwise, the English version of our Code of Conduct, which is the most widely-used in the company, refers to "reporting", although the Code will shortly be translated into our 25 working languages." General Counsel of French multinational Lafarge.

■ "Les cafards, on les écrase"[7] said the general counsel of one French company, by way of describing the likely reaction of his staff to a new reporting program.

■ The Italian company Enel uses the term "segnalazione", loosely translated as "signalling", rather than "denuncia" or the even more pejorative "delazione".

■ "I remember fierce opposition in a European country when introducing a Code of Conduct several years ago. Providing employees the possibility to report suspected violations of the Code to anybody other than their manager was viewed as an incitement to denunciation which brought back memories of the occupation of the country during WW II and the sinister role the Gestapo played in tracking down the resistance. More recently, when working on another Code of Conduct, I had another discussion with the in-house counsel of the same company on the translation of the sentence: "Any employee may report a suspected violation directly to the Compliance Officer ". Surely, my interlocutor said, I must have meant to say 'any employee <u>must</u> report' rather than 'any employee <u>may</u> report'. The memories of the war may still have been there, but they were obviously no longer dictating the approach to whistleblowing."

Chief Compliance Officer and General Counsel, SGS.

3. Union Relations:

In many countries that lack a tradition of internal reporting, that role has been partially filled by trade unions, at least insofar as employment-related violations are concerned. Cooperation with trade unions can be critical to the successful take-up of an internal reporting mechanism, particularly in companies with a tradition of active consultation, and where staff resistance is likely to be strong. This cooperation must begin at the earliest stages of the creation of the program and must continue throughout the implementation and revision of its operation. Such close cooperation can help overcome concerns about management motives and also can help set the right message for the appropriate use of the program.

■ One French multinational reports that if use of its reporting system were to be positively encouraged or required (as opposed to merely available), they would have to involve the trade unions, because to impose anything without them would be "disastrous". Unions already use the internal reporting system for some ethical matters. So far, for purposes of upgrading the system to comply with the Sarbanes-Oxley Act, unions have been informed but not truly engaged.

The company has a Child Labor code that is now at the stage where its implementation needs to be measured and internally audited – for this it will involve the unions. The system is likely to prompt a focus on "signalement", which could lead to the company adopting a more pro-active approach that pushes people to use it rather than leaving them the option to keep quiet.

4. Employee Suspicion or Fear:

A representative of one US company noted that when employees turn to anonymous reporting mechanisms to register legitimate concerns, they must be motivated in part by fear – fear of being ostracized, fear for their jobs, their future, even their safety. Some employees expressed concern that retaliation would be subtle, taking the form of less favorable performance reports or loss of a promotion. Others believed that they could not protect their families if their identity became known. Companies must be able to ensure the protection of those reporting if their programs are to be effective.

In some countries, companies operating internationally should not underestimate the very grave risk to personal safety that some employees take when reporting. The case of Engineer Satyendra Dubey is only the most recent and well-publicized of these cases. Dubey, a 31-year-old engineer in India, reported incidents of corruption on a $2 billion highway project directly to the Prime Minister's office. To establish his credibility, he provided details about his own identity, but asked that they be kept secret. His identity was not protected.

"Since such letters from a common man are not usually treated with due seriousness, I wish to clarify … that this letter is being written after careful thought by a very concerned citizen who is also closely linked with the project. I request you to kindly go through my brief particulars (attached to a separate sheet to ensure secrecy) before proceeding further."

Satyendra Kumar Dubey, murdered by unknown assailant, November 27, 2003.

5. Escape Hatch:

Challenges arise when the person reporting the wrongdoing took part in it as well. Our research indicates that few people who have made reports have entirely clean hands. Often the employee participated in the early stages of a scheme, then reached a point where he felt the behavior must stop. About half of the people we spoke to concluded that the reporter should be granted an amnesty because the company obtained the information needed to correct the situation. Others argued that the program ought not to be used as an escape hatch for an employee simply seeking protection from the consequences of his improper actions. If amnesty is promised in advance, wrongdoers may come forward, although they may never tell all they know. If prosecution is threatened, silence and the hope never to be discovered may seem the best course. There was a general consensus that it makes sense to hold out the possibility of an amnesty, but in each instance to let the seriousness of the offense shape the disposition of the case.

IV. Success Stories:

Few companies are willing to discuss specific success stories related to internal reporting mechanisms. Management will hardly want to relive a barely-averted disaster in the pages of a guidebook, although virtually all acknowledged that their system had unquestionably "paid its way" by turning up valuable information much earlier than would otherwise have happened.

No company interviewed for this guidebook has yet attempted to assess in a systematic way the success of its internal reporting system. Proposals to measure the value of a program based on the large (or small) volume of calls raise a number of problems. A high volume of frivolous calls is undesirable. A small number of reports overall may reflect a company with good corporate governance, but it may also reflect employee ignorance or suspicion of the system.

> ■ We estimate that we save millions of dollars each year because we are able to respond quickly to allegations of wrongdoing. Of course, there is no way to know what we don't hear about, but use of the [hotline] has increased since the Enron scandal.
>
> Ethics Officer for US multinational.

> ■ We found out about several instances of wrongdoing, including one worth several millions of dollars.
>
> General Counsel for French company.

■ "We uncovered a case of a buyer who was conspiring with his suppliers to pocket kickbacks. A major fraud was averted this way and the buyer was sacked. The whistleblower's identity was fully protected and he stayed in his job, having come to see the in-house internal reporting officer personally."

Ethics Manager for European company.

■ Many of the reports received on our hotline are garden-variety complaints. But the hotline has made a difference at times in improving internal communications by encouraging fuller and more open explanation of company activity. We have to look into some "false alarms" received through the hotline, but we believe that even if only 2% of the instances are "real", the extra work is worth it. We had a recent incident in which a hotline call resulted in a voluntary disclosure that would have been treated much more severely by the government agency had it been discovered or reported externally.

Senior Counsel for US multinational.

CONCLUSION:

A company committed to controlling corrupt behavior, whether among its own employees, among the third parties with which it does business, or in the ranks of the government officials through which it must work, need not remain passive and uninformed. Companies may act effectively and inexpensively to improve reporting channels so that when the inevitable violations of company standards occur, senior management need not remain ignorant until it is too late for remedial action.

Despite real obstacles to staff take-up in some countries, the combination of legal requirements and growing shareholder demands for credible ethical and compliance systems has resulted in many companies creating robust internal reporting programs. These require careful design, serious commitment and thorough and consistent communication, but they will exponentially repay the effort and resources they require if they avert the kinds of gravely damaging events that have made company names feature in global headlines in recent years.

[1] As of 31 March 2004.

[2] "The United States calls on workers to turn in [perpetrators of] fraud… But until now, these "informants" have paid a high price for their vigilance" - Le Monde, June 2003.

[3] "America wants to dig deep into the entrails of its companies to uncover unmentionable secrets. A typically Anglo-American approach that would hardly be exportable to the Old Country", and describes internal reporting as "a system of institutionalized ratting".
– Le Monde, June 2003.

[4] Journal du Dimanche, 17 August 2003 – "..but the cure may turn out to be worse than the sickness."

[5] "Ratting?! Is the Ethics Committee there to encourage ratting out colleagues?"

[6] The closest English translation of the French "Intervention" is "taking action" or "speaking up".

[7] "Cockroaches [slang for "snitches"] are for stepping on".

Resources

As media and public interest surrounding corporate fraud and corruption increases, a number of NGOs and consultancy companies are offering a range of services to companies to help them promote a culture of transparent reporting throughout their operations.

Public Concern at Work
http://www.pcaw.co.uk
Public Concern at Work (PCAW) is a public interest consultancy which provides impartial guidance and practical training for companies, advises governments and runs a confidential helpline for employees. In 2004 they published 'Whistleblowing Around The World: Law Culture and Practice' in partnership with the Open Democracy Advice Centre and the British Council.

Open Democracy Advice Centre
http://www.opendemocracy.org.za
The Open Democracy Advice Centre (ODAC) in South Africa promotes accountability in public and private institutions, by helping organizations to develop and implement policies and systems which encourage transparency and protect whistleblowers.

Transparent Accountable Governance
http://www.tag.org.ph
In the Philippines, a collaboration between a national non-governmental organization and a leading business association has resulted in the development of a website to promote transparent accountable governance known as TAG.

International Chamber of Commerce
http://www.iccwbo.org
The International Chamber of Commerce (ICC) is an international business organization. Their 2003 book entitled 'Fighting Corruption – A Corporate Practices Manual' includes a chapter on internal reporting.

Additional resources can be found on the TRACE website at www.TRACEinternational.org

The BRIBEline Initiative

Internal reporting mechanisms can uncover employee malfeasance, but what about trouble that starts outside the company's walls? How can companies identify and track the behavior of corrupt officials in the countries where they do business and so tailor their own anti-bribery safeguards accordingly?

In most countries, no one is monitoring the government officials. If governmental oversight committees exist at all, they are likely to be so under funded that they are susceptible to bribes themselves. There should be a reliable international mechanism for reporting demands for bribes by government officials. The information resides in the minds of employees and other citizens, and they should be encouraged to report it.

TRACE has proposed creation of an international BRIBEline. Individuals will be able to report demands for bribes, voluntarily and anonymously, just as employees can report them now through their company's internal reporting programs. The information gathered will be reported collectively to paint a broad picture by country—possibly even by ministry – of attempts to solicit bribes. This information will not be used to intervene in individual transactions, but instead will be provided to governments to encourage remedial action and to companies and to the public so risk-management strategies can be tailored accordingly. The information gathered in this way would supplement the perception surveys which are currently the best reading of corruption on a country-by-country basis. The primary goal of the BRIBEline, like internal programs, will be information and remedial action, not prosecution.

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www.ISISAM.com

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